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federal register

Book 1 of 3 Books
Friday, January 16, 1981

Highlights

3801 **National Inventors' Day** Presidential proclamation

3803 **National Salute to Hospitalized Veterans' Day** Presidential proclamation

4536 **Grant Programs** ED issues rules making available Federal grants to assist local educational agencies and State educational agencies in the identification of asbetos hazards in school buildings; effective 1–16–81 (Part XIV of this issue)

3951 **Grant Programs** Commerce/MBDA solicits
3952 financial assistance applications to provide technical assistance to minority business persons to increase their management and marketing capabilities (2 documents)

4606 **Education** ED issues rules for the Arts in Education Program and solicits applications for grant awards to state educational agencies, local educational agencies and other public or private institutions in order to establish programs in which the arts are an integral part of elementary and secondary curricula (2 documents) (Part XVIII of this issue)

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There are no restrictions on the republication of material appearing in the **Federal Register.**

Questions and requests for specific information may be directed to the telephone numbers listed under INFORMATION AND ASSISTANCE in the READER AIDS section of this issue.

Highlights

3906, 3908 **Loan Programs** USDA/REA proposes supplement to one bulletin regarding electric loan policies and application procedures and second bulletin with respect to loan terms and conditions and supplemental financing policies; comments by 3–17–81 (2 documents)

4584 **Social Security** HHS/SSA issues rules in regard to determinations of disability concerning disability insurance and supplemental security income; comments by 3–17–81 (Part XVII of this issue)

3983 **Medicare Program** HHS/HCFA establishes policy of reimbursement for costs incurred in relation to union activities; effective 1–16–81

3985 **Medicare Program** HHS/HCFA establishes a schedule of target reimbursement rates for institutions furnishing home dialysis supplies, equipment and support services

3866 **Guaranteed Student Loan Program** ED issues rules with comments by 1–16–81 and proposed rules with comments by 3–17–81 concerning deferment provisions

4412 **Hazards Identification** Labor/OSHA proposes rules requiring employers to identify hazardous chemicals in their workplaces and to inform the employees of the identity and nature of this exposure; comments by 4–18–81 (Part XI of this issue)

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Presidential Documents

Title 3—

The President

Proclamation 4814 of January 14, 1981

National Inventors' Day, 1981

By the President of the United States of America

A Proclamation

As the progress of science and technology is fundamental to the economic and social welfare of our society, so is the patent system essential to the advance of science and technology. This relationship is recognized in the first Article of our Constitution, which empowers the Congress "to promote the progress of science and useful arts" by securing for limited times to inventors an exclusive right to their discoveries.

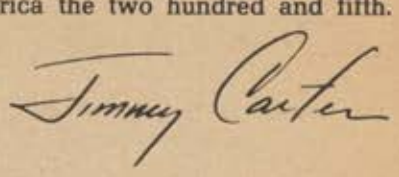
Established in accordance with this constitutional mandate, our patent system dates back to the very beginning of our Nation. Since George Washington signed the first patent act into law on April 10, 1790, the patent system has encouraged our dramatic progress from a small agrarian Nation to a great technological and industrial world leader. From the cotton gin, telephone, and electric lamp, through the transistor, modern medicines and space vehicles, the history of our creativity, ingenuity and determination is reflected in the records of our patent system.

The incentive offered by patent protection to invent and innovate has created new markets, new industries and more jobs. As a consequence, a strong and reliable patent system is a substantial element in our efforts to develop alternative energy sources, increase our productivity, improve our environment, and solve the technological challenges which will confront us in the future.

In honor of the important role played by inventors in promoting progress in the useful arts, and in recognition of the invaluable contribution of inventors to the welfare of our people, the 96th Congress, by House Joint Resolution 337, has designated February 11, 1981, as "National Inventors' Day." Because February 11 is the birthday of Thomas Alva Edison, this Nation's most prolific inventor, it is an especially appropriate day on which to honor one of our most valuable national resources, the inventive genius of our people.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, do hereby call upon the people of the United States to honor all inventors by observing February 11, 1981, as National Inventors' Day, with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of January, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and fifth.



[FR Doc. 81-1896
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Presidential Documents

Proclamation 4815 of January 14, 1981

National Salute to Hospitalized Veterans' Day

By the President of the United States of America

A Proclamation

There are today more than 30 million living veterans of the United States Armed Forces whose military service to their Nation has significantly influenced the role of the United States in world affairs.

During Fiscal Year 1979, approximately 1.3 million of these men and women were hospitalized in the 172 Veterans Administration medical centers across the country. A similar number will be admitted for care and treatment this year and in the years to come.

In order to encourage a continuing awareness of the service and sacrifice of these Americans, I urge citizens of all ages to participate in their communities in honoring our sick and disabled hospitalized veterans. I believe it essential that we do as much as possible to express our collective appreciation to the many hospitalized men and women who have served this Nation faithfully.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, do hereby proclaim February 14, 1981, as "National Salute to Hospitalized Veterans' Day." I invite all of our citizens to join with me in observing this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of January, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and fifth.

Jimmy Carter

[FR Doc. 81-1897
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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 month.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 351

Reduction in Force

AGENCY: Office of Personnel Management.

ACTION: Final Rule; Republication.

SUMMARY: Since November 1979 the Office of Personnel Management (OPM) has published eight final reduction in force regulations in the **Federal Register.** These changes were intended to clarify and simplify existing material, and to reflect changes in the Federal personnel system that resulted from the Civil Service Reform Act (CSRA). For reference, we are now republishing the revised reduction in force regulations. OPM will forward a copy of this document to individual agencies in a Federal Personnel Manual (FPM) posting bulletin.

FOR FURTHER INFORMATION CONTACT: Ted Dow or Tom Glennon, (202) 632-4422.

EFFECTIVE DATE: January 16, 1981.

SUPPLEMENTARY INFORMATION: OPM has published final reduction in force regulations covering eight specific subject areas:

(i) *Preference eligible employees with a compensable service-connected disability of 30 percent or more.* On January 30, 1979, OPM published interim regulations providing for new retention subgroup AD (44 FR 5864). Final regulations were published in the **Federal Register** on November 9, 1979 (44 FR 65047).

(ii) *How to establish reduction in force tenure groups for new supervisors and managers.* OPM published proposed regulations in the **Federal Register** on December 28, 1979 (44 FR 76799). Final regulations were published on April 29, 1980 (45 FR 28301).

(iii) *How to use new performance appraisal systems established by the CSRA in the determination of reduction in force retention standing.* OPM published proposed regulations in the **Federal Register** on February 5, 1980 (45 FR 7818). Final regulations were published on May 2, 1980 (45 FR 29264).

(iv) *Clarification of the reduction in force assignment rights of full-time employees to other-than-full-time positions.* OPM published proposed regulations in the **Federal Register** on February 8, 1980 (45 FR 31379). Final regulations were published on June 20, 1980 (45 FR 41628).

(v) *Clarification of the transfer of function provisions.* OPM published proposed regulations in the **Federal Register** on May 13, 1980 (45 FR 31379). Final regulations were published on September 12, 1980 (45 FR 60401).

(vi) *Clarification of how agencies determine the retention standing of employees receiving military retired pay.* OPM published proposed regulations in the **Federal Register** on May 20, 1980 (45 FR 33640). Final regulations were published on September 23, 1980 (45 FR 62971).

(vii) *How to establish reduction in force competitive levels for supervisors and managers covered by the Merit Pay System provisions, and/or new probationary period requirements, that were established by the CSRA.* OPM published proposed regulations in the **Federal Register** on July 1, 1980 (45 FR 44304). Final regulations were published on December 12, 1980 (45 FR 81725).

(viii) *Clarification of how reemployment priority lists are established and maintained.* OPM published proposed regulations in the **Federal Register** on July 22, 1980 (45 FR 48904). Final regulations were published on December 30, 1980 (45 FR 85651).

The revised Part 351 of this title (which this document republishes) includes these final provisions.

Before March 1, 1981, OPM plans to publish final reduction in force regulations covering two additional subject areas:

(ix) *Clarification of how agencies formally designate positions as trainee or developmental positions for reduction in force purposes.* OPM published poposed regulations in the **Federal Register** on October 21, 1980 (45 FR 69469). Final regulations are expected to be published before March 1, 1981.

(x) *Clarification of how agencies identify employees with transferring positions under the transfer of function provisions of OPM's reduction in force regulations.* OPM published proposed regulations in the **Federal Register** on October 28, 1980. Final regulations are expected to be published before March 1, 1981.

Proposed regulations (ix) and (x) would properly incorporate in Part 351 of this title existing policy that is presently set forth in FPM Chapter 351.

OPM has determined that this is a significant regulation for the purposes of E.O. 12044.

Office of Personnel Management.

Beverly M. Jones,

Issuance System Manager.

Accordingly, Part 351 of Title 5, Code of Federal Regulations, is republished to read as follows:

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Authority: 5 U.S.C. 1302, 3502, unless otherwise noted.

Subpart A [Reserved]

Subpart B—General Provisions

§ 351.201 Use of regulations.

(a) Each agency shall follow this part when it releases a competing employee from his/her competitive level by separation demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

(b) This part does not require an agency to fill a vacant position. However, when an agency, in its discretion, chooses to fill a vacancy by an employee who has been reached for release from his/her competitive level for one of the reasons named in paragraph (a) of this section, this part shall be followed.

(c) This part does not apply to the change of an employee from regular to substitute in the same pay level in the U.S. Postal Service field service.

(d) An agency authorized to administer alien employee programs under section 444 of the Foreign Service Act of 1946, as amended (22 U.S.C. 889), may include special plans for reduction in force in its alien employee programs. In these special plans an agency may give effect to the labor laws and practices of the locality of employment by supplementing the selection factors in Subparts D and E of this part to the extent consistent with the public interest. Subpart I of this part does not apply to actions taken under the special plans authorized by this paragraph.

(e) This part does not apply to the termination of a temporary promotion or to the return of an employee to the position from which he/she was temporarily promoted or his/her reassignment or demotion to a different position that is not at a lower grade or level than the position from which he/she was temporarily promoted.

(f) This part does not apply to the release from his/her competitive level of a National Guard technician under section 709 of title 32, United States Code.

(g) This part does not apply to an employee in the Senior Executive Service.

(h) This part does not apply to the return of an employee promoted under § 335.102(g) to the position from which promoted or to a position of equivalent grade and pay.

§ 351.202 Coverage.

(a) Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

(1) the executive branch of the Federal Government,

(2) Those parts of the Federal Government outside the executive branch which are subject by statute to the competitive service requirements,

(3) the civil service of the government of the District of Columbia.

(b) This part does not apply to an employee:

(1) In a position in or under the legislative or judicial branch of the Federal Government, except an employee in a position subject by statute to the competitive service requirements, or

(2) Whose appointment is required by Congress to be confirmed by, or made with, the advice and consent of the United States Senate, except a postmaster.

§ 351.203 Definitions.

In this part:

(a) "Competing employee" means an employee in tenure group I, II, or III.

(b) "Days" means calendar days.

(c) "Function" means all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

(d) "Local commuting area" means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and reasonably can be expected to travel back and forth daily in their usual employment.

(e) "Performance rating" means the current official performance rating under a performance rating plan approved by OPM.

(f) "Reorganization" means the planned elimination, addition, or redistribution of functions or duties in an organization.

(g) "Representative rate" means the fourth step of the grade for a position subject to the General Schedule, the prevailing rate for a position under a wage-board or similar wage-determining procedure, and for other positions, the rate designated by the agency as representative of the position.

(h) "Transfer of function" means:

(1) The transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas; or

(2) The movement of the competitive area in which the function is performed to another commuting area.

§ 351.204 Responsibility of agency.

Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction in force is necessary.

§ 351.205 Authority of OPM.

The Office of Personnel Management may examine an agency's preparations for reduction in force at any stage. When OPM finds that an agency's preparations are contrary to the spirit and intent of these regulations or that they would result in violation of employee rights or equities, OPM shall require appropriate corrective action.

Subpart C—Transfer of Function

§ 351.301 Applicability.

The transfer of function provisions set forth in § 351.203(i)(1) are applicable when the work of one or more employees is moved from one competitive area to another, regardless of whether or not the movement is made under authority of a statute, Executive Order, reorganization plan, or other authority.

§ 351.302 Transfer of employees.

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area,

each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

(b) An employee whose position is transferred under this subpart solely for liquidation, and who is not identified with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days, is not a competing employee for other positions in the competitive area gaining the function.

(c) Regardless of an employee's personal preference, an employee has no right to transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.

(5 U.S.C. 3503)

Subpart D—Scope of Competition

§ 351.401 Determining retention standing.

Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§ 351.402 Competitive area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

(c) An agency may establish a competitive area larger than one that meets the standard named in paragraph (b) of this section. In exceptional circumstances, and with the prior approval of the Office, an agency may establish a competitive area smaller than one that meets the standard named in paragraph (b) of this section. Agencies which have been delegated individual authority to do so may establish competitive areas smaller than named in paragraph (b) of this section, without prior approval of the Office.

(d) An agency may combine two or more competitive areas for initial competition in an enlarged competitive level or levels without correspondingly combining the areas for assignments between competitive levels. When an agency combines areas for initial competition only, it may limit competition for assignments between competitive levels to (1) the enlarged area, (2) a single competitive area, or (3) an area larger than a single area but smaller than the enlarged area.

(5 U.S.C. 1104; Pub. L. 95-454, sec. 3(5))

§ 351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by OPM.

(b)(1) Each agency shall establish separate competitive levels for competitive positions, as distinguished from excepted positions. Among competitive positions and among excepted positions, each agency shall establish separate competitive levels for positions that are:

(i) Under different pay schedules;

(ii) Filled on a full-time basis;

(iii) Filled on a seasonal basis;

(iv) Filled on a part-time basis;

(v) Filled on an intermittent basis; or

(vi) Filled by a supervisor or management official, as defined in 5 U.S.C. 7103(a)(10) and (11).

(2) Among excepted positions, each agency shall establish separate competitive levels for positions filled under different appointment authorities.

(3) Employees covered by the Merit Pay System provisions are General Schedule employees for all reduction in force purposes.

(4) A probationary period required by Subpart I of Part 315 of this title upon initial appointment to a supervisory or managerial position does not constitute a basis for establishing a separate competitive level.

(5) Differences in work schedules among other-than-full-time employees who would otherwise be assigned to the same competitive level do not constitute a basis for establishing separate competitive levels.

§ 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees:

(1) In the competitive level;

(2) Temporarily promoted from the competitive level; or

(3) Detailed from the competitive level under 5 U.S.C. 3341 or other appropriate authority.

(b) Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of his or her retention standing, the name of each competing employee who is:

(1) In the competitive level;

(2) Temporarily promoted from the competitive level; or

(3) Detailed from the competitive level under 5 U.S.C. 3341 or other appropriate authority.

(c) The agency shall enter on a list apart from the retention register the name and expiration date of the appointment or promotion of each employee serving in a position under specifically limited temporary appointment or temporary promotion, followed by the name of each employee serving in the competitive level with, as applicable:

(1) A performance rating of less than "Satisfactory" in an agency that has not implemented a performance appraisal system meeting all the requirements of 5 U.S.C. 4302 and Subpart 430-B of this title; or

(2) A written decision under § 432.204(a) of this title to remove him or her because of "Unacceptable Performance" as defined in § 432.202 of this title.

§ 351.405 Employees demoted because of unacceptable performance.

An employee who has received a written decision under § 432.204(a) of this title to demote him or her because of "Unacceptable Performance," as defined in § 432.202 of this title, competes under this part from the position to which he or she will be demoted.

Subpart E—Retention Standing

§ 351.501 Tenure groups and subgroups—competitive service.

(a) Each agency shall classify the competing employees on a retention register who occupy positions in the competitive service in the following groups and subgroups on the basis of tenure of employment and veteran preference. The descending order of retention standing:

(1) By groups is group I, group II, group III;

(2) Within each group is subgroup AD, subgroup A, subgroup B;

(3) Within each subgroup persons are ranked beginning with the earliest service date.

(b) Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this title is in group I if the employee is otherwise eligible to be included in this group.)

(c) Group II includes:

(1) Each employee serving a probationary period under Subpart H of Part 315 of this title. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this title is in group II if that employee has not completed a probationary period under Subpart H of Part 315 of this title); and

(2) Each career-conditional employee.

(d) Group III includes:

(1) Each indefinite employee;

(2) Each employee serving under a temporary appointment pending establishment of register;

(3) Each employee in status quo; and

(4) Each employee serving under other nonstatus nontemporary appointment.

(e) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(f) Subgroup A includes each preference eligible employee not included in subgroup AD.

(g) Subgroup B includes each nonpreference eligible employee.

(h) A retired member of a uniformed service is considered a preference eligible under this part only if he or she meets at least one of the conditions in the following paragraphs (h) (1), (2), or (3):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's military service does not include 20 or more years of full-time active service, regardless of when performed. However, this total does not include periods of active duty for training.

(3) The employee has been employed continuously since November 30, 1964, in a position covered by this Part without a break in service of more than 30 days.

(4) An employee who would otherwise be considered a preference eligible under conditions in § 351.501(h)(2) or (3) is not, effective October 1, 1980, considered a preference eligible for purposes of this part if the employee retired at or above the rank of major or its equivalent.

§ 351.502 Tenure groups and subgroups—excepted service.

Each agency shall classify the competing employees on a retention register who occupy positions in the excepted service by groups and subgroups that correspond to those for employees who occupy positions in the competitive service having similar tenure of employment and veteran preference, except that an employee who completes 1 year of current continuous service under a temporary appointment is in tenure group III.

§ 351.503 Length of service.

(a) Each agency shall establish a service date for each competing employee.

(b) An employee's service date is whichever of the following dates reflects his or her total creditable service, and the service credit rating provided under this part:

(1) The date the employee entered on duty, when he or she has no previous creditable service;

(2) The date obtained by subtracting the employee's total creditable previous service from the date he or she last entered on duty; or

(3) The date obtained by subtracting from the date in paragraph (b)(1) or (b)(2) of this section, the service equivalent allowed for a performance rating under § 351.504.

(c) An employee who is a retired member of a uniformed service is entitled to credit under this part for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active sevices in the armed forces if the employee meets one of the conditions included under § 351.501(h) of this title.

(d) Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

§ 351.504 Credit for performance.

(a) Each employee's performance rating of record on the date of issuance of specific reduction in force notices shall determine the employee's entitlement to additional service credit for performance under this section.

(b) An agency that has not implemented a performance appraisal system meeting all the requirements of 5 U.S.C. 4302 and Part 430 Subpart B of this title, and assigns summary objective performance ratings, shall credit the following employees with additional service, which is added to each employee's creditable service under this part:

(1) Each employee who has an "Outstanding" performance rating shall receive 4 years of additional service; and

(2) Each employee who has a performance rating between "Satisfactory" and "Outstanding" shall receive 2 additional years of service.

(c) An agency that has implemented a performance appraisal system meeting all the requirements of 5 U.S.C. 4302, and Part 430 Subpart P of this title, is responsible for using employee performance appraisals to credit employees with additional service toward retention standing. This additional service is added to each employee's creditable service under this part. Each employee who has an "Outstanding" or highest appraisal under the agency's system, shall receive 4 additional years of service. Each employee whose performance meets, but does not exceed the established minimum performance standards for the critical elements of his or her position shall be credited with no additional years of service. Agencies may use employee performance appraisals to assign other employees whose performance exceeds the established minimum performance standards for the critical elements of the position, but is less than "Outstanding" or the highest equivalent appraisal under the agency's system, an amount of service credit ranging from 0 to less than 4 years.

Each agency is responsible for ensuring that these provisions are:

(1) Consistent with Part 430 Subpart B of this title; and

(2) Uniformly and consistently applied in any one reduction in force.

§ 351.505 Records.

Each agency shall maintain the current, correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by:

(a) A representative of OPM; and

(b) An employee of the agency to the extent that the registers and records have a bearing on his case.

The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

§ 351.506 Effective date of retention standing.

Except for determining additional service credit for performance ratings as provided in § 351.504:

(a) The retention standing of each employee released from his competitive level in the order prescribed in § 351.602 is determined as of the date he is so released.

(b) The retention standing of each employee temporarily retained in his competitive level under § 351.608 is determined as of the date he would have been released from his competitive level had temporary retention action under § 351.608 not been taken. The retention standing of each employee so retained remains fixed until the completion of the reduction in force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction in force action to accord with the employee's true retention standing as of the effective date established by this section.

Subpart F—Release From Competitive Level

§ 351.601 General.

(a) An agency may not release a competing employee from a competitive level while retaining in that level an employee with:

(1) A specifically limited temporary appointment;

(2) A specifically limited temporary promotion;

(3) A performance rating of less than "Satisfactory" in an agency that has not implemented a performance appraisal system meeting all the requirements of 5 U.S.C. 4302 and Subpart B or Part 430 of this title; or

(4) A written decision under § 432.204(a) of removal or demotion from the competitive level because of "Unacceptable Performance," as defined in § 432.202 of this title.

(b) An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory exception or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

§ 351.602 Order of release from competitive level.

Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

§ 351.603 Actions.

Subject to Subpart G of this part, when an agency selects an employee for release from his competitive level, it shall:

(a) Assign him with his consent to a position for which he is qualified which will last at least 3 months;

(b) Furlough him; or

(c) Separate him.

§ 351.604 Use of furlough.

(a) An agency may furlough a competing employee only when it intends to recall him within 1 year to duty in the position from which furloughed.

(b) An agency may not separate a competing employee under this part while an employee with lower retention standing in the same competitive level is on furlough.

(c) An agency may not furlough a competing employee for more than 1 year.

(d) When an agency recalls employees to duty in the competitive level from which furloughed, it shall recall them in the order of their retention standing, beginning with the highest standing employee.

§ 351.605 Liquidation provisions.

When an agency will abolish all positions in a competitive area within 3 months it shall release employees in subgroup order but may release them regardless of retention standing within a subgroup, except as provided in § 351.606. When an agency releases an employee under this section, the notice to the employee shall so state and also shall give the date the liquidation will be completed. An agency may apply §§ 351.607 and 351.608 in liquidation.

§ 351.606 Mandatory exceptions.

(a) When an agency applies § 351.602 or §351.605, it shall give the following special retention priorities:

(1) Each group I or II preference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for 1 year after restoration shall be retained over other employees in his subgroup for the retention period; and

(2) Each group I or II nonpreference eligible employee entitled under section 9 of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. 459), to retention for either 6 months or 1 year after restoration shall be retained over other employees in his subgroup for the retention period.

(b) Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the regular order of selection required by paragraph (a) of this section.

§ 351.607 Permissive continuing exceptions.

An agency may make exception to the selection sequence in § 351.602 and to the action provisions of § 351.603 when needed to retain an employee on duties that cannot be taken over within 90 days and without undue interruption to the activity by an employee with higher retention standing. The agency shall notify in writing each higher-standing employee reached for release from the same competitive level of the reasons for the exception.

§ 351.608 Permissive temporary exceptions.

An agency may make exception for not more than 90 days to the selection sequence in § 351.602 and to the action provisions of § 351.603 when needed to retain an employee for 90 days or less after the effective date of release from the same competitive level of a higher-standing employee to continue an activity without undue interruption, or to satisfy a Government obligation to the retained employee, or when the temporary retention of the lower-standing employee does not adversely affect the rights of any higher-standing employee who is released ahead of him. The temporary retention of a lower-standing employee on sick leave as a permissive exception may exceed 90 days but may not exceed the date of exhaustion of his sick leave. When the agency retains an employee for more than 30 days after the effective date of release from the same competitive level of a higher-standing employee, it shall notify in writing each higher-standing employee of the reasons for the exception and the date the lower-standing employee's retention will end. When the agency retains a lower-standing employee for 30 days or less it shall list opposite his name on the retention register the reasons for the exception and the date his retention will end.

Subpart G—Assignment Rights

§ 351.701 Qualifications for assignment.

(a) Except as provided in § 351.702, an employee is qualified for assignment under § 351.603 if the employee:

(1) Meets the Office standards and requirements for the position, including any minimum educational requirement;

(2) Is physically qualified for the duties of the position;

(3) Meets any special qualifying condition which the Office has approved for the position; and

(4) Has the capacity adaptability, and any special skills needed to satisfactorily perform the duties and responsibilities of the position without undue interruption to the activity.

(b) An agency may not consider the sex of an employee as a factor in determining the employee's qualification for a position, except when the position is one for which restriction of certification of eligibles by sex is found justified by the Office.

(c) An employee who is carried on leave of absence because of a compensable injury and is released from his/her competitive level may not be denied an assignment right solely because the employee is not physically qualified for the duties of the position when the physical disqualification resulted from the compensable injury. Such an employee must be afforded appropriate assignment rights subject to his/her recovery as provided by 5 U.S.C. 8151 and Part 353 of this chapter.

(d) If an agency determines that, on the basis of evidence before it, a preference eligible employee who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of a position to which the employee would otherwise have been assigned under this part, the agency must notify the Office of this determination. At the same time, the agency must notify the employee of the reasons for the determination and of the right to respond, within fifteen days of the notification, to the Office, which will require the agency to demonstrate that the notification was timely sent to the employee's last known address. The Office shall make a final determination concerning the physical ability of the employee to perform the duties of the position. This determination must be made before the agency may select any other person for the position. When the Office has completed its review of the proposed disqualification on the basis of physical disability, it must send its finding to both the agency and the employee. The agency must comply with the findings of the Office. The functions of the Office under this paragraph may not be delegated to an agency.

§ 351.702 Exception to qualifications.

An agency may assign an employee under § 351.201(b) or § 351.603 without regard to OPM's standards and requirements for the position if:

(a) He meets any minimum education requirement for the position; and

(b) The agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position.

§ 351.703 Assignment involving displacement.

(a) An agency shall assign under § 351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction, or the least possible reduction, in representative rate when a position in the other competitive level is held by an employee:

(1) In a lower subgroup; or

(2) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

(b) Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.

§ 351.704 Rights and prohibitions.

(a) An agency may satisfy an employee's right to assignment under § 351.703 by assignment under § 351.201(b) or § 351.705 to a position having a representative rate equal to that to which he or she would be entitled under § 351.703.

(b) Section 351.703 does not:

(1) Require an agency to assign an employee to a position having a higher representative rate:;

(2) Authorize or permit an agency to displace a full-time employee by other than a full-time employee;

(3) Authorize or permit an agency to displace an other-than-full-time employee by a full-time employee; or

(4) Authorize or permit an agency to satisfy a full-time employee's right to assignment under § 351.603 by assigning the employee to a vacant other-than-full-time position. However, an agency may, at its discretion, choose to offer a vacant other-than-full-time position to a full-time employee in lieu of separation by reduction in force.

§ 351.705 Administrative assignment.

(a) An agency may, in its discretion, adopt provisions which:

(1) Provide for assignments across competitive areas;

(2) Permit a competing employee to displace an employee with lower retention standing in the same subgroup when it cannot make an equally reasonable assignment by displacing an employee in a lower subgroup;

(3) Permit an employee in subgroup III–AD to displace an employee in subgroup III–A or III–B, or permit an employee in subgroup III–A to displace an employee in subgroup III–B; or

(4) Provide competing employees in the excepted service with assignment rights similar to those in § 351.703 and in paragraphs (a) (1), (2), and (3) of this section.

(b) Provisions adopted by an agency under paragraph (a) of this section:

(1) Shall be consistent with this part;

(2) Shall be uniformly and consistently applied in any one reduction in force;

(3) May not provide for the assignment of a less-than-full-time employee to a full-time position;

(4) May not provide for the assignment of an employee in a competitive position to a position in the excepted service; and

(5) May not provide for the assignment of an excepted employee to a position in the competitive service.

Subpart H—Notice to Employee

§ 351.801 Notice period.

(a) Each competing employee selected for release from his or her competitive level under this part is entitled to a written notice at least 30 full days before the effective date of his or her release.

(b) The notice shall not be issued more than 90-days before release except when the agency determines that additional time will protect employee rights or avoid administrative hardship.

(c) When an agency retains an employee under § 351.606 or § 351.608 the agency may not continue the notice period beyond the employee's retention period. The notice to the employee shall cite the date on which the retention period ends as the effective date of the employee's release from his or her competitive level.

(5 U.S.C. 1104; Pub. L. 95–454, sec. 3 (5))

§ 351.802 Content of notice.

Except as provided in § 351.803, the notice required by § 351.801 shall state specifically the action to be taken and its effective date; the employee's competitive area, competitive level, subgroup, and service date; the place where the employee may inspect the regulations and records pertinent to this case; the reasons for retaining a lower-standing employee in the same competitive level under § 351.607; the reasons for retaining a lower-standing employee in the same competitive level for more than 30 days under § 351.608; and the employee's right to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations. The agency shall comply with the provisions of § 1201.21 of this title.

(5 U.S.C. 7701, et seq.)

§ 351.803 General and specific notices.

When an agency cannot determine specifically all individual actions at the start of the notice period, it may issue general notices which shall be supplemented by specific notices. The combined contents of the general and specific notices shall meet the requirements in § 351.802. When an agency issues a general notice, the notice period begins the day after the employee receives the general notice. An agency may cancel an unexpired general notice, or may renew it for additional periods within the maximum notice period referred to in § 351.801. A general notice expires as stated therein unless, on or before the expiration date, the employee receives a renewal of the general notice or a specific notice. A general notice expires no later than at a time that will allow 5 days before the end of the maximum notice period. When a general notice is supplemented by a specific notice, an agency may not release an employee from his competitive level until at least 5 days after the employee's receipt of the specific notice.

§ 351.804 Content of general notice.

A general notice shall inform the employee that action under this part may be necessary but that the agency has determined no specific action in his case. The notice shall state that as soon as the agency determines what action, if any, will be taken under this part the employee will receive specific notice of the action to be taken. The general notice shall state that it will expire as stated therein unless, on or before the expiration date, it is renewed or supplemented by a specific notice.

A general notice may also include any other information specified in § 351.802.

§ 351.805 Expiration of notice.

A general notice expires as provided in § 351.803. A specific notice expires except when followed by the action specified, or by action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action. The agency may not take the action before the effective date specified in the specific notice. An action taken after the specified date in the specific notice shall not be ruled invalid for that reason except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for reduction in force as a result of the action or except when it results in a notice period longer than the maximum allowed.

§ 351.806 New notice required.

An employee is entitled to a new written notice of at least 30 full days if the agency decides to take an action more severe than first specified.

§ 351.807 Status during notice period.

When possible, the agency shall retain the employee on active duty during the notice period, but it may place him/her on annual leave with or without his/her consent, on leave without pay with his/her consent, or in a nonpay status without his/her consent when in an emergency the agency lacks work or funds for all or part of the notice period.

(5 U.S.C. 7701, et seq.)

§ 351.808 Notice concerning consideration for reemployment.

An employee who receives a specific notice of separation under this part must be given information concerning his or her right to consideration for reemployment under the provisions of Subparts B and C of Part 330 of this title. This information is in addition to that specified in § 351.802. The information concerning consideration for reemployment should be included in or with the specific reduction in force notice; otherwise, a separate supplemental notice covering this information must be given to the employee.

Subpart I—Appeals and Corrective Action

§ 351.901 Appeal.

An employee who has been affected by a reduction in force action and who believes this part has not been correctly applied may appeal to the Merit Systems Protection Board under the provisions of the Board's regulations.

(5 U.S.C. 7701, et seq.)

§ 351.902 Correction by agency.

When an agency decides that an action under this part was unjustified or unwarranted and restores an individual to his former grade or rate of pay or to an intermediate grade or rate of pay, it shall make the restoration retroactively effective to the date of the improper action.

(5 U.S.C. 7701, et seq.)

Subpart J—Reemployment Priority List

§ 351.1001 Establishment and maintenance of the reemployment priority list.

Each agency shall establish and maintain a reemployment priority list for each commuting area in which it separates group I or group II employees from competitive positions under this part.

§ 351.1002 Persons covered.

(a) The name of each group I or group II employee who receives a specific notice of separation from a competitive position (as distinguished from an excepted position) under this part is entered on the reemployment priority list.

(b) This priority extends to all competitive positions in the commuting area for which the employee is qualified and available, except as provided in § 351.1005.

(c) Subpart B of Part 330 of this title covers appointment from the reemployment priority list.

§ 351.1003 Employee eligibility.

(a) A full-time group I or group II employee is entered on the reemployment priority list unless he or she has declined assignment under Subpart G of this part to a position that:

(1) Is full-time;

(2) Is competitive;

(3) Is nontemporary; and

(4) Has a representative rate no lower than that of the position from which the employee was separated.

(b) An other-than-full-time group I or group II employee is entered on the reemployment priority list unless he or she has declined assignment under Subpart G of this part to an other-than-full-time position that:

(1) Is of the same type work schedule (i.e., part-time, intermittent, or seasonal) as the position from which the employee was separated;

(2) Is competitive;

(3) Is nontemporary;

(4) Has a representative rate no lower than that of the position from which the employee was separated; and

(5) Has a regularly scheduled administrative workweek no lower than that or the position from which the employee was separated.

§ 351.1004 Duration of eligibility.

(a) The name of a group I employee remains on the reemployment priority list for 2 years, and a group II employee's name for 1 year, from the date he or she was separated.

(b) An employee's name is deleted from the reemployment priority list when the employee submits a written request to the agency asking that his or her name be deleted.

(c) A full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a non-temporary, full-time, competitive position; or

(2) Declines under this subpart a full-time, nontemporary, competitive position with a representative rate the same as, or higher than, that of the position from which he or she was separated under this part.

(d) An other-than-full-time employee's name is also deleted from the reemployment priority list when the employee:

(1) Accepts a nontemporary competitive position; or

(2) Declines under this subpart a nontemporary, competitive position with a representative rate, and regularly scheduled administrative workweek, the same as or higher than that of the position from which the employee was separated under this part.

§ 351.1005 Operation of the list in Alaska and overseas.

(a) The name of each group I or group II employee who receives a notice of separation under this part from a competitive position in Alaska or overseas is entered on the reemployment priority list for the area in which the position from which separated is located, except when:

(1) The employee leaves that area; or

(2) The agency has a general program for rotating employees between overseas areas and the United States and the employee's immediately preceding overseas services or residence, combined with prospective overseas service under available appointments, exceeds the maximum duration of an overseas duty tour in the agency's rotation program.

(b) Upon his or her written request, the name of an employee who leaves the area is entered on the agency's reemployment priority list for:

(1) The commuting area from which he or she was employed for Alaskan or overseas service; or

(2) Another area, except in Alaska or overseas, that is mutually acceptable to the employee and the agency.

(c) In addition to any of the reasons, as appropriate, in § 351.1004 (b), (c), or (d), for deleting an employee's name from the reemployment priority list, the name of an employee is deleted from an Alaskan or overseas reemployment priority list when the employee:

(1) Leaves the area covered by that list; or

(2) Becomes disqualified for overseas appointment because of his or her previous service or residence.

(5 U.S.C. 3315)

[FR Doc. 81-1751 Filed 1-15-81; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 220, and 235

[Amendments 47, 37, and 5, respectively]

National School Lunch Program, School Breakfast Program and State Administrative Expense Funds; Changes to National Average Payment Factors

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the National School Lunch Program, School Breakfast Program, and State Administrative Expense fund regulations for the period January 1, 1981 through September 30, 1981 in the following ways: (1) there will be no January 1, 1981 semiannual adjustment made in the Section 4 and Section 11 National Average Payment factors for lunches and breakfast served; (2) the Section 4 and Section 11 National Average Payment adjustment to be made in July 1981 shall be based on the Consumer Price Index for the previous 12 months, rather than for the previous six months; (3) Section 4 National Average Payment factors for school lunches will be reduced by two and one-half cents for all categories of lunches served by school food authorities in which less than 60 percent of the lunches served were served free or at a reduced price during school year 1978–79; (4) reductions in Section 4 National Average Payment factors must be reflected in reimbursement payments actually made to School Food Authorities in which less than 60 percent of the lunches served were served free or at a reduced price during school year 1978–79; (5) State revenue matching requirements under the National School Lunch Program for the school year beginning July 1, 1981 will not be reduced by the reduction in Section 4 National Average Payment factors; and (6) State Administrative Expense fund allocations for the fiscal year ending September 30, 1983 will not be reduced by the reduction in Section 4 National Average Payment Factors. These changes implement the mandates of P.L. 96–499, the Omnibus Reconciliation Act of 1980. These changes are anticipated to save $126.1 million for the National School Lunch Program and $8 million for School Breakfast Program.

EFFECTIVE DATE: January 1, 1981.

FOR FURTHER INFORMATION CONTACT: Stanley C. Garnett, Branch Chief, Policy and Program Development Branch, School Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447–9065. An Impact Analysis Statement is available on request from the above named individual.

SUPPLEMENTARY INFORMATION: This final action has been reviewed under USDA procedures established in the Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified "not significant." Robert Greenstein, Administrator, Food and Nutrition Service, has determined that this final rule is nondiscretionary and mandated by Public Law 96–499. Therefore, solicitation of public comments is unnecessary. Good cause exists both for the dispensing with the solicitation of public comments and for making this rule effective earlier than 30 days after publication.

Background

Public Law 96–499 authorized several legislative changes in all Child Nutrition Programs which will result in significant savings for fiscal year 1981. These changes are intended by Congress to achieve savings by amending Part 210 National School Lunch Program and Part 220 School Breakfast Program with the three provisions which are explained below.

Two and one-half cent Section 4 Reduction in Reimbursement Rates

Section 4 of the National School Lunch Act provides for general cash payment for all lunches served under the National School Lunch Act. Currently most States earn 18.5 cents under Section 4 for each lunch (free, reduced-price or paid) served under the National School Lunch Program. Section 201 of Public Law 96–499 provides for a two and one-half cent reduction in the

general cash payment factor under Section 4 of the National School Lunch Act for all categories of lunches served (free, reduced-price, paid) by school food authorities in which less than 60 percent of the lunches were served free or at a reduced-price during the second preceding school year (SY 1978–79).

The two and one-half cent reduction in the Section 4 general cash payment factor will not affect the amount of State administrative expense funds to be made available under Section 7 of the Child Nutrition Act of 1966 for the fiscal year ending September 30, 1983. In addition, the amount of State revenues appropriated or used for meeting the requirements under Section 7 of the National School Lunch Act for the school year ending June 30, 1982 will not be affected by a reduction in the amount of Federal funds expended as a result of the reduction in Section 4 earnings.

Annual Adjustments in National Average Payment (NAP) Rates

Section 204 of Public Law 96–499 eliminated the semiannual adjustment in the Section 4 and Section 11 National Average Payment factors for lunch and the National Average Payment factors for breakfast served under Section 4 of the Child Nutrition Act of 1966 for fiscal year 1981. This final rule eliminates the January 1, 1981 semiannual adjustment of National Average Payment factors for the National School Lunch Program and School Breakfast Program. The National Average Payment factors for these programs for the period January 1, 1981, through June 30, 1981, will be those factors prescribed for the period July 1 through December 31, 1980, (45 FR 48174), except for the changes noted below.

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

Accordingly, Part 210 is amended as follows:

1. § 210.4 paragraph (a) is amended by adding a new sentence at the end of the paragraph to read as follows:

§ 210.4 Payment of Funds to States and FNSROs.

* * * * *

(a) * * * For the period from January 1, 1981 through September 30, 1981, the National Average Payment factor for lunches served under the National School Lunch Act, after being adjusted under Section 11(a) of the National School Lunch Act, shall be reduced by two and one-half cents for any school food authority in which less than 60 percent of lunches served in the National School Lunch Program were served free or at a reduced price during the second preceding school year (SY 1978–79).

§ 210.4 [Amended]

2. § 210.4 paragraph (c) is amended by adding a new sentence at the end of the paragraph to read as follows:

* * * * *

(c) * * * In the fiscal year ending September 30, 1981, however, the Secretary shall omit the January semiannual adjustments and shall make adjustments by July 1, which shall reflect changes in the cost of operating the program as indicated by the changes in the food away from home series of the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor for the 12 month period ending May 31, 1981.

* * * * *

3. § 210.6 paragraph (b) is amended by revising the last sentence of the paragraph to read as follows:

§ 210.6 Matching of funds.

* * * * *

(b) * * * For the school year beginning July 1, 1979, and for each school year thereafter, such State revenue shall constitute at least 10 percent of the matching requirements for the preceding school year based on the total general cash-for-food assistance funds expended for that period: *Except that*, for the school year beginning July 1, 1981, an additional amount shall also be subject to the State revenue matching requirement. Such amount for each State shall be determined by multiplying two and one-half cents by the number of lunches served during the period January 1, 1981 through June 30, 1981 in those School Food Authorities administered by the State agency in which less than 60 percent of the lunches served under the Program during the 1978–79 school year were served free or at a reduced price.

* * * * *

4. § 210.11 paragraph (c) is amended by revising the first sentence of the paragraph to read as follows:

§ 210.11 Reimbursement payments.

* * * * *

(c) Based on the principles set forth in this section, State agencies, and FNSROs where applicable, shall have maximum flexibility in assigning rates of reimbursement from general cash-for-food assistance funds among schools and School Food Authorities: *Except that*, for the period January 1, 1981 through September 30, 1981, the total amount of general cash-for-food assistance reimbursement actually paid to all School Food Authorities under the jurisdiction of a State agency in which less than 60 percent of the lunches served were served at a free or reduced price in school year 1978–79, shall not be greater than the amount of general cash-for-food assistance funds available for such School Food Authorities for this period under § 210.4(a) of this part. * * *

* * * * *

PART 220—SCHOOL BREAKFAST PROGRAM

§ 220.9 [Amended]

section 220.9 paragraph (b) is amended by adding a new sentence at the end of the paragraph to read as follows:

(b) * * * In the fiscal year ending September 31, 1981, however, the Secretary shall omit the January 1 semiannual adjustments and shall make annual adjustments by July 1, which shall reflect changes in the cost of operating the program, as indicated by the changes in the food away from home series of the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor for the 12 month period ending May 31, 1981.

* * * * *

PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

Section 235.4 paragraph (a) is amended by adding the following sentence after the first sentence of the paragraph:

§ 235.4 Allocation of funds to States.

(a) * * * For the fiscal year ending September 30, 1981, the amount of funds expended under Section 4 of the National School Lunch Act in each State shall, for purposes of this paragraph, be the sum of: (1) the amount of such funds actually expended within the State during the fiscal year, and (2) the amount determined by multiplying two and a half cents times the number of lunches served during the period January 1, 1981 through September 30, 1981 in those School Food Authorities in which less than 60 percent of the lunches served under the National School Lunch Program during the 1978–79 school year were served free or at a reduced price. * * *

(Catalogue of Federal Domestic Assistance Nos. 10.555 and 10.556).

(Public Law 96–499. Sections 201 and 204, 94 Stat. 2599)

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 80-1294 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-30-M

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7 CFR Part 226

Child Care Food Program; Matching of Federal Funds

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final regulation implements for the Child Care Food Program a provision of Title VI of Pub. L. 96-205. This provision (section 601) waives any requirements for local matching funds under $100,000 for American Samoa and the Northern Mariana Islands.

EFFECTIVE DATE: March 12, 1980.

FOR FURTHER INFORMATION CONTACT: Beverly Walstrom, Branch Chief, Policy and Program Development Branch, Child Care and Summer Programs Division, USDA, Food and Nutrition Service, Washington, D.C. 20250. Telephone (202) 447-6509. The final Impact Statement describing the options considered in developing this final rule and the impact of implementing each option is available on request from Beverly Walstrom at the above address.

SUPPLEMENTARY INFORMATION:

Administrative Procedures

This final action has been reviewed under USDA procedures established in the Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified as "not significant."

Robert Greenstein, Administrator, FNS, has determined that a situation exists which warrants publication without opportunity for a public comment period on this final action. Section 601 of Pub. L. 96-205 is mandatory; the Department is not at liberty to change the matching requirement should public comments indicate disapproval of the rule.

Solicitation of public comments is unnecessary. Good cause exists both for dispensing with the solicitation of public comments and for making this rule effective earlier than 30 days after publication.

Current Child Care Food Program Matching Requirements

Section 17(a) of the National School Lunch Act requires States to match the Federal funds received to assist institutions to acquire food service equipment under the Food Service Equipment Assistance (FSEA) Program (7 CFR 226.25). Section 226.25(d) requires States to provide at least one-fourth of the cost of equipment financed with FSEA funds from sources within the State, except that especially needy institutions are exempted from this matching requirement. The regulations also establish the matching requirement on a fiscal year basis.

Pub. L. 96-205

In section 601 of Pub. L. 96-205, enacted on March 12, 1980, Congress has required that "* * * in the case of American Samoa and the Northern Mariana Islands any department or agency shall waive any requirement for local matching funds under $100,000 (including in-kind contributions) required by law to be provided by American Samoa or the Northern Mariana Islands."

Effect of Law on Child Care Food Program

A review of FNS data indicates that for Fiscal Year 1980, the Northern Mariana Islands was not required to produce matching FSEA funds because all the child care institutions participating in the CCFP in this territory were classified as "especially needy." As of March 12, 1980, pursuant to the mandate of section 601 of Pub. L. 96-205, the Northern Mariana Islands was also exempt from producing local FSEA matching funds under $100,000. Furthermore, it is not anticipated that future funding will increase to a level that would require this jurisdiction to match Federal monies.

American Samoa was not participating in the Child Care Food Program in Fiscal year 1980 and therefore was not awarded any FSEA funds. Should American Samoa participate at some future time, it is not anticipated that any Food Service Equipment Assistance funds allocated to this territory would be at a high enough level to require this jurisdiction to match Federal monies. Therefore, these territories are expected to be exempt from the matching requirements of Part 226 in accordance with Pub. L. 96-205 and these regulations.

PART 226—CHILD CARE FOOD PROGRAM

Accordingly, Part 226, Child Care Food Program, is amended as follows:

Section 226.25 of the regulations is amended by revising paragraph (d) to read as follows:

§ 226.25 Food service equipment assistance.

* * * * *

(d) Matching of food service equipment assistance funds. Payment to any State of funds allocated under this paragraph for any fiscal year shall be made upon condition that at least one-fourth of the cost of equipment funded under this section shall be financed from sources within the State, except that this condition shall not apply to equipment obtained for institutions that are especially needy, as defined in the approved State Plan of Child Care Food Program Operations. Beginning March 12, 1980, however, American Samoa and the Northern Mariana Islands shall be exempt from the matching requirements under this section if their respective matching requirement is under $100,000. Payments made by FNS to State agencies and by State agencies to institutions may be matched by either the recipient institution or other State or local sources and payments. Funds from sources within the State may include any source of State or local funds.

* * * * *

(Sec. 601, Pub. L. 96-205, 94 Stat. 90 (42 U.S.C. 1469a))

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81-1302 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-30-M

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7 CFR Part 245

Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools; Implementation of Revised Income Poverty Guidelines

AGENCY: Food and Nutrition Service.

ACTION: Emergency final rule.

SUMMARY: The Department announces the temporary use of revised eligibility standards and procedures that schools participating in the National School Lunch and Breakfast Programs and Special Milk Program shall use to determine a child's eligibility for free and reduced price meals and free milk for the remainder of this fiscal year through September 30, 1981. The new income poverty guidelines that include a standard deduction are posted in the Notice of Income Poverty Guidelines that appears in the Notice Section of today's **Federal Register**. Public Law 96-499 requires this change in the income guidelines and the use of a standard deduction. This emergency ruling specifies the timetable and the steps to be taken to implement the changes.

These changes will affect the eligibility of some children for free and reduced price meals and free milk. This rule requires that those children be given advance notice of a reduction or termination of benefits.

EFFECTIVE DATE: January 1, 1981.

FOR FURTHER INFORMATION CONTACT: Stanley C. Garnett, Branch Chief, Policy and Program Development Branch, School Programs Division, USDA, FNS, Washington, D.C. 20250, (202) 447–9069. An Impact Analysis Statement is available on request from Mr. Garnett.

SUPPLEMENTARY INFORMATION:

Classification: This final rule has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified as "not significant". Robert Greenstein, Administrator of the Food and Nutrition Service, has determined that an emergency situation exists which warrants making this rule effective on January 1, 1981. Because the provisions of this rule are mandated by Public Law 96–499 and are thus non-discretionary, solicitation of public comment is impractical and unnecessary. Further, the provisions of Public Law 96–499 implemented by this rule are effective January 1, 1981. Therefore, good cause exists both for making this rule effective earlier than 30 days after publication and for dispensing with the solicitation of comments.

Background

Public Law 96–499 which was enacted on December 5, 1980, requires the following provisions: (1) deletion of the Secretary's adjustment of the Office of Management and Budget's Income Poverty Guidelines; (2) replacement of the hardship deductions with a standard deduction; and (3) implementation options for School Food Authorities to use in determining eligibility under the new income poverty guidelines. These provisions are in effect through September 30, 1981. These provisions are fully explained in the Notice of Income Poverty Guidelines that appears in today's **Federal Register**.

Public Law 96–499 requires the Department to establish the standard deduction for each family size as follows:

(1) in States other than Alaska, Hawaii, and Guam, the Secretary shall allow a standard deduction of $60 each month for each household, which shall be adjusted to the nearest $5 on July 1, 1980, to reflect changes in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics, Department of Labor, for items other than food for the period beginning September 1977 and ending March 1980;

(2) the monthly standard deduction allowed in Alaska shall bear the same ratio to the standard deduction allowed in the contiguous States as the applicable income poverty guidelines for Alaska bear to the applicable income poverty guidelines for such States; and

(3) the monthly standard deduction allowed in Hawaii and Guam shall bear the same ratio to the standard deduction allowed in the contiguous States as the applicable income poverty guidelines for Hawaii bear to the applicable income poverty guidelines for such States.

The new Income Poverty Guidelines which are announced in the notice section of this **Federal Register** include the standard deduction allowed by law for each household.

Implementation

In determining a child's eligibility under the new income guidelines, a school shall compare the family's income to the guidelines without allowing any hardship deductions, because such deductions are not allowable through September 30, 1981. They have been replaced by the appropriate standard deductions which have been incorporated into the Income Poverty Guidelines.

Because the income guidelines change in the middle of the school year, Public Law 96–499 allows the Department to provide schools with some flexibility in implementing the new certification procedures.

A School Food Authority has two choices in implementing the new income guidelines. It may: 1) use the applications that it has on hand to make new eligibility determinations; or 2) it may distribute new applications with the new guidelines. In either case, the School Food Authority shall review all of its applications and make new eligibility determinations based on the new guidelines. School Food Authorities which distribute new applications are provided an additional 30 days to collect the income information. The family of each child whose eligibility for program benefits is reduced or terminated shall receive written notice of the reduction in benefits at least 10 days prior to the date the reduction or termination of benefits takes effect. This advance notice will enable children to arrive at school prepared to pay an additional amount if necessary.

Accordingly, a new paragraph is added to Part 245 as follows: § 245.3, a new paragraph (d) is added to the end of the section to read as follows:

§ 245.3 Eligibility standards and criteria.

* * * * *

(d) For the period of time between January 1 and September 30, 1981, notwithstanding any provision of this Part, all State agencies, School Food Authorities, and FNSROs where applicable, shall abide by the following provisions in implementing the revised Income Poverty Guidelines which are required by Public Law 96–499:

(1) Within 15 days after the Department publishes the revised Income Poverty Guidelines, the State agencies or FNSRO, where applicable, shall notify School Food Authorities of the new guidelines.

(2) Within 15 days of receipt of the revised guidelines the School Food Authority shall issue a public release to the informational media to publicly announce the revised family size income standards for determining eligibility for free and reduced price meals and free milk in the National School Lunch Program, School Breakfast Program and Special Milk Program. Applications containing the revised income guidelines may be distributed. A new application shall be issued to parents or guardians who express interest in submitting a new application as a result of the revised family size income standards.

(3) Each School Food Authority shall ensure that each child's eligibility for free or reduced price benefits is redetermined based on the revised Income Poverty Guidelines published in the notice section of the **Federal Register** dated January 16, 1981. Such redeterminations of eligibility may be based on applications already on file for school year 1980–81 or may be based on new applications distributed to comply with this rule. School Food Authorities shall ensure that: (i) schools which use applications on file redetermine each child's eligibility for benefits within 30 days and implement the new income guidelines within 45 days after the State agency or FNSRO, where applicable, issues the new income eligibility guidelines; and (ii) schools which distribute new applications redetermine each child's eligibility for benefits within 60 days and implement the new guidelines within 75 days after the State agency or FNSRO, where applicable, issues the new income eligibility guidelines.

(4) Each School Food Authority shall ensure that when these eligibility redeterminations are made, as specified in the preceding section, "special hardship deductions" are not subtracted from family income. The Income Poverty Guidelines for the remainder of this fiscal year include a standard deduction for each family size, which replaces the hardship deductions.

(5) Each School Food Authority shall ensure that the family of each child whose eligibility for program benefits is

reduced or terminated receives written notice of the reduction or termination of benefits at least 10 days prior to the effective date of the reduction or termination.

(6) No School Food Authority is required to amend its current free and reduced price policy statement as a result of this rule.

(42 U.S.C. 1785, 1766, 1772, 1773(e), sec. 203, Pub. L. 96-499, 94 Stat. 2599)

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81-1299 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-30-M

Animal and Plant Health Inspection Service

7 CFR Part 371

Organization, Functions and Delegations of Authority

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: This document revises the statement of functions of Animal and Plant Health Inspection Service as it relates to the Deputy Administrator, Veterinary Services, to specifically provide authority to purchase unlicensed veterinary biological products on the open market, test same, and disseminate the results of such tests as provided in section 101(d) of the Act of September 21, 1944 (7 U.S.C. 430). Also, for clarification purposes, the statement of functions and delegations of authority for both the Deputy Administrator, Veterinary Services, and the Deputy Administrator, Plant Protection and Quarantine, is begin revised to include U.S. Code citations for the various programs and activities assigned to each Deputy Administrator.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: John C. Frey, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202-447-5335 or 301-436-6466).

SUPPLEMENTARY INFORMATION: The statement of organization, functions, and delegations of authority of the Animal and Plant Health Inspection Service, is being amended to delegate to the Deputy Administrator, Veterinary Services, the authority to purchase in the open market, from applicable appropriations, samples of all tuberculin, serums, antitoxins, or analogous products of foreign or domestic manufacture which are sold in the United States, for the detection, prevention, treatment, or cure of diseases of domestic animals, to test the same, and to disseminate the results of said tests in such manner deemed best. It is necessary to provide this delegation of authority to appropriate officers consistent with, and with due regard to, the continuing responsibility for the proper discharge of the functions assigned to APHIS. Delegation of this authority will provide for the acquisition and dissemination of information regarding the quality of veterinary biological products available in U.S. markets. It will serve to encourage those who produce and distribute veterinary biological products which are pure, safe, potent, and efficacious. The Secretary has delegated this authority to the Assistant Secretary for Marketing and Transportation Services who in turn has delegated such authority to the Administrator, Animal and Plant Health Inspection Service (45 FR 80477).

In addition, to more precisely delineate those functions heretofore delegated to the Deputy Administrators of APHIS, and to assure that future delegations are clear, the applicable U.S. Code citations are being inserted with each program and activity delegation.

This rule relates to internal agency management and, therefore, pursuant to 5 U.S.C. 553, it is found upon good cause that notice and other public procedures with respect thereto are impractical and contrary to the public interest, and good cause is found for making this rule effective less than 30 days after its publication in the **Federal Register.**

Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order 12044, Improving Government Regulations, and, thus, does not require the preparation of a regulatory impact analysis.

Accordingly, 7 CFR Part 371 is amended as follows:

Section 371.2 is amended by revising paragraphs (c)(2) and (d)(2) to read as follows:

§ 371.2 The Office of the Administrator.

* * * * *

(c) * * *

(2) Planning, providing leadership, formulating and coordinating policies, developing and issuing regulations (including quarantines), and directing the administration of PPQ programs and activities. These programs and activities include:

(i) Sec. 102, Organic Act of September 21, 1944, as amended, and the Act of April 6, 1937, as amended (7 U.S.C. 147a, 148, 148a-148e), relating to control and eradication of plant pests and diseases;

(ii) the Mexican Border Act, as amended (7 U.S.C. 149);

(iii) the Golden Nematode Act (7 U.S.C. 150-150g);

(iv) the Federal Plant Pest Act (7 U.S.C 150aa-150jj);

(v) the Plant Quarantine Act, as amended (7 U.S.C. 151-164a, 167);

(vi) the Terminal Inspection Act, as amended (7 U.S.C. 166);

(vii) the Honeybee Act, as amended (7 U.S.C. 281-282);

(viii) the Federal Noxious Weed Act of 1974 (7 U.S.C. 2801-2813);

(ix) the Endangered Species Act of 1973 (87 Stat. 884);

(x) Executive Order 11987; and

(xi) the responsibilities of the United States under the International Plant Protection Convention.

* * * * *

(d) * * *

(2) Planning, providing leadership, formulating and coordinating policies, developing and issuing regulations (including quarnatines) pursuant to law, and directing the administration of the VS programs and related activities involving:

(i) Sec. 306 of the Tariff Act of June 17, 1930, as amended (19 U.S.C. 1306);

(ii) Act of August 30, 1890, as amended (21 U.S.C. 102-105);

(iii) Act of May 29, 1884, as amended, Act of February 2, 1903, as amended, and Act of March 3, 1905, as amended, and supplemental legislation (21 U.S.C. 111-114a, 114a-1, 115-130);

(iv) Act of February 28, 1947, as amended (21 U.S.C. 114b-114c, 114d-1);

(v) Act of June 16, 1948 (21 U.S.C. 114e-114f);

(vi) Act of September 6, 1961 (21 U.S.C. 114g-114h);

(vii) Act of July 2, 1962 (21 U.S.C. 134-134h);

(viii) Act of May 6, 1970 (21 U.S.C. 135-135b);

(ix) Sections 12-14 of the Federal Meat Inspection Act, as amended, and so much of Section 18 of such Act as pertains to the issuance of certificates of condition of live animals intended and offered for export (21 U.S.C. 612-614, 618);

(x) Improvement of poultry, poultry products and hatcheries (7 U.S.C. 429);

(xi) (Laboratory) Animal Welfare Act, as amended (7 U.S.C. 2131-2147, 2149-2155);

(xii) Horse Protection Act (15 U.S.C. 1821-1831);

(xiii) 28 Hour Law, as amended (45 U.S.C. 71-74);

(xiv) Export Animal Accommodation Act, as amended (46 U.S.C. 466a-466b);

(xv) Purebred animal duty-free entry provision of Tariff Act of June 17, 1930, as amended (19 U.S.C. 1202, Part I, Item 100.01);

(xvi) Virus-Serum Toxin Act (21 U.S.C. 151–158);

(xvii) Sections 203 and 205 of the Agricultural Marketing Act of 1946, as amended with respect to voluntary inspection and certification of inedible animal byproducts and inspection, testing, treatment, and certification of animals and a program to investigate and develop solutions to the problems resulting from the use of sulfonamides in swine (7 U.S.C. 1622, 1624); and

(xviii) Section 101(d) of the Organic Act of September 21, 1944 (7 U.S.C. 430).

* * * * *

(5 U.S.C. 301)

Issued at Washington, D.C., this 31st day of December, 1980.

Harry C. Mussman,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 81-1589 Filed 1-15-81; 8:45 am]

BILLING CODE 3401-34-M

Farmers Home Administration

7 CFR Part 1900

Farmers Home Administration Appeal Procedure

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) amends its appeal procedures to provide clarity, limit unnecessary hearings, and add a reporting function designed to ultimately provide FmHA and the public with information on appeal results. This action is the result of an administrative review.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Arthur M. Collings, Jr., Special Assistant to the Administrator, USDA, FmHA, Washington, DC 20250, phone 202–447–8448.

The Final Impact Statement describing the options considered in developing this final rule and the impact of implementing each option is available on request from Joseph H. Linsley, Chief, Directives Management Branch, USDA, FmHA, Washington, DC 20250, telephone (202) 447–4057.

SUPPLEMENTARY INFORMATION: This final action has been reviewed under USDA procedure established in Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified "not significant."

C.F.D.A. No. 10.404—Emergency Loans
C.F.D.A. No. 10.405—Farm Labor Housing Loans and Grants
C.F.D.A. No. 10.406—Farm Operating Loans
C.F.D.A. No. 10.407—Farm Ownership Loans
C.F.D.A. No. 10.408—Grazing Association Loans
C.F.D.A. No. 10.409—Irrigation, Drainage, and Other Soil and Water Conservation Loans
C.F.D.A. No. 10.410—Low to Moderate Income Housing Loans (Rural Housing Loans—Section 502—Insured)
C.F.D.A. No. 10.411—Rural Housing Site Loans (Section 523 and 524 Site Loans)
C.F.D.A. No. 10.413—Recreation Facility Loans
C.F.D.A. No. 10.414—Resource Conservation and Development Loans
C.F.D.A. No. 10.415—Rural Rental Housing Loans
C.F.D.A. No. 10.416—Soil and Water Loans (SW Loans)
C.F.D.A. No. 10.417—Very Low-Income Housing Repair Loans and Grants
C.F.D.A. No. 10.418—Water and Waste Disposal Systems for Rural Communities
C.F.D.A. No. 10.419—Watershed Protection and Flood Prevention Loans
C.F.D.A. No. 10.420—Rural Self-Help Housing Technical Assistance (Section 523 Technical Assistance)
C.F.D.A. No. 10.421—Indian Tribes and Tribal Corporation Loans
C.F.D.A. No. 10.423—Community Facilities Loans
C.F.D.A. No. 10.424—Industrial Development Grants
C.F.D.A. No. 10.425—Emergency Livestock Loans
C.F.D.A. No. 10.426—Area Development Assistance Planning Grants (Section 111)
C.F.D.A. No. 10.427—Rural Rental Assistance Payments
C.F.D.A. No. 10.428—Economic Emergency Loans
C.F.D.A. No. 10.430—Energy Impacted Area Development Assistance Program
C.F.D.A. No. 10.431—Technical and Supervisory Assistance Grants
C.F.D.A. No. 10.432—Biomass Energy and Alcohol Fuels Loans and Loan Guarantees

The FmHA programs and projects which are affected by this instruction are subject to State and local clearinghouse review in the manner delineated in FmHA Instruction 1901–H.

On December 31, 1979, FmHA published in the **Federal Register** (44 FR 77183) a notice of proposed rulemaking involving the amending of Subpart B of Part 1900, Chapter XVIII, Title 7, Code of Federal Regulations.

Comments were received from 19 individuals and organizations. Followup correspondence and/or dialogue has occurred with some respondents and changes or revisions have been made as a result of a review of the comments. The overall appeal process has been broken down into 3 sections: 1900.56, 1900.57, and 1900.58 in an attempt to provide recognizable distinctions between the functions. The following sections were reconsidered and in most instances the December 31, 1979, proposed rules revised as a result of the comments received:

1900.51—Reference to administrative decisions made after November 13, 1978, has been deleted.

1900.52—One respondent asked that the term "applicant" be defined. FmHA determined this to be unnecessary.

1900.52(b)—A respondent asked that coercion of any kind in limiting appeals be forbidden. FmHA has acted to forbid any Agency officials from delaying approved assistance pending the outcome of appeal of a partial adverse action.

1900.52(c)—The proposed new 1900.52(c) as a definition of decisions not appealable has been deleted. The essence of this subsection has been transferred to a new § 1900.53. A number of suggested specific instances where a decision is not appealable were rejected in that they were subjective in nature.

1900.52(d)(5)—An objection was raised to District Directors handling foreclosure appeals. Section 510 of the Housing Act of 1949 was cited. The changed regulation provides that hearing officers for appeals of accounts serviced in County Offices will be a District Director from a nearby district. Appeals of such accounts that are serviced in District Offices will be heard by the appropriate Assistant Administrator or designee.

1900.52(d)—Hearing officer: Changed to provide that the appropriate Assistant Administrator or designee will be the hearing officer for decisions made by State Directors.

1900.52(f)—Review officer: Changed to provide that the appropriate Assistant Administrator or designee will be review officer for State Director decisions and in foreclosure cases. A request that there be only one National Office review, including that of the Administrator, was rejected.

1900.52—A new definition for stayed assistance was added to provide clarity. Also, a new definition for official positions is added to note that FmHA titles for similar level positions may vary in some areas.

1900.53—A new § 1900.53 is incorporated to list examples of decisions which are not appealable. Denial of section 502 refinancing because of the 5-year limitation was deleted due to passage of Pub. L. 96–153.

1900.53(a)(13)—Appraisals of property value are not appealable via a hearing. See § 1900.54. Two respondent groups objected to FmHA's omitting appraisals, but the decision was made since all appraisals are somewhat subjective and

therefore every decision on value could produce a hearing.

1900.53(a)(14)—Published interest rates may not be appealed.

1900.53(a)(15)—Rent increase rejections are not appealable when the borrower fails or refuses to apply for rental assistance and low-income tenants must pay more than 25 percent of the income for rent.

1900.53(b)—New § 1900.53(b) is added to prohibit appeals on new applications or requests when an adverse decision has been appealed and upheld, and there is no change in circumstances.

1900.54—A new § 1900.54 entitled "review of appraisals" provides for a review by the State Director, but without a hearing. FmHA rejected two suggestions that appraisals should be appealable, since they are a judgmental art, and almost every appraisal could be contested. State Directors will dispatch a representative to make an onsite review when the situation appears warranted.

1900.55—A new section designed to limit hearings guides FmHA actions leading to the reduction of hearings without interfering with an appellant's ultimate right to a hearing.

1900.56—Appeal from an FmHA Decision—Changed to include actions leading up to a hearing. Numerous suggestions and complaints were received related to the circumstances leading to a hearing. This section:

(1) Prescribes that the appellant must first have a meeting with the decisionmaker before requesting a hearing. They may bring a representative to the meeting as well as to the hearing.

(2) Provides that, when the individual or organization receives an adverse notice and invitation to meet with the decision maker, the name, title, address, and telephone number of the hearing officer will be included. FmHA received comments on all sides of this issue. Many respondents stated that notifying the borrower of the hearing officer in the initial letter would lead to direct access to that route without trying to resolve differences with the decision maker. They believed it would encourage unnecessary appeals. FmHA elected to identify the hearing officer in the letter but require the meeting before a hearing.

1900.56(a)(3)—FmHA will provide the name and address of legal services and legal referral services on request. At least one respondent asked that FmHA automatically supply the name of local legal services with the notice of adverse action. Another believed FmHA should never supply this service. The decision represents a middle ground. FmHA must provide copies of subsequent notices and correspondence to the appellant's representative.

1900.56(a)(4)—Provides that requests for a meeting with the decision maker must be made within 15 days of notification of the adverse action. Requests for a hearing must be made within 15 days of notification of results of the meeting with the decision maker.

1900.56(e)—Provides for exceptions to the hearing process in Samoa, Guam, and the Pacific Trust Territories. This area is serviced by Hawaii and time and travel budget restraints inhibit FmHA's ability to provide hearings.

1900.56(f)—Clarifies that appellants will be afforded favorable consideration when interest rates change during an appeal.

1900.57—A new section covering the hearing.

1900.57(a)—Refers to a new Exhibit A—"Guide for a Hearing."

1900.57(d)—Provides for copies of FmHA file information at no expense to the appellant, in accordance with Freedom of Information and Privacy Act Regulations.

1900.57(f)—Requires FmHA to tape record all hearings, but only as a back up to the hearing notes, which are the official record. FmHA received a number of suggestions on how best to develop a hearing record. Verbatim notes and transcripts were rejected as being too costly and time consuming.

1900.57(f)(2)—Changed to suggest that hearing officer take own notes.

1900.57(h)—Changed to eliminate the proposed prohibition on making hearing decisions in consultation with other FmHA employees. This approach is implied in Exhibit A—"Guide to Conducting a Hearing."

1900.58—Additional Appeals—This new section relates solely to appeal reviews. Few changes have been made to the review process other than to provide time deadlines and make the regulation easier to follow by utilizing the separate section.

1900.60—Reporting requirements. Has been changed to provide for a record which will follow an appeal through its course. Several respondents deplored the fact that FmHA has no record wherein appeal decisions can be used to change practical operating procedures and thus limit the need for appeals. FmHA is studying methods for instituting a computerized index system which would utilize information from the appeal record.

Exhibit A—"A Guide to Conducting a Hearing," developed to provide uniformity in holding hearings, and guidance for FmHA officials, the basic information contained in this Exhibit was used in Administrative Notice (A. N.) circulated to field staff on August 2, 1979.

Exhibit B—"Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions where the Decision is Appealable," supplements the regulation to provide uniformity, guidance to FmHA officials, and assurance that there will be due process.

Exhibit C—"Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions where the Decision is not Appealable." Provides for a invitation to meet with the decision maker when hearings will not be permitted.

Therefore, Subpart B of Part 1900 is revised to read as follows:

PART 1900—GENERAL

Subpart B—Farmers Home Administration Appeal Procedure

Sec.

1900.51 Purpose.
1900.52 Definitions.
1900.53 Decisions which are not appealable.
1900.54 Review of appraisals.
1900.55 FmHA actions to limit hearings.
1900.56 Appeal from an initial FmHA decision.
1900.57 Hearings.
1900.58 Additional appeals.
1900.59 Effect of appeal decision.
1900.60 Reporting requirements.
1900.61–1900.100 [Reserved]
Exhibit A—Guide to Conducting a Hearing.
Exhibit B—Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions Where the Decision is Appealable.
Exhibit C—Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions Where the Decision is not Appealable.

Authorities: 7 U.S.C. 1989; 42 U.S.C. 1480; delegation of authority by the Secretary of Agriculture, 7 CFR 2.23; delegation of authority by the Assistant Secretary for Rural Development, 7 CFR 2.70.

PART 1900—GENERAL

Subpart B—Farmers Home Administration Appeal Procedure

§ 1900.51 Purpose.

This Subpart provides a uniform procedure whereby a person or organization may appeal any Farmers Home Administration (FmHA) program administrative action directly affecting such person or organization. This procedure does not apply to Guaranteed loans, debt settlement actions as found in Part 1864 of this Chapter (FmHA Instruction 456.1), Freedom of Information Act or Privacy Act appeals, and is not intended to affect the Suspension and Debarment procedure found at Subpart E of Part 1924 of this chapter. This procedure takes precedence over all other FmHA

appeals procedures affecting applicants, borrowers, or grantees. Tenant appeals are covered in Subpart L of Part 1944 of this Chapter. This regulation does not replace any existing procedures for handling discrimination complaints.

§ 1900.52 Definitions.

(a) *Appellant.* An appellant is an applicant for FmHA assistance or an FmHA borrower or grantee, either individual or organization, that is directly and adversely affected by an administrative decision by FmHA.

(b) *Directly and adversely affected.* The term "directly and adversely affected" includes having a request for FmHA assistance denied in whole or in part or having FmHA assistance reduced, cancelled, or not renewed. The term "directly and adversely affected" does not include actions where persons or organizations are clearly not eligible such as in the examples cited in § 1900.53. FmHA officials may not deny or delay approved assistance pending the outcome of appeal of a partial adverse action.

(c) *Hearing.* A hearing, as used in this Subpart, is an informal proceeding at which an appeal from an adverse decision is heard.

(d) *Hearing officer.* The hearing officer has the authority to uphold or reverse decisions and will be:

(1) In the case of an appeal of an initial decision by a County Supervisor, the District Director having jurisdiction over that County Office. If that District Director has a significant role in the initial determination, the District Director from a nearby District Office will be designated by the State Director. The term "significant role" does not include routine supervision by the District Director.

(2) In the case of an appeal of an initial decision by the County Committee, the State Director or Acting State Director. The State Director may designate a State Office program chief, or other State Office official, including a District Director, to conduct the hearing, acting for the State Director, provided that the designee has had no significant role in the decision.

(3) In the case of an appeal of an initial decision by a District Director, the State Director, who may designate a program chief or other State Office official to be the hearing officer.

(4) In the case of an appeal of an initial decision by a State Director, the appropriate Program Assistant Administrator or designee.

(5) In the case of a decision to foreclose an account:

(i) For accounts serviced in County Offices, a District Director from a nearby district.

(ii) For accounts serviced in District Offices, the appropriate Program Assistant Administrator or designee.

(6) In the case of an appeal of an initial decision by a Division Director or an Assistant Administrator, the appropriate Deputy Administrator or designee.

(7) For any decision not directly covered in paragraphs (d) (1) through (6) of this section, the person in the next highest level of FmHA authority, or the designee of that person.

(e) *Record.* The term "record" means the FmHA file, papers filed by an appellant, notes, tapes, or transcript (if any) of a hearing, and decisions made by FmHA.

(f) *Review officer.* The review officer has the authority to uphold or reverse the decision of the hearing officer. Regardless of the level of the decision maker and hearing officer, there will only be one review made in the National Office. However, the review provided for in § 1900.58 (c)(6), and (e) will always be available except where the Administrator is the review officer. When the hearing officer is:

(1) The District Director, the review officer will be the State Director or designee, except that, when a decision to foreclose is appealed, the review officer will be the appropriate Assistant Administrator or designee;

(2) The State Director or designee, the review officer will be the appropriate Assistant Administrator or designee;

(3) The Program Assistant Administrator or designee, the review officer will be the Administrator, or designee.

(g) *District Director.* Wherever the term "District Director" is used, it will also include Assistant District Director.

(h) *Decision maker.* The FmHA official who actually makes the specific decision. For example, if a State Director reviews a preapplication from an organization and directs a District Director to include specific items in Form AD 622, "Notice of Preapplication Review Action," the State Director is the decision maker. However, when the State Director or designee serves only in an advisory capacity in interpreting instructions, policies, and technical items and is not significantly involved in the decision, the District Director will be considered the decision maker. Additionally, when State Directors refer questions of interpretation to the National Office, and National Office officials act only in an advisory capacity, the State Director will be considered the decision maker.

(i) *Stayed assistance.* The act by FmHA of maintaining assistance at a current or present level, instead of reducing or terminating it pending the outcome of an appeal.

(j) *Official positions.* The terms "County Supervisor" and "District Director" may vary in a few geographical areas. These terms will also mean Assistant Area Loan Specialist and Area Loan Specialist, respectively, in Alaska.

§ 1900.53 Decisions which are not appealable.

(a) FmHA decisions based solely on a limitation of law, or solely and directly on objective standards that are included in published regulations may not be appealed. Examples of these include:

(1) Denial of a Section 504 grant to an applicant less than 62 years of age.

(2) Denial of a loan and/or grant when a city or town to be served has a population in excess of published limits.

(3) Denial of a loan and/or grant to an organization not identified as an eligible applicant by the regulations.

(4) Applications for emergency loans not filed before a prescribed termination date.

(5) Decision not to release basic security for unauthorized purposes.

(6) Denial of a loan because of confirmed income that is above FmHA published limits.

(7) Interest credit reduction that is the result of a confirmed income increase.

(8) A determination of ineligibility for emergency loans based on confirmation or verification by the Agricultural Stabilization and Conservation Service (ASCS) or the Federal Crop Insurance Corporation (FCIC) that the applicant did not have the required production losses of 20 percent or more.

(9) A finding that a cooperative, corporation or partnership applying for an economic emergency loan is not eligible when it has been *confirmed* that less than 50 percent of such applicant's total income is from farming.

(10) Denial of compensation for construction defects when it has been determined that the contractor is willing and able to correct the deficiencies.

(11) Requirements and conditions designated by law to be developed by agencies other than FmHA. They include, but are not limited to: Davis-Bacon wage rates; flood plain determinations; and archaeological and historical areas preservation requirements.

(12) Property standards. An appeal may only be made when the appellant claims FmHA is misapplying the written standards.

(13) Appraisals of property value. (See § 1900.54)

(14) Interest rates as set forth in FmHA procedure.

(15) A rent increase rejection when the borrower fails or refuses to apply for rental assistance in accordance with Exhibit C of Subpart C of Part 1930 of this Chapter.

(b) A new application or request for FmHA assistance, when an adverse decision has been appealed and upheld, and when the applicant provides no new supportive information or substantative change, may not be appealed.

§ 1900.54 Review of appraisals.

Appraisals of property value are not appealable. When a loan is not made because the appraisal did not justify the amount requested, the applicant will be notified and advised that a request may be made for a review of the appraisal by the State Director. When a request is made the State Director will review the specific appraisal documents and, when warranted and deemed necessary, send a representative to make an on site review.

§ 1900.55 FmHA actions to limit hearings.

Formal appeals and hearings are time consuming and actions are to be taken to avoid them whenever possible, but without jeopardizing the rights of the appellant. The following procedure should be utilized to minimize the number of appeals.

(a) FmHA personnel should carefully check the accuracy of any adverse actions to be taken.

(b) The reasons for adverse actions should be clearly explained when the applicant or borrower is notified. Vague reasons such as "you lack repayment ability" should be avoided and the applicant or borrower specifically advised why they lack repayment ability.

(c) Affected parties will be required to meet with the decision maker before they request a hearing.

§ 1900.56 Appeal from an initial FmHA decision.

(a) If an applicant for FmHA assistance, an FmHA borrower, or an FmHA grantee is directly and adversely affected by an FmHA decision or action, the official taking such action or making the decision will inform that person or organization by letter of the action taken within 15 calendar days of such action. The letter will be similar in form and content to Exhibit B of this Subpart, or Exhibit C in the case of actions not appealable in accordance with § 1900.53 of this Subpart, and will include the following:

(1) A statement of the action taken or decision made and all of the specific reason(s) for so doing.

(2) An invitation to call at the decision-making official's office, which may include a meeting with the County Committee, to discuss the decision with that official and to obtain information on appeal rights. The person (or organization) may bring to the meeting any additional information or a representative, including an attorney. (Whenever an appellant utilizes the services of a representative FmHA will provide that representative with copies of all notices and correspondence directly related to the appeal.)

(3) A statement that if the appellant wishes the services of an attorney and does not have one, the name and address of the nearest legal services representative and any known legal referral assistance will be furnished upon request.

(4) When the FmHA actions are appealable, as statement that the person or organization is entitled to a hearing in the event the meeting with the decision maker does not satisfactorily resolve their differences. The letter will state that:

(i) Requests for a meeting with the decision maker must be made within 15 days of the notification.

(ii) When not satisfied with the results of the meeting, the person or organization may appeal directly to the hearing officer. The appeal must be made within 15 days of the notification of the results of the meeting. An additional 30 days may be granted when circumstances clearly warrant the extension.

(iii) The name, title, address, and telephone number of the hearing officer.

(iv) A statement that they should provide the hearing officer and/or bring to the hearing, any evidence supporting their claim.

(v) A statement that if the person (or organization) wants the terminated or reduced assistance maintained at the existing level, the decision to reduce or terminate may be stayed pending appeal if requested by the person (or organization). The appellant will agree to repay any assistance received during the stay for which the appellant is, upon completion of the appeal, determined to have been ineligible.

(vi) When an appeal from a foreclosure action is instituted and includes appeal of corollary matters such as denial of moratorium or interest credits, the letter will include a statement that all matters are merged into a single appeal.

(vii) In acceleration notices, the statement shall read substantially as found in the "Notice of Acceleration" Exhibit C to Subpart A of Part 1955 of this Chapter. The term "hearing" will be used in lieu of "meeting" in the "Notice of Acceleration."

(b) When the person or organization takes the opportunity for a meeting with the decision-making official and the meeting results in a resolution of the problem, the official will send the person or organization a letter within 7 days setting forth the resolution and all of the reasons for it. If the meeting does not result in granting the request or a part of the request the letter will restate the person or organization's right to a hearing, and provide the name, title, address, and telephone number of the hearing officer. The letter will require that such hearing requests be made within 15 days of notification.

(c) If a request is received to stay the decision, the hearing officer, based on the facts and circumstances, will stay the decision. An appropriate case for a stay would be if not to grant the stay would make an appeal useless.

(d) When an appellant appeals a decision and requests a hearing, the appeal will be handled as follows:

(1) Upon the receipt of the request for a hearing, the hearing officer will request the entire file from the decision-making official.

(2) The hearing officer will arrange for a hearing to be held as soon as possible but within 30 calendar days of the receipt of the request for a hearing. The hearing will be held at a location convenient to the appellant, decision-making official and hearing officer. If no such place can be agreed on, the hearing officer will select the location. The hearing officer, after reviewing the file, will return it to the office of the decision-maker so that it will be available to the appellant or representative. If the appellant or the decision-maker for good reason is unable to attend a hearing within the 30 calendar day period, the hearing officer, after considering the circumstances, will reschedule the hearing within 15 days of the original hearing date. The 15 day extension may only be exceeded for verified medical reasons, or other good cause as agreed to by FmHA.

(3) Failure to appear.

(i) If the appellant or appellant's representative, without reasonable cause, fails to appear at the hearing, the appellant's appeal will be deemed to have been concluded.

(ii) If the failure to appear is with reasonable cause and the appellant can demonstrate inability to notify FmHA, the hearing officer will reschedule the hearing at a time convenient to all interested parties, but usually not later

than 15 days after the initially scheduled date.

(e) Cases originating in Samoa, Guam and the Western Pacific Territories and submitted to the Hawaii State Office for a hearing, may be acted upon without a meeting between the appellant and the hearing officer when circumstances due to travel and time involved preclude having such a meeting. In such cases the decision-maker must obtain and mail to the hearing officer the complete FmHA file for the case together with any available documents from the appellant supporting their allegations, and statements from other witnesses who would have appeared at the hearing.

(f) When interest rates change during an appeal involving a loan application, and the decision is reversed or modified, the final rate shall be the one most favorable to the appellant if authorized by statute.

(g) Whenever a preliminary review of the file by the hearing officer clearly indicates that the decision will be reversed, the hearing officer will make that decision, notify all involved parties of the reasons, and cancel the hearing.

§ 1900.57 Hearings.

(a) The hearing will be an informal proceeding at which the appellant will bear the burden of proving the initial decision erroneous. To do so the appellant may provide any information or witnesses the appellant believes should be considered in reaching a proper decision. The appellant may present evidence, witnesses, and arguments in support of appellant's complaint, controvert evidence relied on by FmHA, and question all witnesses. Any evidence may be received by the hearing officer without regard to whether that evidence could be employed in judicial proceedings. A suggested guide for the order of presentation at a hearing is included in Exhibit A to this Subpart.

(b) The decision making official (or successor) or delegate will be at the hearing and will present evidence if necessary. Any other witnesses or FmHA personnel the decision making official thinks necessary to fully determine the matter will be at the hearing to present evidence.

(c) The hearing officer may request additional witnesses to appear or request further information if in the hearing officer's opinion such is necessary to reach a proper decision.

(d) Before the hearing, the appellant or appellant's representative, may examine, and copy at no cost to the appellant, all relevant documents, records, and regulations of FmHA normally releasable under the provisions of the Freedom of Information Act and the Privacy Act.

(e) If any new evidence or reasons for adverse action will be presented by FmHA, it should be provided to the appellant at least 3 working days before the hearing, or sooner when such information becomes known and available to FmHA.

(f) Hearing record:

(1) FmHA will tape record all hearings, but will use the tapes as a back up to support the outline notes as the official record.

(i) The appellant may tape record the proceedings at their own expense or may obtain a copy for the cost of reproduction. FmHA must notify the other party when the taping begins.

(ii) The taking of transcripts is neither required nor prohibited. Either party may arrange to have a transcript of the hearing made at their own expense. When one party has a transcript made the other will make their own arrangements to obtain a copy. Ordinarily FmHA will not have transcripts made. Prior approval of the Administrator is required when transcripts are made or copied for FmHA.

(2) An FmHA employee (not the decision maker) will take notes at the hearing. The hearing officer may take the notes or assign this responsibility to another FmHA employee. Hearing officers will, in the interest of efficient use of agency staff time, give first consideration to taking their own notes.

(3) The notes will *informally reflect* the essential positions, pertinent information presented, and comments made by both parties, *may be in outline form*, and *need not repeat proceedings* verbatim. They will indicate if the appellant arranged for a transcript.

(4) A typed copy of the notes will be provided to the appellant within 15 days of the hearing. The appellant will notify FmHA of any changes the appellant thinks should be made within 7 days of receipt of the copy. This period of time may be extended an additional 7 days by FmHA upon the request of the applicant. The suggested changes will be made part of the record even if not agreed to by FmHA.

(5) File documents and other written materials used in the hearing will be included as part of the FmHA record.

(g) For good cause, the hearing officer on the request of either the appellant or an FmHA official may, at the hearing officer's complete discretion, continue the hearing to a future time.

(h) *The decision of the hearing officer* shall be based on facts presented at the hearing, appropriate FmHA files, applicable statutes and regulations, and the hearing officer's general knowledge of FmHA program functions.

(i) Within 30 days of the hearing, the hearing officer will determine what action to take with regard to the appeal, unless FmHA has ordered a transcript in which case the decision will be made within 15 days of receipt of the transcript. Hearing officers will make their decision in less time when possible.

(j) If the initial decision is reversed, the hearing officer will inform the appellant and original decision making official by letter of the decision, the reason for it, and what action will be taken. The State Director or Acting State Director must sign the letter on County Committee decision reversals regardless of who conducts the hearing for the State Director.

§ 1900.58 Additional appeals.

(a) If the initial decision is upheld or modified but not reversed, the hearing officer will inform the appellant by letter of the decision giving specific reasons, with a copy to the decision making official. The letter must contain the following statement:

"If you wish to have the above decision further reviewed, you may appeal in writing to (*review officer/address*) within 20 calendar days of the date of this letter explaining why you believe the decision is incorrect. Since this review will be based on the record, including papers filed, FmHA files, notes, or transcripts of the appeal meeting, my decision, applicable statutes and regulations, and any *additional written* information you wish to submit, you should include any additional information you think is important and indicate whether you wish to present any information in person. The right to present information in person is limited to a meeting and is not to be construed as another hearing."

(b) If the appellant does not request in writing a review of the hearing officer's decision within the 20 calendar day period provided in the letter, the appeal will be considered concluded.

(c) If the appellant appeals to the review officer:

(1) Upon receipt of the appeal the review officer will request that the hearing officer forward the record to the review officer. The hearing officer will promptly do so.

(2) With prior approval of the Administrator the review officer may obtain a copy of the transcript of the hearing if one was arranged for by the appellant.

(3) If no personal meeting was requested by the appellant, the review officer will review the record on the case and applicable law and regulations, any additional information furnished by the appellant, and such

additional information as the review officer deems necessary and render a decision within 30 calendar days of receipt of the appeal.

(4) If the appellant indicates a desire to present information in person, the review officer will arrange a meeting for the sole purpose of receiving such additional information. The meeting will be held within 15 calendar days of receipt of the appeal and at the offices of the review official. A final decision will be rendered within 20 calendar days after the meeting.

(5) If the decision of the hearing officer is reversed, the appellant will be informed by letter of the decision and what action will be taken. The decision-making official and the hearing officer will also be notified, with the reasons for reversal provided.

(6) If the hearing officer's decision is upheld or modified but not completely reversed, the appellant will be informed of the decision by letter giving the specific reasons for the decision, with a copy each to the decision making official and hearing officer. The letter must contain the following statement:

If you believe the above decision is arbitrary and capricious, that it is lacking any rational, factual, or legal basis, or is contrary to FmHA regulations, you may write the Administrator, FmHA, 14th and Independence Avenue, SW., Washington, D.C. 20250, within 30 days, explaining why. The Administrator's review will be based only on the existing written record. A copy of your letter to the Administrator should be sent to me so that I can expeditiously forward the record to the Administrator.

(d) If a letter appealing the decision of the review officer is not received within 30 days, the appeal will be concluded.

(e) Upon receipt of an appeal from a review officer's decision, the Administrator or a delegate will review the record, which will have been forwarded by the review officer upon receipt of a copy of the letter, and determine whether the decision was arbitrary and capricious or contrary to FmHA regulations. If not, the decision will be upheld and the appellant so notified. If the Administrator or a delegate finds the decision to have been arbitrary and capricious, or contrary to FmHA regulations, the official will determine what action should be taken and notify all affected parties.

§ 1900.59 Effect of appeal decision.

(a) *Effective date.* When an appeal is concluded, the effective date of the action to be taken will be the date of the initial decision from which the appeal was taken. Regulations in effect on the effective date will govern the action unless those requirements would not be authorized under statutory or case law at the time the appeal is concluded. Effective interest rates are covered in § 1900.56(f).

(b) *Legal effect.* When an appeal is concluded the decision will be administratively conclusive. The decision will not, however, be determinative of the legality of the action to be taken.

§ 1900.60 Reporting requirements.

(a) A record will be maintained for all cases appealed. The record will consist of the following:

(1) Form FmHA 1900–2, "Appeal Record." This completed form will follow each appeal through final action.

(2) Copies of decision letters by the hearing officer and/or review officer will be attached to Form FmHA 1900–2.

(3) The hearing outline notes will also be attached to Form FmHA 1900–2.

(b) The original appeal record will be maintained in the applicable case folder.

(c) Copies of the appeal record for cases handled at the State Office level and below will be transmitted to and filed in the State Office where the appropriate information will be assembled for the computer entry. The Management Information Systems Division (MISD) will maintain files on appeals in the National Office and will assemble information for computer entry.

(d) Summary reports listing the number and type of appeals and disposition will be submitted semi-annually to the MISD in the National Office on Form FmHA 1900–1, "Semi-annual Report on Appeals." County and District Offices will submit their report to the State Office by the tenth of April and October. State Offices will prepare consolidated State reports which will be transmitted to the National Office by the twentieth of April and October.

§§ 1900.61–1900.100 [Reserved]

[FmHA Instruction 1900–B]

Exhibit A—Guide to Conducting a Hearing

A. Obtain the FmHA file from the decision-maker and retain the file. After reviewing the file the hearing officer will return it to the decision maker so that it may be available to the appellant or representative.

B. Arrange a hearing within 30 calendar days of receipt of the notice of appeal at a place convenient to the appellant, decision-making official, and hearing officer.

C. Ensure that appellant sees and is able to photocopy the FmHA file if appellant so requests before the hearing.

1. Concern here should be that if the appellant requests an opportunity to see the file that every document (unless privileged) which may be used in making the decision will be made available to the appellant.

2. This is necessary to give the appellant an adequate opportunity to rebut the evidence that might be against the appellant.

D. Be an unbiased presiding officer.

1. The hearing officer is not representing FmHA or the decision-maker, nor is the hearing officer an advocate for the initial decision.

2. The hearing officer should have no preconceived opinions concerning the issues.

3. To preserve this unbiased atmosphere—

a. The hearing should be held someplace other than the hearing officer's office or office of any FmHA official. The latter may not be possible, but an attempt should be made to hold the hearing at a neutral place.

b. The hearing officer should not fraternize with the decision-maker or other FmHA personnel in the presence of the appellant before or after the hearing. This can be accomplished by having the hearing officer seated separate from the others at the hearing.

E. Conduct an informal proceeding.

1. At this informal proceeding the appellant will bear the burden of proving the initial decision erroneous.

2. The hearing officer may receive evidence without regard to whether that evidence could be employed in judicial proceedings.

3. However the hearing must be conducted in a manner to get facts on the record. Therefore, the hearing must deal in facts and not opinions.

4. The hearing officer should keep control over the hearing and not allow any of the participants, including counsel for the appellant or the decision-maker, to unduly attempt to set the tone of the hearing.

5. As a fact-finder, the hearing officer may question any witness, request additional witnesses to appear, and/or request further information if this information is necessary to reach a proper decision. If the hearing officer is going to request additional witnesses, these witnesses should be given adequate notice along with the time and place of the hearing.

F. Order of presentation. The order listed below should be followed:

1. Opening statement by appellant setting forth why original decision was erroneous. This is an outline of how appellant plans to proceed.

2. Opening statement by decision-maker to show why decision is correct.

3. Appellant presents evidence including documents, witnesses, and arguments supporting their position. The decision-maker can be questioned at this time by the appellant. Any witnesses presented by the appellant can be questioned by the decision-maker or other Government representative.

4. Decision-maker or other Government representative then has opportunity to rebut appellant's arguments and/or evidence by presenting evidence including witnesses. Any witnesses may be questioned by appellant.

5. The hearing should be concluded by a summary by both sides.

6. If the appellant has arranged to have a transcript of the hearing made at the appellant's expense, the hearing officer, with the prior approval of the Administrator, may purchase a copy of the transcript.

G. See to it that typed notes of the hearing are forwarded to the appellant for review

within 15 days of the hearing. These notes should be reviewed by the hearing officer before transmittal to the appellant. The appellant has an additional 7 days from receipt of the notes to return them with any suggested changes noted.

H. Make a decision based on the following:

1. Facts presented at the hearing.

2. Appropriate FmHA files.

3. Applicable statutes and regulations.

4. The hearing officer's general knowledge of FmHA program functions.

5. In short, the decision must be based on the record plus the general knowledge of the FmHA program functions.

I. After reaching a decision, the hearing officer must prepare the appropriate letter setting out the decision and forward it to the appellant.

1. This letter must set out *specific* reasons for the decision. The letter must contain more than conclusions. *It also must set forth the facts on which the decision is based.*

2. The decision will be communicated by letter to the appellant within 30 calendar days of the hearing.

a. If the initial decision is reversed, the letter will so inform the appellant and the decision-maker giving the reasons and action to be taken.

b. If the initial decision is upheld or modified, the letter will contain a statement set out in the regulations that the appellant may have the decision reviewed further if the appellant files an appeal within 20 calendar days of the date of the letter.

[FmHA Instruction 1900-B]

Exhibit B—Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions Where the Decision is Appealable

UNITED STATES DEPARTMENT OF AGRICULTURE

Farmers Home Administration

(Washington, D.C. 20250)

(Date) ————

Dear ————:

After careful consideration we were unable to take favorable action on your application/request for Farmers Home Administration services.

(Insert here the adverse decision and all of the *specific* reasons for the adverse action. Non appealable reasons may be entered; however, if all reasons are non appealable, use Exhibit C)

You have a right to appeal this decision and are entitled to a hearing. However, FmHA regulations require that you first meet with (this Office/the County Committee) so that we may explain in greater detail why your request has not been approved. We may also review possible alternatives and any new information you may have. Any new information or evidence supporting your claim should be provided this office or brought with you to the meeting. You may bring a representative. If you wish the services of an attorney and do not have one, we will furnish you with the name and address of the nearest legal services representative and known legal referral assistance. Your request for a meeting must be made within 15 days of this notice.

The hearing officer is (insert name, title, address and telephone number). You must make a hearing request to the hearing officer within 15 days of notification of the results of the meeting with (this office/the County Committee). A 30 day extension of time may be granted, but only when you are unable to meet the 15 day deadline for warranted or unavoidable reasons. Additional evidence to support your claim can be sent to the hearing officer or taken to the hearing.

(When the action involves an applicant or borrower who will receive less assistance than requested or a termination of assistance add the following paragraph):

You may wish to have your present assistance maintained at the current level. At your request we will maintain this level of assistance pending the outcome of your appeal. However any such request carries with it an automatic agreement to repay any reduced or terminated assistance should the FmHA decision be upheld.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with the law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Very truly yours,

(Decision-maker) ————

(Title) ————

[FmHA Instruction 1900-B]

Exhibit C—Guide Letter for Notifying Applicants and Borrowers of Adverse Decisions Where the Decision Is Not Appealable

United States Department of Agriculture

Farmers Home Administration

(Insert Address)

(Date) ————

Dear ————:

After careful consideration we were unable to take favorable action on your application/request for Farmers Home Administration services.

(Insert here all of the *specific* reasons for the adverse action. Examples of non appealable reasons are listed in § 1900.53(a))

If you have any questions about this action, we would like the opportunity to explain in detail why your request has not been approved, explain any possible alternative, or provide any other information you would like. You may bring any additional information you may have and you may bring a representative if you wish. Please call *(telephone number)* for an appointment.

Applicants and borrowers generally have a right to appeal adverse decisions, but certain FmHA decisions are not appealable. We have determined that the decisions(s) made in this case (is/are) not appealable under FmHA regulations. You may, however, write the State Director (insert name and address) for a review of the accuracy of our finding this decision not appealable. (Substitute the appropriate hearing officer's name and address in the event the decision was made by a State Director or National Office Official.)

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with the law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Very truly yours,

(Decision-maker) ————

(Title) ————

[Form FmHA 1900-1]

Check Appropriate Blank:

County Office————

District Office————

State Office————

National Office————

Semi-Annual Report on Appeals:

Location: (City and State) ————

I. Appeals to Decision Maker:
- A. Number of letters suggesting pre-appeal meetings ————
- B. Disposition:
  - 1. Differences settled ————
  - 2. Appeal letters mailed ————
  - 3. Disposition still pending ————

II. Hearings:
- A. Number held ————
- B. Disposition:
  - 1. Decision upheld ————
  - 2. Decision overruled ————
  - 3. Decision modified ————
- C. Pending Hearings ————

	State Director	Assistant Administrator	Administrator
III. Review of Appeals:			
A. Number appeal reviews			
B. Disposition:			
1. Decision upheld			
2. Decision overruled			
3. Decision modified			
C. Reviews pending			

[Form FmHA 1900-2]

Appeal Record

(FmHA Office Code)

1. Appellant's Name: ————
2. Appellant's Address: ————
3. Appellant's Social Security Number: ————
4. Applicant or Borrower: ————
5. Date Appeal Received by FmHA: ————
6. Type of loan or grant program:————
7. Primary Reason For Appeal:————

8. Secondary Reason for Appeal:———
9. Appeal Level: ———
10. Appeal Decision for each item cited in item 7 above: ———
11. Date of Appeal Decision:———

[Forms Manual Insert (Form FmHA 1900-2)]

Appeal Record

1. Enter Last name, First name, and then Middle Initial.
2. Enter street address or RFD number and Box Number.
3. Enter Appellant's Social Security Number.
4. Enter "A" for Applicant and "B" for Borrower.
5. Enter Month, Day and Year numerically.
6. Enter Type of Loan Program involved, such as: OL, FO, EM, EE, S&W, 502, 504.
7. Enter the appropriate Reason or Reasons by code as shown below:
A. Lack of repayment ability.
B. Poor credit history.
C. Management capability.
D. Foreclosure action.
E. Excessive cost.
F. Credit elsewhere.
G. Not recognized as a farmer.
H. Size of farm operation.
I. Inadequate security.
J. (Reserved).
K. Third party eligibility or deficiencies.
L. Not in rural area.
M. Loan/grant ratio.
N. Other.
8. Enter the appropriate reason or reasons by code as shown below—match to the Primary code entered in item 5 by space entry.
1. Insufficient income to pay loan.
2. Excessive debt payments.
3. Credit history one of general slow payment.
4. Credit history one of default.
5. Judgements on record and reasons not excluded in FmHA Instruction 1910-A.
6. Significant legal action pending that would impair security and repayment.
7. Insufficient managerial experience.
8. Experience totally unrelated to loan purpose.
9. Delinquent more than 4 monthly payments.
10. Has been continually delinquent for more than 6 months.
11. FmHA paid real estate taxes.
12. Legal action by other creditors.
13. FmHA payment adjustment plans not carried out.
14. Not primarily serving rural residents.
9. Enter the appropriate codes.
1. District Director.
2. State Director.
3. Area Coordinator.
4. Assistant Administrator.
5. Administrator.
10. Enter the appropriate code: 1. Upheld; 2. Overruled; 3. Modified.
11. Enter the month, day and year numerically.

This document has been reviewed in accordance with FmHA Instruction 1901-G, "Environmental Impact Statements." It is the determination of FmHA that the proposed action does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the National Environmental Policy Act of 1969, Pub. L. 91-190 an Environmental Impact Statement is not required.

Dated: January 6, 1981.

Gordon Cavanaugh,

Administrator, Farmers Home Administration.

[FR Doc. 81-1596 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-07-M

Food Safety and Quality Service

7 CFR Part 2852

United States Standards for Grades of Frozen Brussels Sprouts [1]

AGENCY: Food Safety and Quality Service, USDA.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to revise the voluntary U.S. grade standards for frozen Brussels sprouts. The final rule was developed by the U.S. Department of Agriculture at the request of the frozen vegetable industry. This rule (1) revises the present grade standard to permit more variation in the trim of units, (2) converts the current variables (score points) standard to an attributes type standard, and (3) replaces dual grade nomenclature with single letter designations. Its effect will be to improve the standards, and promote orderly and efficient marketing.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin J. Horst, Processed Products Branch, Fruit and Vegetable Quality Division, Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-6194. The Final Impact Statement describing the options considered in developing this final rule and the impact of implementing each option is available on request from the above named individual.

SUPPLEMENTARY INFORMATION:

Significance

This final rule has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified "not significant".

[1] Compliance with the provisions of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug, and Cosmetic Act, or with applicable State laws and regulations.

Background

The current voluntary grading standards for frozen Brussels sprouts have been in effect since May 11, 1951. At the time these standards were developed, nearly all Brussels sprouts were harvested by hand and transported to the processing plant in burlap bags, baskets or wooden boxes. At the processing plant, the sprouts were hand sorted and trimmed. The sprouts were expected to be cut neatly at or near the point of attachment to the outer leaves. Therefore, reflecting marketing practices prevalent when they were developed, the current grade standards require that any unit (sprout) not smoothly trimmed at the point of attachment be scored as a "defect".

California is the source of nearly all of the commercial crop of Brussels sprouts produced for processing. In 1979, approximately 61,353,000 pounds of frozen Brussels sprouts were packed in the United States.

During the 1960's, machinery became available to harvest and trim Brussels sprouts. By 1966, according to unofficial estimates, approximately 50 percent of the California Brussels sprouts crop was harvested by machine. The use of machines, such as the mechanical trimmer, has become commonplace in the typical Brussels sprouts processing plant. Due to the effects of mechanical harvesting and processing, sprouts often vary in size and shap. Although product can be processed more efficiently using machinery than by hand, the sprouts will more often show the effects of machine trimming. For example, the butt end might have a more ragged or slanted cut and the head end might show a cut edge exposing the underlying head material. In addition more of the tender leaf material, cut from the outer portion of the sprout head, is now more likely to appear in the finished product. These trimming conditions are "cosmetic" and do not affect the eating quality or nutritional value of the finished food.

This revision of the voluntary grading standards for Brussels sprouts changes the quality requirement of the product with respect to appearance by permitting more variation in the trim of the units, allowing conformity to the present day industry practice of using mechanical trimmers.

The current grade standards for frozen Brussels sprouts specifies a numerical scoring system (0 to 100 points) for assigning a quality grade to the product. When the total score is not less than 90 points, a Grade "A" or "Fancy" quality grade is assigned. When the total score is 80 to 89 points, a Grade "B" or "Extra Standard" quality grade is

assigned. When the total score is 70 to 79 points, a Grade "C" or "Standard" quality grade is assigned. Frozen Brussels sprouts which have a total score of less than 70 points are given a "Substandard" quality rating.

This action also changes the procedure for assigning a quality grade and eliminates the numerical scoring system. The new system for determining whether the product quality meets or fails to meet a designated grade level is called "attributes sampling." Under this new system, the quality of the product would be compared with the minimum quality permitted in the intended or designated grade. If the quality is as good as, or better than, the minimum quality permitted, the product would be assigned that grade. If the quality of the product is not as good as the minimum quality permitted, the product could not be assigned that grade. However, it could be assigned a lower grade.

The existing grade standards for frozen brussels sprouts provide two names for each quality grade level. Currently, "Grade A" and "Fancy" are used to describe the highest quality grade level; "Grade B" and "Extra Standard" are the intermediate quality grade level; and "Grade C" and "Standard" are the lowest quality grade level acceptable in the marketplace. This action changes the grade names by deleting the terms "Fancy," "Extra Standard," and "Standard" and retains only the single letter grades of "Grade A," "Grade B," and "Grade C," preferred by consumers.

Comments

The proposed rule to revise the voluntary grading standards for frozen brussels sprouts was published in the Federal Register on January 4, 1980 (45 FR 1046–1049). One comment was received from the American Frozen Food Institute fully endorsing the proposed rule with suggestions for minor editorial changes for the purpose of clarity. Several editorial changes have been made in the final publication to enable better reader understanding.

Options Considered

The Department considered three options in preparing this final rule.

Option I—Revision of the U.S. Standards for Grades of Frozen Brussels Sprouts (Attributes type). The U.S. Standards would be revised to permit more variation in the trim of units; convert the current variables (score points) standard to an attributes type standard; and replace the dual grade nomenclature with single letter designations.

Option II—Revision of the U.S. Standards for Grades of Frozen Brussels Sprouts (Variables type). The U.S. Standards would be revised to permit more variation in the trim of units; and replace the dual grade nomenclature with single letter designations.

Option III—Continue the currently effective U.S. Standards for Grades of Frozen Brussels Sprouts. The frozen vegetable industry would be denied a change in the standards. No action would be taken to adjust the standards to comply with USDA policy or consumer preferences. Options II and III were rejected as they would not promote the orderly marketing of frozen Brussels sprouts and would fail to utilize the procedure which is currently available to improve the U.S. standards.

Thus, after review of the comments and in order to promote the orderly marketing of brussels sprouts, USDA hereby revises the U.S. grades for Brussels sprouts to (1) permit more variation in the trim of units allowing conformity with the present industry practice of using mechanical trimmers, (2) convert to attributes type standards; and (3) replace dual grade nomenclature with single letter designations.

In consideration of the foregoing, Subpart—United States Standards for brussels sprouts (7 CFR 2852.651 through 2852.659) are hereby revised to read as follows, and the Table of Contents is revised accordingly:

Subpart—United States Standards for Grades of Frozen Brussels Sprouts

Sec.

2852.651 Product description.
2852.652 Definitions of terms.
2852.653 Recommended sample unit size.
2852.654 Grades.
2852.655 Factors of quality.
2852.656 Classification of defects.
2852.657 Tolerances for defects.
2852.658 Sample size.
2852.659 Quality requirements.

Subpart—United States Standards for Grades of Frozen Brussels Sprouts

§ 2852.651 Product description.

Frozen Brussels sprouts means the frozen product prepared from the clean, sound succulent heads of the Brussels sprouts plant (*Brassica oleracea L. var. gemmifera*) by trimming, washing, blanching, and properly draining. The product is frozen in accordance with good commercial practice and maintained at temperatures necessary for its preservation.

§ 2852.652 Definitions of terms.

(a) *Acceptable Quality Level (AQL)* means the maximum percent of defective units or the maximum number of defects per hundred units of product that, for the purpose of acceptance sampling, can be considered satisfactory as a process average.

(b) *Blemished* means a unit affected by surface or internal discoloration, pathological injury, insect injury, or by other means to the extent that the appearance or eating quality is affected:

(1) Slightly;

(2) Materially; or

(3) Seriously.

(c) *Character.* (1) *Good character* means the individual heads are well formed, compact or very compact, and reasonably firm.

(2) *Reasonably good character* means the individual heads are reasonably well formed, reasonably compact, and fairly firm.

(3) *Fairly good character* means the individual heads are fairly well formed.

(4) *Poor character* means the individual heads fail the requirements for fairly good character.

(d) *Color (individual units).* (1) *Well colored* means the individual units have a color ranging from a distinct dark green to a lighter predominating characteristic green color with a definite yellow cast.

(2) *Fairly well colored* means the individual units have a predominating characteristic yellow color with or without slight tinges of green color.

(e) *Defect (or defective)* means any nonconformance of a unit(s) of product from a specified requirement of a single characteristic.

(f) *Extraneous vegetable material* means harmless vegetable substances other than from Brussels sprouts.

(g) *Flavor and odor. "Normal flavor and odor"* means that the product, after cooking, is free from objectionable flavors or odors of any kind.

(h) *Loose leaves and loose small pieces* means Brussels sprouts leaves, pieces of leaves or small pieces of edible stalk or stems not attached to a unit.

(i) *Sample unit* means the amount of product specified to be used for grading. It may be: (1) The entire contents of a container;

(2) A portion of the contents of a container;

(3) A combination of the contents of two or more containers; or

(4) A portion of unpacked product.

(j) *Trim.* (1) *Well trimmed* means the appearance of the unit is not materially affected by mechanical damage or by cutting into the head or by cutting of the stalk or stem.

(2) *Poorly trimmed* means the appearance of the unit is materially affected by mechanical damage or by excessive cutting into the head, or by insufficient cutting of the stalk or stem.

(k) *Unit* means a Brussels sprout or portion thereof other than loose leaves and loose small pieces.

§ 2852.653 Recommended sample unit size.

Meeting the requirements for factors of quality is based on a sample unit size of 50 units.

§ 2852.654 Grades.

(a) *U.S. Grade A* is the quality of frozen Brussels sprouts that: (1) Meets the following prerequisites in which the sprouts: (i) Have similar varietal characteristics;

(ii) Have a normal flavor and odor;

(iii) Have a good overall brightness;

(iv) Are free from grit or silt that affect the appearance or eating quality; and

(v) Have loose leaves and loose small pieces that may slightly affect the appearance or eating quality.

(2) Is within the limits for defects as classified in Tables I and II and specified in Tables III and IV, as applicable.

(b) *U.S. Grade B* is the quality of frozen Brussels sprouts that:

(1) Meets the following prerequisites in which the sprouts: (i) Have similar varietal characteristics;

(ii) Have a normal flavor and odor;

(iii) Have a reasonably good overall brightness;

(iv) Are free from grit or silt that affect the appearance or eating quality; and

(v) Have loose leaves and loose small pieces that may materially affect the appearance or eating quality.

(2) Is within the limits for defects as classified in Tables I and II and specified in Tables III and IV, as applicable.

(c) *U.S. Grade C* is the quality of frozen Brussels sprouts that: (1) Meets the following prerequisites in which the sprouts: (i) Have similar varietal characteristics;

(ii) Have a normal flavor and odor;

(iii) Have a fairly good overall brightness;

(iv) Have no more than a slight trace of grit or silt; and

(v) Have loose leaves and loose small pieces that may seriously affect the appearance or eating quality.

(2) Is within the limits for defects as classified in Tables I and II and specified in Tables III and IV, as applicable.

(d) *Substandard* is the quality of frozen Brussels sprouts that fails to meet the requirements of *U.S. Grade C.*

§ 2852.655 Factors of quality.

The grade of frozen Brussels sprouts is based on meeting the requirements for the following quality factors: (a) *Prerequisite quality factors:*

(1) Varietal characteristics;

(2) Flavor and odor;

(3) Brightness;

(4) Grit or silt; and

(5) Loose leaves and loose small pieces.

(b) *Classified quality factors:*

(1) Individual unit color (in U.S. Grades A and B only);

(2) Blemish;

(3) Trim;

(4) Extraneous vegetable material; and

(5) Character.

§ 2852.656 Classification of defects.

All defects, other than character defects, are classified as minor, major, severe, or critical. All character defects are classified as reasonably good, fairly good, or poor. Each "X" in Tables I and II represents "one (1) defect."

Table I.—*Classification of Defects (Other Than Character)*

Quality factor	Defects	Classification			
		Minor	Major	Severe	Critical
Individual unit color	Fairly well colored in U.S. Grades A and B only (each unit).		X		
Blemished	Slightly (each unit)	X			
	Materially (each unit)		X		
	Seriously (each unit)			X	
Trim	Poor (each unit)		X		
Extraneous vegetable material	Each piece				X

Table II.—*Classification of Character Defects*

Quality factor	Defects	Reasonably good	Fairly good	Poor
Character	"B" (each unit)	X		
	"C" (each unit)		X	
	"Substandard" (each unit)			X

§ 2852.657 Tolerances for defects.

Table III.—*All Classified Defects Except Character*

	Total [1]	Major	Severe	Critical
	Grade A			
AQL [2]	20.0	12.5	4.0	0.15
	Grade B			
AQL [2]	40.0	33.0	8.5	1.5
	Grade C			
AQL [2]	50.0	33.0	10.0	2.5

[1] AQL expressed as defects per hundred units.
[2] Total = Minor + Major + Severe + Critical.

Table IV.—*Classified Defects for Character Only*

	Grade					
	A			B		C
	Total [1]	Fairly good	Poor	Total [1]	Poor	Poor
AQL [2]	15.0	5.0	1.5	40.0	8.5	40.0

[1] AQL expressed as percent defective.
[2] Total = Reasonably Good + Fairly Good + Poor.
[3] Total = Fairly Good + Poor.

§ 2852.658 Sample size.

The sample size to determine meeting the requirements of these standards shall be as specified in the sampling plans and procedures in the "Regulations Governing Inspection and Certification of Processed Fruits and Vegetables, Processed Products Thereof, and Certain Other Processed Food Products" (7 CFR 2852.1–2852.83), for lot grading and on-line grading, as applicable.

§ 2852.659 Quality requirements.

(a) *Lot grading.* A lot of frozen Brussels sprouts is considered as meeting the requirements for quality if:

(1) The prerequisite requirements specified in § 2852.654 are met; and

(2) The Acceptable Quality Levels (AQL) in Tables III and IV, as applicable, are not exceeded.

(b) *On-line grading.* A portion of production is considered as meeting the requirements for quality if:

(1) The prerequisite requirements specified in § 2852.654 are met; and

(2) The Acceptable Quality Levels (AQL) in Tables III and IV, as applicable, are not exceeded.

(c) *Single sample unit.* Each single sample unit submitted for quality evaluation will be treated individually

and is considered as meeting the requirements for quality if:

(1) The prerequisite requirements specified in § 2852.654 are met; and

(2) The Acceptable Quality Levels (AQL) in Tables III and IV, as applicable, are not exceeded.

(Agricultural Marketing Act of 1946, Secs. 203, 205, 60 Stat. 1087, as amended, 1090, as amended (7 U.S.C. 1622, 1624))

Done at Washington, DC, on: January 12, 1981.

Donald L. Houston,

Administrator, Food Safety and Quality Service.

[FR Doc. 81-1548 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-DM-M

DEPARTMENT OF ENERGY

Economic Regulatory Administration

10 CFR Part 212

[Docket No. ERA-R-80-26]

Maximum Lawful Selling Price for Unleaded Gasoline

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Final rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) hereby adopts two amendments to its gasoline price rules. The first amendment adopted includes the unleaded gasoline production incentive in the "B" factor rather than in the "H" factor to make clear that the increased cost passthrough computed under the incentive may be "banked" and to specify its sequence of recoupment. Second, DOE clarifies that new grades of unleaded gasoline may be treated as separate product categories.

EFFECTIVE DATE: January 9, 1981.

FOR FURTHER INFORMATION CONTACT:

William Webb (Office of Public Information), Economic Regulatory Administration, Room B-110, 2000 M Street, NW., Washington, D.C. 20461, (202) 653-4055.

Chuck Boehl (Office of Regulatory Policy), Economic Regulatory Administration, Room 7116, 2000 M Street, NW., Washington, D.C. 20461, (202) 653-4290.

William Mayo Lee or William Funk (Office of General Counsel), Department of Energy, Room 6A-127, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-6754 or 252-6736.

SUPPLEMENTARY INFORMATION:

I. Background
II. Summary of Comments
III. Discussion
IV. Amendment
V. Procedural Requirements

I. Background

On August 15, 1980, DOE issued a notice of proposed rulemaking (45 FR 54694) proposing several changes to the price rules for unleaded gasoline. Specifically DOE proposed: (1) That all firms be permitted the option of imputing a May 15, 1973 selling price for unleaded gasoline; (2) several alternative methods of imputing the May 15, 1973 selling price for all grades of unleaded gasoline; (3) that all new grades of unleaded gasoline be considered separate product categories; and (4) that the unleaded gasoline production incentive be included in the "A" factor.

Generally, under the current price regulations the maximum lawful price refiners may charge for unleaded gasoline is the May 15, 1973 selling price of unleaded gasoline plus increased product and non-product costs. In addition, refiners are permitted to recoup additional increased costs on gasoline pursuant to the unleaded gasoline production incentive in § 212.83(j).

If a refiner did not sell unleaded gasoline on May 15, 1973, or 30 days prior thereto, the maximum lawful selling price for unleaded gasoline is calculated using an imputed May 15, 1973 selling price determined pursuant to § 212.112(b)(1). This imputed selling price is the weighted average selling price charged for leaded gasoline on May 15, 1973, of the same or nearest octane as the unleaded gasoline currently sold, plus one cent. The additional one cent is intended to reflect the additional cost associated with producing unleaded gasoline.

Pursuant to § 212.83(c)(1)(i)(B) refiners may designate different types and grades of gasoline as separate categories within the product category gasoline, provided such types and grades have consistently and historically been designated as such by the refiner and not disapproved by the DOE. In some instances, DOE has not disallowed refiners treating new grades of unleaded gasoline as separate product categories.

Finally, refiners are permitted to increase the amount of costs which may be passed through in gasoline price increases to reflect increased production of unleaded gasoline (44 FR 69594, December 3, 1979). The increased costs are permitted refiners which produce more unleaded gasoline than the national average or than they refined in the corresponding month in 1978.

II. Summary of Comments

Approximately 13 interested parties testified at a public hearing held in Washington, D.C. on September 24, 1980, and approximately 26 firms submitted written comments regarding the proposals.

The majority of the parties commenting were refiners. While they generally supported the thrust of DOE's proposals, there was considerable disagreement on the appropriate methods to impute a standard base price for both minimum octane and higher grades of unleaded gasoline. Also there were suggestions that no changes in the present system be made since decontrol will occur no later than September 30, 1981.

With respect to the various proposals for changing the method of imputing the May 15, 1973 selling prices, most refiners agreed that none of the proposals adequately reflected the increased costs associated with producing unleaded gasoline. Some refiners stated that it would be impossible to determine the per octane cost for producing higher grades of unleaded gasoline. Several commenters stated that in establishing prices often there is only an indirect relationship between the cost of producing a product and its selling price.

Most of the refiners that impute a May 15, 1973 unleaded gasoline selling price with reference to the May 15, 1973 selling price of a sub-regular grade of gasoline supported using an imputed selling price of regular leaded gasoline instead of the actual selling price of the sub-regular grade of leaded gasoline plus one cent to determine the May 15, 1973 unleaded selling price.

Commenters favored permitting refiners which sold unleaded on May 15, 1973, to have the option of imputing a May 15, 1973 selling price for unleaded gasoline. Most refiners opposed amending the rules to require all refiners which sold unleaded gasoline in May 1973 to impute unleaded base selling prices.

Commenters supported the proposal to eliminate the requirement that DOE approval be obtained before new grades of unleaded gasoline may be treated as separate product categories.

Many refiners supported removing the unleaded production incentive from the "H" factor. However, most commenters suggested it be included in the "B" factor to remove any confusion over the relationship between the production incentive and the gasoline "tilt" provision contained in the "A" factor.

III. Discussion

The amount of increased costs that refiners may assign to gasoline has increased because of the "tilt" and the unleaded gasoline production incentive rules. Moreover, during 1980, most refiners were unable to recover a significant amount of increased costs attributable to gasoline. It appears that cumulative gasoline banks are now approaching $30 billion.

The elimination of the equal application rule grants refiners greater pricing flexibility by permitting them to recoup increased costs allocated to gasoline as they deem appropriate. A refiner's aggregate price increases will be compared to total increased costs to determine compliance with the price rules. In other words, the primary limitation on a refiner's allowable gasoline price increases above the May 15, 1973, selling price is that the total increased costs allocated to gasoline for passthrough may not be exceeded.[1]

DOE believes that the current level of refiner "banks" and the pricing flexibility permitted refiners by elimination of the equal application rule will insure that refiners have an incentive to produce sufficient quantities of unleaded gasoline. Therefore, DOE does not believe that additional price relief is necessary at this time. Currently, refiners may allocate increased costs to meet competitive factors. Accordingly, DOE is terminating this rulemaking with respect to all the proposals concerning the provisions for imputing a May 15, 1973, selling price for unleaded gasoline.

IV. Amendments

The elimination of the equal application rule (45 FR 72626, November 3, 1980) permits refiners to allocate increased costs to determine maximum lawful selling prices of gasoline as refiners deem appropriate. Accordingly, refiners may allocate increased costs *within* their historical categories of gasoline at their discretion. Consequently, the limitations in the provision in § 212.83(c)(1)(i)(B) regarding separate categories of gasoline within the gasoline product categories are meaningless with respect to the allocation of increased costs to determine maximum lawful selling prices and, therefore, are being deleted. Refiners may allocate increased costs to all types and grades of gasoline, regardless of when they were first produced, as the refiner deems appropriate.

The other amendment DOE is adopting today is technical in nature. DOE is deleting the unleaded production incentive from the "H" factor and including it in the "B" factor.

The purpose of the amendment is to clarify that recouped costs derived from the incentive may be "banked" and to specify their exact order of recoupment. By removing the incentive from the "H" factor any ambiguities regarding "banks" and sequence of recoupment are eliminated. The production incentive is included in the "B" factor rather than the "A" factor to remove any confusion regarding the treatment of the production incentive and the "tilt" rule.

V. Procedural Requirements

A. FERC Review

Under Section 404(a) of the Department of Energy Organization Act, Pub. L. 95-91 (DOE Act), the proposed rule was referred to the Federal Energy Regulatory Commission (FERC) for a determination as to whether it may significantly affect any functions within the jurisdiction of the FERC under Section 402 (a)(1), (b), and (c)(1) of the DOE Act. The FERC has declined to make such a determination.

B. NEPA Review

Under DOE's Proposed Guidelines for Compliance with the National Environmental Policy Act (44 FR 42136, July 18, 1978) the DOE has determined that the adoption of this rule is not a major federal action significantly affecting the quality of the environment. Thus the preparation of an environmental impact statement is not required.

C. Effective Date

The provisions of 5 U.S.C. section 553(d) generally require that only substantive rules may not be made effective less than 30 days following publication of the rule. In this instance, the rule is not substantive in nature, so DOE is making the rule effective the day it is issued.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, Pub. L. 95-70, Pub. L. 95-619, and Pub. L. 96-30; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91, Pub. L. 95-509, Pub. L. 95-619, Pub. L. 95-620, and Pub. L. 95-621; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

In consideration of the foregoing, Part 212, Chapter II of Title 10 of the Code of Federal Regulations is amended as set forth below effective the date this rule is issued.

Issued in Washington, D.C., January 9, 1981.

Hazel R. Rollins,

Administrator, Economic Regulatory Administration.

1. Section 212.83(c)(1)(i)(B) is revised to read as follows:

§ 212.83 Price rule.

* * * * *

(c) *Allocation of increased costs.*

* * *

(1) *Allocation of increased costs incurred in the period "t"—*

(i) * * *

* * * * *

(B) Notwithstanding any other provision of this subpart, for purposes of this section, a refiner may designate as categories within the product gasoline different types (unleaded gasoline as differentiated from leaded gasoline) and grades (differentiated by octane number), if the categories so designated by the refiner represent discrete gasoline types and grades. In apportioning the total amount of increased costs allocable to gasoline among categories of gasoline, a refiner may apportion amounts of increased costs to a particular category of gasoline in whatever amounts it deems appropriate.

* * * * *

2. Section 212.83(c)(2)(iii)(C) *The "B" factor* is revised in the definition of "B_i^T" to read as follows:

§ 212.83 Price rule.

* * * * *

(c) *Allocation of increased costs.* * * *

(2) *Formulae.* * * *

(iii) *Definitions.* * * *

(C) *The "B" factor.*

* * * * *

"B_i^T" is the total increased cost of the specific covered product or products of the type "i" purchased or landed in the period "t," provided such cost is not included in computing "A_i." The cost of a specific covered product or products of the type "i" shall include the cost of a product or products not of the type "i" which was a covered product as of May 31, 1976 and is purchased and defined or blended, that is attributable to the production of the covered product or products of the type "i." Beginning December 1, 1979, with respect to category "i" = 3, the cost of gasoline

[1] Section 212.83(c)(1)(C) prohibits refiners from charging in retail sales at a retail outlet more than 17.7 cents per gallon over the price charged by the refiner in its nearest DTW price to an independent retailer.

shall include materials and compounds, including catalyst, alcohol, and process chemicals, that are purchased and refined or blended and are attributable to the production of gasoline. The cost and quantity of covered products purchased or landed that are consumed as refinery fuel shall be excluded from this amount. Effective January 9, 1981, "B_i^T" shall include the unleaded gasoline production incentive found in § 212.83(j).

Where: cl^o = The total cost of a covered product or products of the type "i" purchased or landed in the period "o".

cl^T = The total cost of a covered product or products of the type "i" purchased or landed in the period "t".

ql^o = The total quantity or volume of a covered product or products of the type "i" purchased or landed in the period "o".

ql^T = The total quantity or volume of a covered product of the type "i" purchased or landed in the period "t".

Y_i = The lowest price at or above [below] which at least 10 percent of the product or products of type "i" were priced in transactions during the month of May 1973, or, if no transactions occurred in that month, the month next preceding May 1973 in which such transactions occurred.

* * * * *

3. Section 212.83(c)(2)(iii)(G) The "H" factor is revised to read as follows:

§ 212.83 Price rule.

* * * * *

(c) *Allocation of increased costs.* * * *

(2) *Formulae.* * * *

(iii) *Definitions.* * * *

(G) *The "H" Factor.*

"H_i^u" = For i=1, i=2, and i=4, the portion, if any, of the total dollar amount available in the period "u" for inclusion in price adjustments to the product of the type "i" that pursuant to paragraphs (d) or (e) of this section the refiner elects to include in prices of gasoline for the period "u" (in which case "H_i^w" shall be subtracted); for "i"=3, the portion, if any, of the total dollar amount available in the period "u" for inclusion in price adjustments to No. 2 oils, aviation jet fuel, or general refinery products that pursuant to paragraphs (d) or (e) of this section the refiner elects to include in the price of gasoline for the period "u" (in which case "H_i^w" shall be added).

* * * * *

[FR Doc. 81-1740 Filed 1-15-81; 8:45 am]

BILLING CODE 6450-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 305

Rules for Using Energy Cost and Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act; Technical Correction to Ranges of Comparability

AGENCY: Federal Trade Commission.

ACTION: Technical corrections to final rule and comparability ranges.

SUMMARY: On November 19, 1979, the Federal Trade Commission issued a final rule that requires the disclosure of energy efficiency information for the following categories of appliances: refrigerators and refrigerator-freezers, freezers, dishwashers, clothes washers, water heaters, room air conditioners and furnaces. Section 305.8 of the rule requires affected members of the appliance industry to submit to the Commission information relating to the energy cost or energy efficiency rating of covered appliances. Using this information, the Commission published [1] the ranges of energy cost or energy efficiency ratings for the appliances covered by the rule. This information was to be used by the industry to prepare required labels and fact sheets.

After publication of the ranges, the Commission discovered certain technical errors, and published corrections on March 25, 1980. The Commission found that the information published on March 25 contained errors in the furnace ranges that were not ascertainable prior to publication, and published corrections on April 17, 1980.

The Commission has found that the refrigerator and refrigerator-freezer ranges published on April 17 also contain errors. This notice corrects those errors.

A provision in section 326(c) of the Energy Policy and Conservation Act prohibits the Commission from requiring that labels be changed to reflect revised tables of ranges more often than annually. Consequently, any changes made to required labels in response to this notice would be purely voluntary.

EFFECTIVE DATE: These corrections are effective on January 16, 1981.

FOR FURTHER INFORMATION CONTACT: James Mills, 202–724–1491 or Lucerne D. Winfrey, 202–724–1453, Attorneys, Federal Trade Commission, 414 11th Street NW., Washington, D.C. 20580.

[1] 45 FR 13998, March 3, 1980.

SUPPLEMENTARY INFORMATION: The Commission published the final rule on November 19, 1979 (44 FR 66466). Information respecting the annual ranges of comparability was published in the **Federal Register** on Monday, March 3, 1980 (45 FR 13998), Tuesday, March 25, 1980 (45 FR 19520) and on Thursday, April 17, 1980 (45 FR 26036). The published ranges are applicable to refrigerators and refrigerator-freezers, freezers, dishwashers, clothes washers, water heaters, room air conditioners and furnaces. Appendix A1- Refrigerators, and Appendix A2- Refrigerator-freezers have been corrected so that the ranges of comparability for these products now more accurately reflect all of the information submitted by industry members prior to the submission deadline of January 21, 1980.

A1.—*Refrigerators*

Manufacturer's rated total refrigerated volume in cubic feet	Ranges of estimated yearly energy costs, electricity	
	Low	High
Less than 2.5	$18	$25
2.5 to 4.4	20	31
4.5 to 6.4	22	31
6.5 to 8.4	22	23
8.5 to 10.4	22	35
10.5 to 12.4	24	37
12.5 to 14.4	28	41
14.5 to 16.4	(1)	(1)
16.5 and over	58	59

[1] No data submitted.

A2.—*Refrigerators-Freezers*

Manufacturer's rated total refrigerated volume in cubic feet	Ranges of estimated yearly energy costs, electricity	
	Low	High
Less than 10.5	$27	$38
10.5 to 12.4	31	60
12.5 to 14.4	31	69
14.5 to 16.4	33	92
16.5 to 18.4	45	88
18.5 to 20.4	58	91
20.5 to 22.4	64	89
22.5 to 24.4	83	94
24.5 to 26.4	79	109
26.5 to 28.4	94	94
28.5 and over	(1)	(1)

[1] No data submitted.

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-1745 Filed 1-15-81; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 282

[Docket No. RM81-9]

Rule Adopting Revised Alternative Fuel Price Ceilings for the State of Kentucky; Public Hearing

Issued January 12, 1981.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of public hearing.

SUMMARY: On December 24, 1980, the Federal Energy Regulatory Commission (Commission) issued an Interim Rule (46 Fed. Reg. 2036) in Docket No. RM81-9 revising the alternative fuel price ceilings for the State of Kentucky under the Natural Gas Policy Act of 1978. The Commission has received a request for a public hearing in Docket No. SA81-9 wherein interested persons would have the opportunity to make oral presentations of their views on the interim rule. Pursuant to this request, the Commission has scheduled a public hearing to be held on January 19, 1981, at the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, Hearing Room A.

DATES: The public hearing will be held on January 19, 1981, 10:00 a.m.

ADDRESSES: The public hearing will be held at: Hearing Room A, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT:

Sandra Delude, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357-9095

Alice Fernandez, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357-9095

Kenneth F. Plumb,

Secretary.

[FR Doc. 81-1722 Filed 1-15-81; 8:45 am]

BILLING CODE 6450-85-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

Labor Certification Process for the Permanent Employment of Aliens in the United States; Correction

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule; correction.

SUMMARY: This document corrects an error in a final rule on the permanent alien labor certification process, published December 19, 1980 (45 FR 83926).

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Bodin, Division of Labor Certifications. Telephone: 202-376-6295.

SUPPLEMENTARY INFORMATION: This document corrects an error contained in the final rule on the permanent alien labor cretification process, published at 45 FR 83926 (December 19, 1980). In the final rule, the word "shall" in the introductory language to 20 CFR 656.21(b) was changed incorrectly to the word "may". See 45 FR 83939.

Accordingly, the Employment and Training Administration is correcting the introductory language to 20 CFR 656.21(b) to read as follows:

§ 656.21 Basic labor certification process.

* * * * *

(b) Except for labor certification applications involving occupations designated for special handling (see § 656.21a) and *Schedule A* occupations (see §§ 656.10 and 656.22), the employer shall submit as a part of every labor certification application, on the *Application for Alien Employment Certification* form or in attachments, as appropriate, the following clear documentation:

* * * * *

Signed in Washington, D. C., this 9th day of January, 1981.

Ernest G. Green,

Assistant Secretary for Employment and Training.

[FR Doc. 81-1032 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 80F-0164]

Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers; 4-[[4,6-Bis(Octylthio)-S-Triazin-2-yl]amino]-2,6-di-Tert-Butylphenol

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of 4-[[4,6-bis(Octylthio)-*s*-triazin-2-yl]amino]-2,6-di-*tert*-butylphenol as an antioxidant and thermal stabilizer for styrene block copolymers, polystyrene, and rubber-modified polystyrene polymers. Ciba-Geigy Corp. petitioned for this use.

DATES: Effective January 16, 1981; objections by February 17, 1981.

ADDRESS: Written objections to the Hearing Clerk (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Mary W. Lipien, Bureau of Foods (HFF-334), Food and Drug Administration, 200 C St. SW., Washington, D.C. 20204, 202-472-5740.

SUPPLEMENTARY INFORMATION: FDA issued a notice in the Federal Register of June 10, 1980 (45 FR 39340) announcing that a food additive petition (FAP OB3509) had been filed by Ciba-Geigy Corp., Ardsley, NY 10502, proposing that § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) be amended to provide for the safe use of 4-[[4,6-bis(Octylthio)-*s*-triazin-2-yl]amino]-2,6-di-*tert*-butylphenol as an antioxidant and thermal stabilizer for styrene block copolymers complying with § 177.1810 (21 CFR 177.1810) and polystyrene and rubber-modified polystyrene polymers complying with § 177.1640 (21 CFR 177.1640).

FDA has evaluated data in the petition and other relevant material and concludes that § 178.2010 should be amended as set forth below to include the petitioned additive.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 201(s) and 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s) and 348)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Part 178 is amended in § 178.2010(b) by inserting a new entry alphabetically in the table, to read as follows:

§ 178.2010 Antioxidants and/or stabilizers for polymers.

* * * * *

(b) * * *

Substances	Limitations
* * * * *	
4-[[4,6-Bis(octylthio)-s-triazin-2-yl]amino]-2, 6-di-*tert*-butylphenol (CAS Reg. No. 991-84-4).	For use only: 1. At levels not to exceed 0.5 percent by weight in styrene block copolymers complying with § 177.1810 of this chapter: *Provided*, That the finished styrene block copolymers contact food identified as types I, II, IV-B, VI, VII-B, and VIII in table 1 of § 176.170(c) of this chapter under conditions of use D, E, F, and G described in table 2 of § 176.170(c) of this chapter. 2. At levels not to exceed 0.1 percent by weight in polystyrene and rubber-modified polystyrene complying with § 177.1640 of this chapter: *Provided*, That the finished polystyrene and rubber-modified polystyrene polymer contact food only under conditions of use D, E, F, and G described in table 2 of § 176.170(c) of this chapter.
* * * * *	

Any person who will be adversely affected by the foregoing regulation may at any time on or before February 17, 1981 submit to the Hearing Clerk (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written objections thereto and may make a written request for a public hearing on the stated objections. Each objection shall be separately numbered and each numbered objection shall specify with particularity the provision of the regulation to which objection is made. Each numbered objection on which a hearing is requested shall specifically so state; failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held; failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Four copies of all documents shall be submitted and shall be identified with the Hearing Clerk docket number found in brackets in the heading of this regulation. Received objections may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Effective date. This regulation becomes effective January 16, 1981.

(Secs. 201(s) and 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s) and 348))

Dated: January 12, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-1661 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Parts 430, 436 and 442

[Docket No. 80N-0285]

Antibiotic Drugs; Cefaclor

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the antibiotic drug regulations to provide for the certification of a new antibiotic drug, cefaclor. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective January 16, 1981. Comments by February 17, 1981.

ADDRESS: Written comments to the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Joan Eckert, Bureau of Drugs (HFD–140), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to providing for the certification of a new antibiotic drug, cefaclor. The agency concludes that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in Parts 430, 436, and 442 (21 CFR Parts 430, 436, and 442) to provide for its certification.

The agency has determined pursuant to 21 CFR 25.24(b)(22) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Thus, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Parts 430, 436, and 442 are amended as follows:

PART 430—ANTIBIOTIC DRUGS; GENERAL

1. Part 430 is amended in Subpart A as follows:

a. In § 430.5 by adding new paragraph (a)(66) and new paragraph (b)(66) to read as follows:

§ 430.5 Definitions of master and working standards.

(a) * * *

(66) *Cefaclor.* The term "cefaclor master standard" means a specific lot of cefaclor that is designated by the Commissioner as the standard of comparison in determining the potency of the cefaclor working standard.

(b) * * *

(66) *Cefaclor.* The term "cefaclor working standard" means a specific lot of a homogeneous preparation of cefaclor.

b. In § 430.6 by adding new paragraph (b)(68) to read as follows:

§ 430.6 Definitions of the terms "unit" and "microgram" as applied to antibiotic substances.

* * * * *

(b) * * *

(68) *Cefaclor.* The term "microgram" applied to cefaclor means the cefaclor activity (potency) contained in 1.0493 micrograms of cefaclor master standard.

PART 436—TESTS AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

2. Part 436 is amended in § 436.105 (a) and (b) by alphabetically inserting a new item into the respective tables, as follows:

§ 436.105 Microbiological agar diffusion assay.

* * * * *

(a) * * *

Antibiotic	Media to be used (as listed by medium number in § 436.102(b))		Milliliters of media to be used in the base and seed layers		Test organism	suggested volume of standardized inoculum to be added to each 100 milliliters of seed agar	Incubation temperature for the plates
	Base layer	Seed layer	Base layer	Seed layer			
						Milliliters	*Degrees C*
*	*	*	*	*	*	*	*
Cefaclor	2	1	21	5	A	0.05	36-37.5
*	*	*	*	*	*	*	*

(b) * * *

Antibiotic	Working standard stock solutions					Standard response line concentrations	
	Drying conditions (method number as listed in § 436.200)	Initial solvent	Diluent (solution number as listed in § 436.101(a))	Final concentration units or milligrams per milliliter	Storage time under refrigeration	Diluent	Final concentrations, units or micrograms of antibiotic activity per milliliter
*	*	*	*	*	*	*	*
Cefaclor	Not dried		1	1 mg	1 day	1	3.2, 4.0, 5.0, 6.25, 7.81 µg
*	*	*	*	*	*	*	*

PART 442—CEPHA ANTIBIOTIC DRUGS

3. Part 442 is amended:

a. In Subpart A by adding new § 442.4 to read as follows:

§ 442.4 Cefaclor monohydrate.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cefaclor monohydrate is the monohydrate form of (6*R*, 7*R*)-7-[(*R*)-2-amino-2-phenylacetamido]-3-chloro-8-oxo-5-thias-1-azabicyclo [4.2.0]oct-2-ene-2-carboxylic acid. It is so purified and dried that:

(i) Its potency is not less than 860 micrograms and not more than 1,050 micrograms of cefaclor per milligram on an "as is" basis.

(ii) Its moisture content is not less than 3.0 percent and not more than 8.0 percent.

(iii) Its pH in an aqueous suspension containing 25 milligrams per milliliter is not less than 3.0 and not more than 4.5.

(iv) It gives a positive identity test.

(v) It is crystalline.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on the batch for potency, moisture, pH, identity, and crystallinity.

(ii) Samples required: 10 packages, each containing approximately 300 milligrams.

(b) *Tests and methods of assay*—(1) *Potency.* Use either of the following methods; however, the results obtained from the hydroxylamine colorimetric assay shall be conclusive.

(i) *Microbiological agar diffusion assay.* Proceed as directed in § 436.105 of this chapter, preparing the sample for assay as follows: Dissolve an accurately weighed sample in sufficient 1 percent potassium phosphate buffer, pH 6.0 (solution 1), to obtain a stock solution containing 1 milligram of cefaclor per milliliter (estimated). Further dilute an aliquot of the stock solution with solution 1 to the reference concentration of 5.0 micrograms of cefaclor per milliliter (estimated).

(ii) *Hydroxylamine colorimetric assay.* Proceed as directed in § 442.40(b)(1)(ii) of this chapter, except prepare the working standard and sample solutions and calculate the cefaclor content as follows:

(*a*) *Preparation of working standard solution.* Dissolve and dilute an accurately weighed portion of the cefaclor working standard in sufficient 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram of cefaclor per milliliter.

(*b*) *Preparation of sample solution.* Dissolve an accurately weighed portion of the sample in sufficient 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram of cefaclor per milliliter.

(*c*) *Calculations.* Calculate the cefaclor content in micrograms per milligram as follows:

$$\text{Micrograms of cefaclor per milligram of sample} = \frac{A_u \times P_s}{A_s \times W_u}$$

where:

A_u = Absorbance of sample solution;

P_s = Potency of working standard solution in micrograms per milliliter;

A_s = Absorbance of working standard solution;

W_u = Milligrams of sample per milliliter of sample solution.

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *pH.* Proceed as directed in § 436.202 of this chapter, using an aqueous suspension containing 25 milligrams per milliliter.

(4) *Identity.* Proceed as directed in § 436.211 of this chapter, using the

sample preparation described in paragraph (b)(2) of that section.

(5) *Crystallinity.* Proceed as directed in § 436.303(a) of this chapter.

b. In Subpart B by adding new §§ 442.104, 442.104a, and 442.104b to read as follows:

§ 442.104 Cefaclor monohydrate oral dosage forms.

§ 442.104a Cefaclor monohydrate capsules.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity* Cefaclor monohydrate capsules are composed of cefaclor monohydrate and one or more suitable and harmless lubricants and diluents enclosed in a gelatin capsule. Each capsule contains cefaclor monohydrate equivalent to either 250 milligrams or 500 milligrams of cefaclor. Its potency is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of cefaclor that it is represented to contain. Its moisture content is not more than 8.0 percent. The cefaclor monohydrate used conforms to the standards prescribed by § 442.4(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(*a*) The cefaclor monohydrate used in making the batch for potency, moisture, pH, identity, and crystallinity.

(*b*) The batch for potency and moisture.

(ii) Samples required:

(*a*) The cefaclor monohydrate used in making the batch: 10 packages, each containing approximately 300 milligrams.

(*b*) The batch: A minimum of 30 capsules.

(b) *Tests and methods of assay*—(1) *Potency.* Proceed as directed in § 442.40(b)(1)(ii) of this chapter, except prepare the working standard and sample solutions and calculate the potency of the sample as follows:

(i) *Preparation of working standard solution.* Dissolve and dilute an accurately weighed portion of the cefaclor working standard in sufficient 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram of cefaclor.

(ii) *Preparation of sample solution.* Place one capsule into a high-speed glass blender jar containing sufficient 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram per milliliter. Filter a portion to be used through a 10-micron filter.

(iii) *Calculations.* Calculate the cefaclor content in milligrams per capsule as follows:

$$\text{Milligrams of cefaclor per capsule} = \frac{A_u \times P_s \times d}{A_s \times 1{,}000}$$

where:

A_u = Absorbance of sample solution;
P_s = Potency of working standard in micrograms per milliliter;
A_s = Absorbance of working standard solution;
d = Dilution factor of the sample.

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

§ 442.104b Cefaclor monohydrate for oral suspension.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Cefaclor monohydrate for oral suspension is cefaclor monohydrate with one or more suitable and harmless diluents, buffer substances, colorings and flavorings. When reconstituted as directed in the labeling, each milliliter contains cefaclor monohydrate equivalent to 25 milligrams or 50 milligrams of cefaclor. Its potency is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of cefaclor that it is represented to contain. Its moisture content is not more than 2.0 percent. When reconstituted as directed in the labeling, its pH is not less than 2.5 and not more than 4.5. The cefaclor monohydrate used conforms to the standards prescribed by § 4442.4(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(*a*) The cefaclor monohydrate used in making the batch for potency, moisture, pH, identity, and crystallinity.

(*b*) The batch for potency, moisture, and pH.

(ii) Samples required:

(*a*) The cefaclor monohydrate used in making the batch: 10 packages, each containing approximately 300 milligrams.

(*b*) The batch: A minimum of six immediate containers.

(b) *Tests and methods of assay*—(1) *Potency.* Proceed as directed in § 442.40(b)(1)(ii) of this chapter, except prepare the working standard and sample solutions and calculate the potency of the sample as follows:

(i) *Preparation of working standard solution.* Dissolve and dilute an accurately weighed portion of the cefaclor working standard in sufficient 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram of cefaclor.

(ii) *Preparation of sample solution.* Reconstitute the sample as directed in the labeling. Transfer a 5.0-milliliter portion into an appropriate-sized volumetric flask and dilute to volume with 0.1*M* potassium phosphate buffer, pH 4.5 (as described in § 436.101(a)(4) of this chapter) to obtain a concentration of 1 milligram per milliliter.

(iii) *Calculations.* Calculate the cefaclor content as follows:

$$\text{Milligrams of cefaclor for 5 milliliters of sample} = \frac{A_u \times P_s \times d}{A_s \times 1{,}000}$$

where:

A_u = Absorbance of sample solution;
P_s = Potency of working standard in micrograms per milliliter;
A_s = Absorbance of working standard solution;
d = Dilution factor of the sample.

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *pH.* Proceed as directed in § 436.202 of this chapter, using the drug reconstituted as directed in the labeling.

This regulation announces standards that FDA has accepted in a request for approval of an antibiotic drug. In accordance with the conditions for certification in section 507 of the act, FDA permits the manufacturer to market this drug on a "release" status pending the regulation's becoming effective.

Because this regulation is not controversial and because when effective it provides notice of accepted standards and permits earlier certification of regulated products, notice and comment procedure and delayed effective date are found to be unnecessary and not in the public interest. The amendment, therefore, is effective upon the date of publication in the **Federal Register**. However, interested persons may, on or before February 17, 1981, submit to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written comments on this rule. Four copies of any comments to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch office between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this regulation may file objections to it, request a hearing, and show reasonable grounds for the hearing. Any person who decides to seek a hearing must file (1) on or before February 17, 1981, a written notice of participation and request for hearing, and (2) on or before March 17, 1981, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 430.20. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 430.20.

All submissions under this order must be filed in four copies, identified with the docket number appearing in the heading of this order and filed with the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the office of the Dockets Management Branch, between 9 a.m. and 4 p.m., Monday through Friday.

Effective date. This regulation shall be effective January 16, 1981.

(Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357))

Dated: January 6, 1981.

Mary A. McEniry,

Assistant Director for Regulatory Affairs, Bureau of Drugs.

[FR Doc. 81-1306 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Parts 510 and 558

Tylosin; New Animal Drugs for Use in Animal Feeds

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the animal drug regulations to reflect approval of a new animal drug application (NADA) filed for Indiana Farm Bureau Cooperative Association, Inc., providing for safe and effective use of a 10-grams-per-pound tylosin premix for making complete swine feeds, and to add this firm to the list of approved NADA sponsors.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Jack C. Taylor, Bureau of Veterinary Medicine (HFV–136), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–5247.

SUPPLEMENTARY INFORMATION: Indiana Farm Bureau Cooperative Association, Inc., 120 E. Market St., Indianapolis, IN 46204, is sponsor of NADA 125–226 submitted on its behalf by Elanco Products Co. The NADA provides for use of a premix containing 10 grams of tylosin (as tylosin phosphate) per pound for making complete swine feeds used to increase rate of weight gain and improve feed efficiency.

Approval of this NADA relies upon safety and effectiveness data contained in Elanco Products Co.'s approved NADA 12–491. Use of the data in NADA 12–491 to support this NADA has been authorized by Elanco. This approval does not change the approved use of the drug. Consequently, approval of this NADA poses no increased human risk from exposure to residues of the animal drug, nor does it change the conditions of the drug's safe use in the target animal species. Accordingly, under the Bureau of Veterinary Medicine's supplemental approval policy (42 FR 64367; December 23, 1977), approval of this NADA has been treated as would an approval of a Category II supplement and does not require reevaluation of the safety and effectiveness data in NADA 12–491.

Indiana Farm Bureau Cooperative Association, Inc., has not previously been included in the regulations under the list of approved sponsors. The regulations are amended to reflect this approval and to include this firm in the list of sponsors.

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

The agency has determined pursuant to 21 CFR 25.24(d)(1) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))), under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1) and redelegated to the Bureau of Veterinary Medicine (21 CFR 5.83), Parts 510 and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. In Part 510, § 510.600 is amended by adding a new sponsor alphabetically to paragraph (c)(1) and numerically to paragraph (c)(2), to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Indiana Farm Bureau Cooperative Association, Inc., 120 E. Market St., Indianapolis, IN 46204	021502
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
*	* * * * *
021502	Indiana Farm Bureau Cooperative Association, Inc., 120 E. Market St., Indianapolis, IN 46204
*	* * * * *

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

2. In Part 558, § 558.625 is amended by adding new paragraph (b)(76), to read as follows:

§ 558.625 Tylosin.

* * * * *

(b) * * *

(76) To 021502: 10 grams per pound; paragraph (f)(1)(vi)(*a*) of this section.

* * * * *

Effective date. This regulation is effective January 16, 1981.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)))

Dated: January 7, 1981.

Gerald B. Guest,

Acting Director, Bureau of Veterinary Medicine.

[FR Doc. 80-1380 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-80-M

21 CFR Parts 430, 436, 446

[Docket No. 80N-0304]

Antibiotic Drugs; Meclocycline Sulfosalicylate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the antibiotic drug regulations to provide for the certification of a new antibiotic drug, meclocycline sulfosalicylate. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective January 16, 1981. Comments by February 17, 1981.

ADDRESS: Written comments to the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Joan Eckert, Bureau of Drugs (HFD-140), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to providing for the certification of a new antibiotic drug, meclocycline sulfosalicylate. The agency concludes that the data supplied by the manufacturer on meclocycline sulfosalicylate are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in Parts 430, 436, and 446 (21 CFR Parts 430, 436, and 446) to provide for its certification.

The agency has determined pursuant to 21 CFR 25.24(b)(22) (proposed December 11, 1979; 44 FR 71742), that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Parts 430, 436, and 446 are amended as follows:

PART 430—ANTIBIOTIC DRUGS; GENERAL

1. Part 430 is amended: a. In § 430.5 by adding paragraphs (a)(70) and (b)(70) to read as follows:

§ 430.5 Definitions of master and working standards.

(a) * * *

(70) *Meclocycline.* The term "meclocycline master standard" means a specific lot of meclocycline that is designated by the Commissioner as the standard of comparison in determining the potency of the meclocycline working standard.

(b) * * *

(70) *Meclocycline.* The term "meclocycline working standard" means a specific lot of a homogeneous preparation of meclocycline.

b. In § 430.6 by adding paragraph (b)(72) to read as follows:

§ 430.6 Definitions of the terms "unit" and "microgram" as applied to antibiotic substances.

* * * * *

(b) * * *

(72) *Meclocycline.* The term "microgram" applied to meclocycline means the meclocycline activity (potency) contained in 1.0493 micrograms of the meclocycline master standard.

PART 436—TESTS AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

2. Part 436 is amended:

a. In § 436.106 (a) and (b) by alphabetically inserting a new item into the respective tables as follows:

§ 436.106 Microbiological turbidimetric assay.

* * * * * * *

(a) * * *

	Working standard stock solutions						Standard response line concentrations
Antibiotic	Drying conditions (method number as listed in § 436.200)	Initial solvent	Diluent (solution number as listed in § 436.101(a))	Final concentration units or milligrams per milliliter	Storage time under refrigeration	Diluent (solution number as listed in § 436.101(a))	Final concentrations—units or micrograms of antibiotic activity per milliliter
*	*	*	*	*	*	*	*
Meclocycline	Not dried		13	1 mg	Use same day	Distilled water	0.048, 0.054, 0.06, 0.067, 0.075 µg
*	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*

(b) * * *

Antibiotic	Test organism	Medium (nutrient broth)	Suggested volume of standardized inoculum to be added to each 100 milliliters of medium (nutrient broth)	Incubation temperature
			Milliliters	*Degrees C*
* * *	*	*	*	*
Meclocycline	A	3	0.2	36-37.5
* * *	*	*	*	*
* * *	*	*	*	*

b. By adding new § 436.329 to read as follows:

§ 436.329 High-pressure liquid chromatographic assay for meclocycline.

(a) *Equipment.* A suitable high-pressure liquid chromatograph, such as a Waters Associates Model 244 [1] or equivalent equipped with:

(1 A low dead volume cell 8 to 20 microliters;

(2) A light path of 1 centimeter;

(3) A suitable ultraviolet detection system operating at a wavelength of 340 nanometers;

(4) A suitable recorder of at least 25.4 centimeter deflection;

(5) A suitable integrator;

(6) A column approximately 25 centimeters in length having an inside diameter of approximately 4 millimeters and packed with a suitable reverse-phase packing such as: 10 micrometer silica gel particles bonded to octadecyl silane, Vydac 201 TP Reverse Phase [2] or equivalent.

(b) *Reagents*—(1) *0.001M Ammonium (ethylenedinitrilo) tetraacetate.* Moisten 293 milligrams of (ethylenedinitrilo) tetraacetic acid with 1 milliliter of methanol and dissolve in 7 milliliters of concentrated ammonium hydroxide. Dilute to 900 milliliters with distilled water, adjust the pH to 6.6 with glacial acetic acid, and dilute to 1,000 milliliters with distilled water.

(2) *Mobile phase.* Mix 150 milliliters of tetrahydrofuran (high-pressure liquid chromatography grade) with 850 milliliters of 0.001*M* ammonium (ethylenedinitrilo) tetraacetate. Filter the mobile phase through a suitable glass fiber filter or equivalent that is capable of removing particulate contamination to 1 micron in diameter. Degas the mobile phase just prior to its introduction into the chromatograph pumping system.

(c) *Operating conditions.* Perform the assay at ambient temperature with a typical flow rate of 0.8 milliliter per minute. Use a detector sensitivity setting that gives a peak height for the reference standard that is at least 50 percent of scale. The minimum between peaks must be no more than 2 millimeters above the initial baseline.

(d) *Preparation of sample and working standard solutions.* Accurately weigh an amount of sample or working standard equivalent to approximately 25 milligrams of meclocycline into a 50-milliliter volumetric flask. Dissolve and dilute to volume with methanol and mix. Transfer exactly 3.0 milliliters of this solution to a 25-milliliter volumetric flask, dilute to volume with mobile phase, and mix.

(e) *Procedure.* Using the equipment, reagents, and operating conditions listed in paragraphs (a), (b), and (c) of this section, inject 10 microliters of the sample or working standard solution prepared as described in paragraph (d) of this section into the chromatograph. Allow an elution time sufficient to obtain satisfactory separation of expected components. The elution order is void volume, oxytetracycline (if present), demeclocycline (if present), methacycline (if present), and meclocycline.

(f) *Calculations.* Calculate the meclocycline content as follows:

$$\text{Micrograms of meclocycline per milligram} = \frac{A}{B} \times \text{milligrams of working standard} \times \text{potency of the working standard in micrograms per milligram} \times \frac{1}{\text{milligrams of sample}}$$

where:

A = Area or peak height of the sample peak (at a retention time equal to that observed for the standard);

B = Area or peak height of the standard peak.

[1] Available from: Water Associates, Inc., Maple St., Milford, MA 10757.

[2] Available from: The Separations Group, 18640 Spruce St., Hesperia, CA 92345.

PART 446—TETRACYCLINE ANTIBIOTIC DRUGS

3. Part 446 is amended:

a. In Subpart A by adding new § 446.42 to read as follows:

§ 446.42 Meclocycline sulfosalicylate.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Meclocycline sulfosalicylate is the sulfosalicylate salt of 7-chloro-4-(dimethylamino)-1,4,4a,5,5a,6,11,12a-octahydro-3,5,10,12,12a-pentahydroxy-6-methylene-1,11-dioxo-2-

naphthacenecarboxamide. It is so purified and dried that:

(i) Its potency is not less than 620 micrograms of meclocycline per milligram on an "as is" basis.

(ii) Its moisture content is not more than 4.0 percent.

(iii) Its pH is an aqueous suspension containing 10 milligrams per milliliter is not less than 2.5 and not more than 3.5.

(iv) It is crystalline.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on potency, moisture, pH, and crystallinity.

(ii) Samples required: 10 packages, each containing approximately 300 milligrams.

(b) *Tests and methods of assay*—(1) *Potency.* Use either of the following methods; however, the results obtained from the high-pressure liquid chromatography method shall be conclusive.

(i) *High-pressure liquid chromatography.* Proceed as directed in § 436.329 of this chapter.

(ii) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Dissolve an accurately weighed portion of the sample in sufficient 0.01*N* methanolic hydrochloric acid (solution 13) to obtain a stock solution of convenient concentration. Further dilute an aliquot of the stock solution with distilled water to the reference concentration of 0.06 microgram of meclocycline per milliliter (estimated).

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *pH.* Proceed as directed in § 436.202 of this chapter, using an aqueous suspension containing 10 milligrams of meclocycline per milliliter.

(4) *Crystallinity.* Proceed as directed in § 436.203(a) of this chapter.

b. In Subpart F by adding new § 446.542 to read as follows:

§ 446.542 Meclocycline sulfosalicylate cream.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Meclocycline sulfosalicylate cream contains meclocycline sulfosalicylate in a suitable and harmless cream base. Each gram contains meclocycline sulfosalicylate equivalent to 10 milligrams of meclocycline. Its potency is satisfactory if it is not less than 90 percent and not more than 125 percent of the number of milligrams of meclocycline that it is represented to contain. the meclocycline sulfosalicylate used conforms to the standards prescribed by § 446.42(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(*a*) The meclocycline sulfosalicylate used in making the batch for potency, moisture, pH, and crystallinity.

(*b*) The batch for potency.

(ii) Samples required:

(*a*) The meclocycline sulfosalicylate used in making the batch: 10 packages, each containing approximately 300 milligrams.

(*b*) The batch: A minimum of five immediate containers.

(b) *Tests and methods of assay; potency.* Use either of the following methods; however, the results obtained from the high-pressure liquid chromatography method shall be conclusive.

(1) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Place an accurately weighed representative portion of the sample into a high-speed glass blender jar containing sufficient 0.01*N* methanolic hydrochloric acid (solution 13) to obtain a stock solution of convenient concentration. Blend for 3 to 5 minutes. Further dilute an aliquot of the stock solution with distilled water to the reference concentration of 0.06 microgram of meclocycline per milliliter (estimated).

(2) *High-pressure liquid chromatography.* Proceed as directed in § 436.329 of this chapter, except, prepare the working standard and sample solution and calculate the meclocycline content as follows:

(i) *Preparation of standard solution.* Accurately weigh an amount of working standard equivalent to approximately 25 milligrams of meclocycline into a 50-milliliter volumetric flask and mix. Transfer exactly 2.0 milliliters of this solution to a 100-milliliter volumetric flask, dilute to volume with mobile phase, and mix.

(ii) *Preparation of sample solution.* Accurately weigh approximately 0.4 to 0.7 gram of sample into a 50-milliliter glass-stoppered centrifuge tube. Add 20 milliliters of methanol and 20 milliliters of 0.025*N* sulfuric acid. Disperse the sample thoroughly by a combination of ultrasonic/vortexing and shaking by hand. Shake for 15 minutes on a wrist action shaker. Quantitatively transfer the contents of the centrifuge tube into a 50-milliliter volumetric flask. Rinse the centrifuge tube with two 5-milliliter portions of methanol and add to the flask. Dilute to volume with methanol and mix. Transfer a portion of the content of the volumetric flask into an appropriate-sized centrifuge tube. Centrifuge for 5 minutes at 2,000 revolutions per minute. Transfer 5.0 milliliters of this solution into a 50-milliliter volumetric flask and dilute to volume with mobile phase and mix. Filter this solution through a 0.5 micrometer filter. Inject the filtrate onto the column.

(iii) *Calculations.* Calculate the meclocyline content as follows:

$$\text{Meclocycline content of cream in percent} = \frac{A \times 2 \times \text{milligrams of working standard} \times \text{Potency of working standard in micrograms per milligram}}{B \times 100 \times \text{milligrams of sample}}$$

This regulation announces standards that FDA has accepted in a request for approval of an antibiotic drug. In accordance with the conditions for certification in section 506 of the act, FDA permits the manufacturer to market this drug on a "release" status pending the regulation's becoming effective. Because this regulation is not controversial and because when effective it provides notice of accepted standards and permits earlier certification of regulated products, notice and comment procedure and delayed effective date are found to be unnecessary and not in the public interest. The amendment, therefore, is effective January 16, 1981. However, interested persons may, on or before February 17, 1981, submit to the Dockets

Management Branch (FDA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written comments on this rule. Four copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch office between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this regulation may file objections to it, request a hearing, and show reasonable grounds for the hearing. Any person who decides to seek a hearing must file (1) on or before February 17, 1981, a written notice of participation and request for hearing, and (2) on or before March 17, 1981, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 430.20. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 430.20.

All submissions under this order must be filed in four copies, identified with the docket number appearing in the heading of this order, with the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the office of the Dockets Management Branch, between 9 a.m. and 4 p.m., Monday through Friday.

Effective date. This regulation shall be effective January 16, 1981.

(Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357))

Dated: December 29, 1980.

Philip L. Paquin,

Acting Director, Bureau of Drugs.

[FR Doc. 81-1307 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Parts 436 and 453

[Docket No. 80N-0316]

Tests and Methods of Assay of Antibiotic-Containing Drugs and Lincomycin Antibiotic Drugs; Microbiological Turbidimetric Assay for Lincomycin Hydrochloride Monohydrate

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the antibiotic drug regulations to provide for an improved method for determining the lincomycin potency of drugs containing lincomycin hydrochloride monohydrate. The new method, microbiological turbidimetric assay, replaces the micribiological agar diffusion assay for lincomycin potency. The regulation is intended to improve drug quality.

DATES: Effective January 16, 1981; comments by February 17, 1981.

ADDRESS: Written comments to the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Joan Eckert, Bureau of Drugs (HFD–140), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4290.

SUPPLEMENTARY INFORMATION: FDA is replacing the microbiological agar diffusion assay currently specified in the regulations for determining the potency of the antibiotic drug lincomycin hydrochloride monohydrate with a microbiological turbidimetric assay. The agency finds that the microbiological turbidimetric assay method is more accurate and reliable than the method being replaced in the regulations.

Three minor editorial changes are also included in this document. The word "monohydrate" is added to correct the section heading for sterile lincomycin hydrochloride; vapor phase chromatography is changed to gas liquid chromatography to reflect current nomenclature; and the work "sirup" is changed to read "syrup" in the section heading for lincomycin hydrochloride sirup and wherever it appears in the monograph to conform with U.S.P. nomenclature.

Also, the chemical method, gas liquid chromatography, is made the conclusive potency assay to reflect current certification practices.

The agency has determined pursuant to 21 CFR 25.24(b)(22) (proposed December 11, 1979, 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Parts 436 and 453 are amended as follows:

1. Part 436 is amended as follows:

PART 436—TEST AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

§ 436.105 [Amended]

a. In § 436.105 *Microbiological agar diffusion assay*, paragraphs (a) and (b) are amended by removing the item "Lincomycin" from the respective tables.

b. In § 436.106(a) and (b) by alphabetically inserting a new item in the respective tables to read as follows:

§ 436.106 **Microbiological trubidimetric assay.**

* * * * * * * *

(a) * * *

Antibiotic	Working standard stock solutions: Drying conditions (method number as listed in § 436.200)	Working standard stock solutions: Initial solvent	Working standard stock solutions: Diluent (solution number as listed in § 436.101(a))	Working standard stock solutions: Final concentration units or milligrams per milliliter	Working standard stock solutions: Storage time under refrigeration	Standard response line concentrations: Diluent (solution number as listed in § 436.101 (a))	Standard response line concentrations: Final concentration—units or micrograms of antibiotic activity per milliliter
*	*	*	*	*	*	*	*
Lincomycin	Not dried		Distilled water	1 mg	1 month	Distilled water	0.400, 0.447, 0.500, 0.559, 0.625μg
*	*	*	*	*	*	*	*

* * * * * * * *

(b) * * *

Antibiotic	Test organism	Medium (nutrient broth)	Suggested volume of standarized inoculum to be added to each 100 milliliters of medium (nutrient broth)	Incubation temperature
			Milliliters	*Degrees C.*
*	*	*	*	*
Lincomycin	A	3	0.1	36–37.5
*	*	*	*	*

* * * * * * * *

c. In § 436.306 by revising the section heading to read as follows:

§ 436.306 Lincomycin gas liquid chromatography.

* * * * *

2. Part 453, is amended as follows:

PART 453—LINCOMYCIN ANTIBIOTIC DRUGS

a. In § 453.30 by revising paragraph (a)(1)(viii), the introductory text of paragraph (b)(1), paragraph (b)(1)(i) and the heading of paragraph (b)(1)(ii) to read as follows:

§ 453.30 Lincomycin hydrochloride monohydrate.

(a) * * *

(1) * * *

(viii) It passes the identity test if the elution pattern of the lincomycin sample compares quantitatively to that of the lincomycin working standard under identical conditions of gas liquid chromatography.

* * * * *

(b) * * *

(1) *Potency.* Use either of the following methods; however, the results obtained from the gas liquid chromatography assay shall be conclusive.

(i) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Dissolve an accurately weighed sample in sufficient sterile distilled water to obtain a stock solution of convenient concentration. Further dilute an aliquot of the stock solution with sterile distilled water to the reference concentration of 0.5 microgram of lincomycin per milliliter (estimated).

(ii) *Gas liquid chromatography assay.* * * *

* * * * *

b. In § 453.30a by revising the section heading and paragraph (a)(1)(xi), the introductory text of paragraph (b)(1), paragraph (b)(1)(i), and the heading of paragraph (b)(1)(ii) to read as follows:

§ 453.30a Sterile lincomycin hydrochloride monohydrate.

(a) * * *

(1) * * *

(xi) It passes the identity test if the elution pattern of the lincomycin sample compares quantitatively to that of the lincomycin working standard under identical conditions of gas liquid chromatorgrphy.

* * * * *

(b) * * *

(1) *Potency.* Use either of the following methods; however, the results obtained from the gas liquid chromatography assay shall be conclusive.

(i) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Dissolve an accurately weighed sample in sufficient sterile distilled water to obtain a stock solution of convenient concentration. Further dilute an aliquot of the stock solution with sterile distilled water to the reference concentration of 0.5 microgram of lincomycin per milliliter (estimated).

(ii) *Gas liquid chromatography assay.* * * *

* * * * *

c. In § 453.130a by revising the introductory text of paragraph (b)(1), paragraph (b)(1)(i), and the heading of paragraph (b)(1)(ii) to read as follows:

§ 453.130a Lincomycin hydrochloride monohydrate capsules.

* * * * *

(b) * * *

(1) *Potency.* Use either of the following methods; however, the results obtained from the gas liquid chromatography assay shall be conclusive.

(i) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Place a representative number of capsules into a high-speed glass blender jar with sufficient sterile distilled water to obtain a stock solution of convenient concentration. Blend for 3 to 5 minutes. Remove an aliquot of the stock solution and further dilute with sterile distilled water to the reference concentration of 0.5 microgram of lincomycin per milliliter (estimated).

(ii) *Gas liquid chromatography assay.* * * *

* * * * *

d. In § 453.130b by revising the section heading, the first sentence in paragraph (a)(1), and paragraph (b)(1) to read as follows:

§ 453.130b Lincomycin hydrochloride syrup.

(a) * * *

(1) *Standards of identity, strength, quality, and purity.* Lincomycin hydrochloride syrup is a syrup containing lincomycin hydrochloride monohydrate, one or more suitable preservatives, flavorings, sweetening agents, colorings, and purified water.

* * *

* * * * *

(b) * * *

(1) *Potency.* Use either of the following methods; however, the results obtained from the gas liquid chromatography assay shall be conclusive.

(i) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Remove an accurately measured representative sample with a suitable hypodermic needle and syringe. Place into a high-speed glass blender jar with sufficient sterile distilled water to give a total volume of 500 milliliters. Blend for 3 to 5 minutes. Further dilute an aliquot with sterile distilled water to the reference concentration of 0.5 microgram of lincomycin per milliliter (estimated).

(ii) *Gas liquid chromatography assay.* Proceed as directed in § 436.306 of this chapter, except prepare the sample for assay by either of the following methods:

(*a*) Place an aliquot of syrup, containing the equivalent of 250 milligrams of lincomycin into a 50-milliliter volumetric flask and add 30 milliliters of absolute ethanol. Place on a steam bath and boil gently for 5 minutes. Remove from the steam bath and cool. Add ethanol to prior volume level and let stand overnight. Adjust to mark, shake well, and transfer a 5-milliliter aliquot into a 25-milliliter volumetric flask and make to mark with methanol. Place 4 milliliters of this solution in a 15-milliliter centrifuge tube and evaporate to dryness on a steam bath with a stream of dry air. Dissolve the residue in 1 milliliter of dry pryidine. Calculate the lincomycin content as follows:

$$\text{Lincomycin content in milligrams per milliliter} = \frac{(R_u)(W_s)(d)(f)}{(R_s)(M)}$$

where:

R_u = Area of lincomycin sample peak / Area of internal standard;

R_s = Area of lincomycin standard peak / Area of internal standard;

W_s = Weight of lincomycin working standard in milligrams;

d = Dilution factor;

f = Potency of lincomycin working standard in milligrams of lincomycin per milligram;

M = Milliliters of syrup used.

(*b*) Treat the lincomycin working standard and sample in a similar manner, except lyophilize an aliquot of the sample containing the equivalent of 50 milligrams of lincomycin. To approximately 50 milligrams of the standard, accurately weighed, and to the dried residue of the sample, add 5 milliliters of dry pyridine which contains 10 milligrams of tetraphenylcyclopentadienone per milliliter. Warm on a hot plate for 5 minutes to attain complete solution. Remove from the hot plate and add 5 milliliters of hexamethyldisilazane and 2 milliliters of trimethylchlorosilane. Shake mechanically for 60 minutes, then centrifuge for 15 minutes. Inject 2 microliters of the supernate into the chromatograph. Calculate the lincomycin content as follows:

$$\text{Lincomycin content in milligrams per milliliter of syrup} = \frac{(R_u)(W_s)(f)}{(R_s)(M)}$$

where:

R_u = Area of lincomycin sample peak / Area of internal standard;

R_s = Area of lincomycin standard peak / Area of internal standard;

W_s = Weight of lincomycin working standard in milligrams;

f = Potency of lincomycin working standard in milligrams of lincomycin per milligram;

M = Milliliters of syrup used.

* * * * *

e. In § 453.230 by revising the introductory text of paragraph (b)(1), paragraph (b)(1)(i), and the heading of paragraph (b)(1)(ii) to read as follows:

§ 453.230 Lincomycin hydrochloride injection.

* * * * *

(b) * * *

(1) *Potency.* Use either of the following methods; however, the results obtained from the gas liquid chromatography assay shall be conclusive.

(i) *Microbiological turbidimetric assay.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Using a suitable hypodermic needle and syringe, remove all of the withdrawable contents if it is represented as a single-dose container; or, if the labeling specifies the amount of potency in a given volume of the resultant preparation, remove an accurately measured representative portion from each container. Place the portion, thus obtained, into a suitably-sized volumetric flask and dilute to volume with sterile distilled water. Remove an aliquot and further dilute with sterile distilled water to the reference concentration of 0.5 microgram of lincomycin per milliliter (estimated).

(ii) *Gas liquid chromatography assay.* * * *

* * * * *

This amendment institutes changes that are either corrective, editorial, or of a minor substantive nature. In addition, because this amendment is an improvement in testing procedures and the only manufacturer affected has agreed to the change, the Food and Drug Administration finds that prior notice, public procedure and delayed effective date are unnecessary and not in the public interest. The amendment may become effective January 16, 1981. However, an opportunity is provided for submission of comments to determine whether the regulation should subsequently be modified or revoked. Interested persons may, on or before Febraury 17, 1981, submit to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, written comments on this regulation. Four copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. (A copy of the agreement with the manufacturer is on file with the Dockets Management Branch).

Any person who will be adversely affected by this regulation may file objections to it, request a hearing, and show reasonable grounds for the hearing. Any person who decides to seek a hearing must file (1) on or before February 17, 1981, a written notice of participation and request for hearing, and (2) on or before March 17, 1981, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 430.20. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 430.20.

All submissions under this order must be filed in four copies, identified with the docket number appearing in the heading of this order, with the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the office of the Dockets Management Branch, between 9 a.m. and 4 p.m., Monday through Friday.

Effective date. This regulation shall be effective January 16, 1981.

(Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357))

Dated: January 6, 1981

Mary A. McEniry,

Assistant Director for Regulatory Affairs, Bureau of Drugs.

[FR Doc. 81-308 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Antibiotic, Nitrofuran, and Sulfonamide Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect the change of sponsor from Thompson-Hayward Chemical Co. to A. L. Laboratories, Inc., the new name for International Minerals & Chemical Corp., and the new drug name for bactracin zinc. The **Federal Register** publications that established these revisions in other sections failed to amend § 558.15 accordingly. This document corrects that omission.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Robert S. Brigham, Bureau of Veterinary Medicine (HFV-238), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-6243.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 5, 1977 (42 FR 18060), FDA amended the animal drug regulations in 21 CFR 510.600 and 558.15 to reflect the change of sponsor of NADA 98-452 from Thompson-Hayward Chemical Co. to A.L. Laboratories, Inc. In the **Federal Register** of February 16, 1979 (44 FR 10058), FDA amended the regulations in 21 CFR 510.600(c) to reflect the change of sponsor name from IMC Chemical Group to International Minerals & Chemical Corp. In the **Federal Register** of June 13, 1978 (43 FR 25444), the agency proposed, and in the **Federal Register** of April 13, 1979 (44 FR 22053) published, a final rule for several amendments to the bacitracin regulations in 21 CFR Part 548, including the name change from zinc bacitracin to bacitracin zinc. The bacitracin name change conforms to a recent revision in the U.S. Pharmacopoeia (U.S.P. XX). The amendments failed to amend 21 CFR 558.15 to reflect the changes. This document amends 21 CFR 558.15 to provide for these changes.

§ 558.15 [Amended]

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))), under the authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1) and redelegated to the Bureau of Veterinary

Medicine (21 CFR 5.83), § 558.15 *Antibiotic, nitrofuran, and sulfonamide drugs in the feed of animals* is amended in paragraph (g) (1) and (2) in the column "Drug sponsor", by deleting the sponsor name "IMC Chemical Group, Inc.," and inserting in its place the name "International Minerals & Chemical Corp.," by deleting the sponsor name "Thompson-Hayward Chemical Co." and inserting in its place "A. L. Laboratories, Inc.," and in paragraph (g)(1) in the column "Drug premix" and in paragraph (g)(2) in the column "Drug ingredient" by deleting the drug name "Zinc bacitracin" and inserting in its place the name "Bacitracin zinc" wherever it appears.

Effective date. This regulation is effective January 16, 1981.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)))

Dated: January 7, 1981.

Gerald B. Guest,

Acting Director, Bureau of Veterinary Medicine.

[FR Doc. 81-1310 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Tylosin and Sulfamethazine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration amends the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Custom Feed Blenders Corp., providing for safe and effective use of a premix containing 10 grams-per-pound each of tylosin and sulfamethazine for making complete swine feeds.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Jack C. Taylor, Bureau of Veterinary Medicine (HFV-136), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-5247.

SUPPLEMENTARY INFORMATION: Custom Feed Blenders Corp., 540 Hawkeye Ave., Fort Dodge, IA 50501, is the sponsor of NADA 122-522 providing for use of premix containing 10 grams per pound each of tylosin (as tylosin phosphate) and sulfamethazine for making complete swine feeds used to increase rate of weight gain and to improve feed efficiency.

Approval of this application is based on safety and effectiveness data contained in Elanco Products Co.'s approved NADA 41-275. Use of the data in NADA 41-275 to support this application has been authorized by Elanco. This approval does not change the approved use of the drug. Consequently, approval of this NADA poses no increased human risk from exposure to residues of the animal drug, nor does it change the conditions of the drug's safe use in the target animal species. Accordingly, under the Bureau of Veterinary Medicine's supplemental approval policy (see the **Federal Register** of December 23, 1977 (42 FR 64367)), approval of this NADA has been treated as would approval of a Category II supplemental NADA and does not require reevaluation of the safety and effectiveness data in NADA 41-275.

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

The agency has determined pursuant to 21 CFR 25.24(d)(1) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))), under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1) and redelegated to the Director of the Bureau of Veterinary Medicine (21 CFR 5.83), Part 558 is amended in § 558.630 by revising paragraph (b)(3) to read as follows:

§ 558.630 Tylosin and sulfamethazine.

* * * * *

(b) * * *

(3) To 011490, 016968, 017255, 017274, 026186, 034500, 035955, 043743, 046987: 10 grams per pound each, paragraph (f)(2)(ii) of this section.

* * * * *

Effective date. This regulation is effective January 16, 1981.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)))

Dated: January 7, 1981.

Gerald B. Guest,

Acting Director, Bureau of Veterinary Medicine.

[FR Doc. 81-1309 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Part 241

[Docket No. R-81-696]

Mortgage and Loan Insurance Programs Under the National Housing Act

AGENCY: Department of Housing and Urban Development.

ACTION: Final rule.

SUMMARY: This final rule amends 24 CFR 241.65 to delete the requirement that the term of a supplementary financing loan insured under Section 214 of the National Housing Act may not exceed the remaining term of the insured mortgage. Section 319 of the Housing and Community Development Amendments of 1979 eliminated the maturity requirement.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Linda D. Cheatham, Office of Multifamily Housing Development, Development Division, Room 6116, 451 Seventh Street, SW., Washington, D.C. 20410. (202) 755-9280 (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: Section 319 of the Housing and Community Development Amendments of 1979 amended Section 241(b)(2) of the National Housing Act to eliminate the requirement that the maximum term of a loan insured under Section 241 could not exceed the remaining term of the insured mortgage. Section 241.65 of 24 CFR is being amended to implement that statutory change.

The Secretary has determined that, in light of the current economic situation, the benefit afforded by this amendment should be made available as soon as possible. Publishing a notice of proposed rulemaking and giving the public an opportunity to comment on this amendment would cause a substantial delay in making the benefit available. Therefore, the Secretary finds that notice and public procedure on this amendment would be contrary to the public interest. Accordingly, this

amendment will become effective as soon as legally permissible following publication of this rule in the **Federal Register**.

A Finding of no significant Impact respecting the National Environmental Policy Act of 1969 has been made in accordance with HUD procedures. A copy of this Finding of Inapplicability will be available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

This rule is not listed in the Department's semiannual agenda of significant rules, published pursuant to Executive Order 12044 as extended by Executive Order 12221.

Accordingly, Title 24, Code of Federal Regulations, § 241.65 is revised as follows:

§ 241.65 Maturity.

The loan shall have a maturity satisfactory to the Commissioner.

(Section 319, Housing and Community Development Amendments of 1979)

Issued at Washington, D.C., on December 1, 1980.

Clyde McHenry,

Deputy Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 81-1739 Filed 1-15-81; 8:45 am]

BILLING CODE 4210-01-M

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24 CFR Part 885

[Docket No. R-81-897]

Loans for Housing for the Elderly or Handicapped (Interest Rate Determination)

AGENCY: Department of Housing and Urban Development (HUD).

ACTION: Final rule.

SUMMARY: This amendment implements the determination by the Secretary of HUD that the allowance for administrative costs and probable losses to be included in the Section 202 direct loan interest rate charged to Borrowers should be ¼ of 1 percent per annum for both the construction loan and the permanent loan. These loans are for housing for the elderly or handicapped.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT: George O. Hipps, Jr., Director, Office of Multifamily Housing Development, 451 7th Street, S.W., Room 6128, Washington, D.C. 20410, Telephone (202) 755-5720. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The present regulation provision (24 CFR 885.410(g)) incorporates a determination by the Secretary that the allowance for administrative costs and probable losses should be 1 percent per annum during the construction period and ⅛ of 1 percent per annum thereafter.

The Section 202 interest rate is based on a rate determined by the Secretary of the Treasury taking into account the average interest rate on all interest-bearing obligations of the United States forming a part of the public debt, computed as of the end of the preceding fiscal year plus the allowance determined by the HUD Secretary.

Because the average interest rate on Federal borrowing during the first half of Fiscal Year 1980 was extraordinarily high, many Section 202 sponsor organizations have sought administrative and statutory relief to obtain a rate not in excess of that charged HUD on loans made during Fiscal Year 1980.

HUD shares the program sponsors' concern over the possible detrimental effect of a higher interest rate on program viability. Therefore, based on consideration of the large portfolio of Section 202 loans now held by HUD, the relatively low number of defaults so far experienced and administrative costs for the program, the Secretary has determined that an allowance of ¼ of 1 percent per annum should be added to the rate determined by the Secretary of the Treasury, beginning with loans made in Fiscal Year 1981.

Because of the remedial nature of the Section 202 interest rate change and in order to avoid further delay in processing projects presently in development, the Department has determined that there is good cause for making this rule effective as soon as possible.

A determination has also been made that public comments need not be obtained because of the remedial nature of the change. Accordingly, this Final Rule becomes effective on the date set forth above.

The Catalog of Federal Domestic Assistance Program title and number is Housing for the Elderly or Handicapped, 14.157.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement Section 102(2)(c) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours at the Office of the Rules Docket Clerk, Office of the General Counsel, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

This Rule is not listed in the Department's semiannual agenda of significant rules, published pursuant to Executive Order 12221.

Accordingly, 24 CFR Part 885, § 885.410(g) (1) and (2) is revised to read as follows:

§ 885.410 Amount and terms of financing.

* * * * *

(g) The loan shall bear interest at a rate established by the Secretary by adding:

(1) A rate determined by the Secretary of the Treasury to be the average interest rate on all interest-bearing obligations to the United States then forming a part of the public debt computed at the end of the fiscal year immediately prior to the date on which the loan is made; plus

(2) an allowance to cover administrative costs and probable losses under the program, which allowance has been determined by the Secretary of HUD to be one-fourth of one percent (.25%) per annum for both the construction and permanent loan periods.

* * * * *

(Sec. 202, Housing Act of 1959 (12 U.S.C. 1701q); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)))

Issued at Washington, D.C., December 2, 1980.

Lawrence B. Simons,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 81-1740 Filed 1-15-81; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Parts 0 and 40

[Order No. 924-81]

Office of Inmate Grievance Procedure Certification Standards for Inmate Grievance Procedures

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The "Civil Rights of Institutionalized Persons Act," requires that the Attorney General of the United States promulgate minimum standards for inmate grievance procedures and establish a method of certifying such procedures. The following fulfills these requirements.

EFFECTIVE DATE: The "Civil Rights of Institutionalized Persons Act" states

that the standards for inmate grievance procedures shall become effective thirty legislative days after the date of publication.

FOR FURTHER INFORMATION CONTACT: William R. Yeomans, Attorney-Advisor, Office for Improvements in the Administration of Justice, Department of Justice, Room 4250, Main Justice Building, Washington, D.C. 20530 (202–633–4582).

SUPPLEMENTARY INFORMATION: "The Civil Rights of Institutionalized Persons Act" of 1980 grants the Attorney General authority to initiate and to intervene in civil actions against states and their political subdivisions to protect the federal rights of institutionalized persons. It also encourages the protection of constitutional rights of adults in correctional facilities by encouraging the development and implementation of administrative mechanisms for the resolution of prisoner grievances within institutions.

The Act requires that the Attorney General develop minimum standards for prisoner grievance mechanisms in adult correctional and detention facilities. States and their political subdivisions voluntarily may submit plans for grievance mechanisms to the Attorney General for certification that they comply with the standards. Courts may continue cases filed pursuant to 42 U.S.C. 1983 by adults confined in correctional or detention facilities for a period of up to 90 days in order to allow exhaustion of the grievance mechanism, if the Attorney General has certified a plan, or the court determines that the grievance mechanism is in substantial compliance with the minimum standards promulgated by the Attorney General. Such continuances should only occur if the issues raised in the action pursuant to 42 U.S.C. 1983 reasonably can be expected to be resolved by the grievance mechanism.

Section 7, Pub. L. 96–247, 94 Stat. 353 (42 U.S.C. 1997e) requires that the minimum standards for grievance mechanisms provide for an advisory role for employees and prisoners in the formulation, implementation, and operation of the mechanism; specific time limits for written replies to grievances including explanations of decisions; priority processing of emergency grievances; safeguards to prevent reprisals against grievants; and independent review of grievance decisions "by a person or other entity not under the direct supervision or direct control of the institution."

The Act also requires that the Attorney General develop a certification procedure to determine whether grievance procedures submitted to the Attorney General are in substantial compliance with the minimum standards. An Office of Inmate Grievance Procedure Certification is created to apply the standards.

A total of sixteen comments were received in response to the publication on November 28, 1980 (45 FR 79095) of the proposed rule. This section responds to the major comments. The following comments prompted changes in the final rule:

Comment One. It was suggested that the proposed definition of "grievance" was too restrictive. Therefore, the definition of a "grievance" was expanded to include "a written complaint by an inmate on the inmate's own behalf regarding * * * a condition in an institution * * *". (See § 40.1(d)). It was thought that this addition combined with the proposed language would allow an inmate to file a grievance regarding any aspect of confinement that might cause the inmate harm and that was not governed by some other procedure, such as a disciplinary or parole proceeding.

Comment Two. It was pointed out that grievance procedures are intended to be adopted by states or their political subdivisions and that the use of "institution" in § 40.2 was inappropriate. The word "institution" has been replaced by "applicant". (See § 40.2).

Comment Three. It was proposed that § 40.5 was unclear where it stated: "The grievance procedure shall not supplant disciplinary procedures." In order to clarify the meaning, the sentence has been changed to read: "The grievance procedure shall not be used as a disciplinary procedure." (See § 40.5).

Comment Four. It was suggested that inclusion of information reflecting trends over time in the use of a grievance procedure would contribute to the usefulness of the evaluation of the procedure. Consequently, the requirement was added to § 40.11 that the evaluation report on "year to year trends in inmate use of the grievance procedure". (See § 40.11).

The following significant comments are not reflected in the final rule for the reasons stated:

Comment One. It was suggested that the standards reflect the different natures of short and long-term holding facilities. It was determined that compliance with the proposed standards by facilities that house inmates for short periods would be difficult. While recognizing the difficulties that such facilities might experience, it was decided that such a distinction was neither practical nor desirable. As a practical matter, the difficulty of administering two sets of standards would introduce confusion and require a larger than desirable bureaucratic structure to apply the standards.

Nor was it thought that separate requirements for short- and long-term facilities were desirable. Under 42 U.S.C. 1997e, certification of a grievance procedure by the Attorney General provides justification for a court to stay consideration of an action by an inmate pursuant to 42 U.S.C. 1983 for 90 days to allow exhaustion of the certified grievance procedure. The possibility that an action by an inmate confined for a short period may be stayed, possibly preventing him from receiving court consideration of his action before his release, places special demands on the fairness of the grievance procedures in short-term holding facilities. Consequently, any dilution of the standards applicable to such facilities was rejected.

Comment Two. It was suggested that § 40.7(b) be changed to permit inmate participation in the disposition of all grievances, not just those "challenging general policy and practices." On the other hand, comments were received opposing inmate participation in the disposition of individual grievances. Both suggestions were rejected in favor of the present language which strikes a desirable balance between the competing concerns of preventing inmate exclusion from meaningful participation in the grievance procedure and affording inmates opportunity to abuse positions of influence.

Comment Three. A variety of comments were offered regarding the nature of the review to be afforded the disposition of inmate grievances under § 40.7(f). The suggestions ranged from elimination altogether of review by a person or entity not under the supervision or control of the corrections agency to providing such review for all grievances. Comments were also received supporting the language of § 40.7(f). It was determined that the proposed language of § 40.7(f) struck a proper balance assuring that the appropriateness of policies challenged through grievances would receive independent examination by individuals who were not responsible for promulgation of the policies, while reducing fears that every grievance would be reviewed outside the correctional agency, thereby creating a potentially costly extra step in the grievance procedure.

Comment Four. It was suggested that the standards require the availability of monetary relief through the grievance procedure. Proposed § 40.6 listed

monetary relief among the remedies that a grievance procedure "may include". The final § 40.6 retains the original language based on a determination that some systems may not be empowered to offer monetary relief through a grievance procedure without amendment of existing statutes. Further, it was determined that, although monetary relief is desirable, it is not an essential component of a fair and effective grievance procedure. Finally, it should be noted that under 42 U.S.C. 1997e a court may determine whether exhaustion of a grievance procedure should be required of an inmate before adjudication of his claim pursuant to 42 U.S.C. 1983. Presumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, exhaustion would not be appropriate.

Comment Five. It was suggested that states with the equivalent of an Administrative Procedure Act be required to adopt formally their grievance procedures. Although formal adoption may be desirable, it does not rise to the level of a requirement for minimum standards for grievance procedures, particularly in consideration of the standards' provisions for inmate and public contribution to the adoption of procedures.

Comment Six. It was suggested that it was not necessary to distribute the written grievance procedure to every inmate, as required by § 40.3. It was decided that this requirement should be retained as the only method of ensuring that all inmates were aware of the existence and workings of the grievance procedure. Such awareness is necessary if inmates are to use the grievance procedure and if they are to contribute meaningfully to its formulation, implementation and operation.

Comment Seven. A comment was received questioning the need for evaluations of grievance procedures, as required by § 40.11. It was determined that such evaluations were essential to inform both corrections administrators and the Attorney General of the effectiveness of grievance procedures. It is essential that grievance procedures, once certified, continue to operate effectively to avoid unfair and needless postponement of court consideration of inmate petitions.

Comment Eight. A comment was received suggesting that the standards address the effect of inmate transfers on pending grievances. It was concluded that the use of a transfer for the purpose of mooting a grievance was covered adequately by § 40.9, which forbids reprisals against inmates for using a grievance procedure. It was also determined that a general rule stating the effect of a transfer on a pending grievance was undesirable in consideration of the myriad matters that may form the subject matter of a grievance. Therefore, it has been left to applicants to treat such matters on a case by case basis. It is expected that the grievance procedure may be used to challenge the mooting of a grievance.

It is the position of the Attorney General that the provision in Section 7, Pub. L. 96-247, 94 Stat. 353 (42 U.S.C. 1997e) subjecting these model standards for inmate grievance procedures to a legislative veto is unconstitutional under Article I, § 7, of the United States Constitution insofar as it deprives the President of the opportunity to veto congressional action that has the effect of law. The standards will be transmitted to Congress as required by Section 7, Pub. L. 96-247, 94 Stat. 353 (42 U.S.C. 1997e) and will be implemented thirty legislative days thereafter. Although any congressional views that are expressed regarding the standards will be considered carefully, any resolution of "disapproval" will not be treated as binding.

For the reasons set forth in the preamble and under the authority of Pub. L. 96-247, 94 Stat. 349 (42 U.S.C. 1997) and 28 U.S.C. 509, 510 and 5 U.S.C. 301, it is hereby ordered as follows:

1. A new Part 40 is added to Title 28, Code of Federal Regulations to read as follows: .

PART 40—STANDARDS FOR INMATE GRIEVANCE PROCEDURES

Subpart A—Minimum Standards for Inmate Grievance Procedures

Sec.
40.1 Definitions.
40.2 Adoption of procedures.
40.3 Communication of procedures.
40.4 Accessibility.
40.5 Applicability.
40.6 Remedies.
40.7 Operation and decision.
40.8 Emergency procedure.
40.9 Reprisals.
40.10 Records.
40.11 Evaluation.

Subpart B—Procedures for Obtaining Certification of a Grievance Procedure

40.12 Submissions by applicant.
40.13 Notice of intent to apply for certification.
40.14 Review by the Attorney General.
40.15 Conditional certification.
40.16 Full certification.
40.17 Denial of certification.
40.18 Reapplication after denial of certification.
40.19 Suspension of certification.
40.20 Withdrawal of certification.
40.21 Contemplated change in certified procedure.
40.22 Notification of court.
40.23 Significance of certification.
Appendix A—Commentary.

Authority: Pub. L. 96-247, 94 Stat. 349 (42 U.S.C. 1997).

Subpart A—Minimum Standards for Inmate Grievance Procedures

§ 40.1 Definitions.

For purposes of this part—

(a) "Act" means the Civil Rights of Institutionalized Persons Act of 1980, Pub. L. 96-247, 94 Stat. 349, (42 U.S.C. 1997).

(b) "Applicant" means a state or political subdivision of a state that submits to the Attorney General a request for certification of a grievance procedure.

(c) "Attorney General" means the Attorney General of the United States or the Attorney General's designees.

(d) "Grievance" means a written complaint by an inmate on the inmate's own behalf regarding a policy applicable within an institution, a condition in an institution, an action involving an inmate of an institution, or an incident occurring within an institution. The term "grievance" does not include a complaint relating to a parole decision.

(e) "Inmate" means an individual confined in an institution for adults who has been convicted of a crime.

(f) "Institution" means a jail, prison, or other correctional facility, or pretrial detention facility that houses adults and is owned, operated, or managed by or provides services on behalf of a state or political subdivision of a state.

(g) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Substantial compliance" means that there is no omission of any essential part from compliance, that any omission consists only of an unimportant defect or omission, and that there has been a firm effort to comply fully with the standards.

§ 40.2 Adoption of procedures.

Each applicant seeking certification of its grievance procedure for purposes of the Act shall adopt a written grievance procedure. Inmates and employees shall be afforded an advisory role in the formulation and implementation of a grievance procedure adopted after the effective date of these regulations, and shall be afforded an advisory role in reviewing the compliance with the standards set forth herein of a grievance procedure adopted prior to the effective date of these regulations.

§ 40.3 Communication of procedures.

The written grievance procedure shall be distributed to all employees and inmates of the institution, together with explanatory materials reasonably necessary to ensure that potential participants understand how to use the procedure. Additionally, each inmate and employee shall, upon arrival at the institution and periodically thereafter, receive an oral explanation of the procedure including the opportunity to have questions regarding the procedure answered orally. Explanatory materials and oral presentations shall be available in any language spoken by a significant portion of the institution's population. An inmate who does not understand a language spoken by a significant portion of the institution's population shall receive an explanation of the grievance procedure in a language in which the inmate is fluent. Impaired and handicapped inmates shall receive explanations in a manner comprehensible to them. All employees of the institution who may reasonably be expected to operate or participate in the grievance procedure shall receive training in the skills necessary to operate or participate in the grievance procedure.

§ 40.4 Accessibility.

Each inmate shall be entitled to invoke the grievance procedure regardless of any disciplinary, classification, or other administrative or legislative decision to which the inmate may be subject. The institution shall ensure that the procedure is accessible to impaired and handicapped inmates.

§ 40.5 Applicability.

The grievance procedure shall be applicable to a broad range of complaints and shall state specifically the types of complaints covered and excluded. At a minimum, the grievance procedure shall permit complaints by inmates regarding policies and conditions within the jurisdiction of the institution or the correctional agency that affect them personally, as well as actions by employees and inmates, and incidents occurring within the institution that affect them personally. The grievance procedure shall not be used as a disciplinary procedure.

§ 40.6 Remedies.

The grievance procedure shall afford a successful grievant a meaningful remedy. Acceptable forms of relief may include, but are not limited to monetary remedies, restitution of property, reclassification, correction of records, personnel actions, agreement by institution officials to remedy an objectionable condition within a reasonable, specified time, and a change in an institution policy or practice. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary.

§ 40.7 Operation and decision.

Initiation. The procedure for initiating a grievance shall be simple and include the use of a standard form. Necessary materials shall be freely available to all inmates and assistance shall be readily available for inmates who cannot complete the forms themselves. Forms shall not demand unnecessary technical compliance with formal structure or detail, but shall encourage a simple and straightforward statement of the inmate's grievance.

(b) *Inmate and employee participation.* The institution shall provide a role for employees and inmates in the operation of the system in such a manner as to promote the credibility and use of the grievance procedure. At a minimum, some employees and inmates shall be permitted to participate directly in an advisory capacity in the disposition of grievances challenging general policy and practices and to review the effectiveness and credibility of the grievance procedure. To protect confidentiality, an inmate shall not participate in the resolution of another inmate's grievance over an objection by the grievant.

(c) *Investigation and consideration.* The institution shall establish a procedure for investigating the allegations and establishing the facts of each grievance. No inmate or employee who appears to be involved in the matter shall participate in any capacity in the resolution of the grievance.

(d) *Reasoned, written responses.* Each grievance shall be answered in writing at each level of decision and review. The response shall state the reasons for the decision reached and shall include a statement that the inmate is entitled to further review, if such is available, and shall contain simple directions for obtaining such review.

(e) *Fixed time limits.* Responses shall be made within fixed time limits at each level of decision. Time limits may vary between institutions, but expeditious processing of grievances at each level of decision is essential to prevent grievances from becoming moot. In all instances grievances must be processed from initiation to final disposition in less than 90 days, unless the grievant agrees in writing to an extension for a fixed period. Expiration of a time limit at any stage of the process shall entitle the grievant to move to the next stage of the process, unless the grievant has agreed in writing to an extension of the time for a response.

(f) *Review.* The grievant shall be entitled to review by a person or other entity, not under the institution's supervision or control, of the disposition of all grievances concerning alleged reprisals by an employee against an inmate and grievances concerning the substance or general application of policy. A grievance challenging a policy promulgated by the correctional agency that supervises the institution shall be reviewed by a person or other entity not under the supervision or control of the correctional agency. The correctional agency must give serious consideration to the results of such review, but need not agree to be bound by the results. A request for review shall be allowed automatically without interference by administrators or employees of the institution or correctional agency and such review shall be conducted without influence or interference by administrators or employees of the institution or correctional agency.

§ 40.8 Emergency procedure.

The grievance procedure shall contain special provision for responding to grievances of an emergency nature. Emergency grievances shall be defined, at a minimum, as matters regarding which disposition according to the regular time limits would subject the inmate to a substantial risk of personal injury, or cause other serious and irreparable harm to the inmate. The grievance procedure shall state specifically the matters that will be reviewed under the emergency procedure. Emergency grievances shall be forwarded immediately, without substantive review to the level at which corrective action can be taken. The procedure for resolving emergency grievances shall provide for expedited responses at every level of decision. The emergency procedure shall also include review by a person or entity not under the supervision or control of the institution.

§ 40.9 Reprisals.

The grievance procedure shall prohibit reprisals against inmates for their use of the procedure, and shall specify the steps that will be taken to prevent and redress reprisals, and the penalties for engaging in a reprisal. "Reprisal" means any action or threat of action against an inmate based on the inmate's use of or participation in the grievance procedure. Each inmate must be given written assurance that use of or participation in the grievance

mechanism will not result in formal or informal reprisals against the inmate. Employees of the institution shall also be given assurances that they will not be subject to reprisals resulting from their participation in the grievance procedure. An inmate shall be entitled to pursue through the grievance procedure a complaint that a reprisal occurred against the inmate.

§ 40.10 Records.

(a) *Nature.* Records regarding the filing and disposition of grievances shall be collected and maintained systematically by the institution. Such records shall be preserved for at least three years following final disposition of the grievance. At a minimum, such records shall include aggregate information regarding the numbers, types and dispositions of grievances, as well as individual records of the date of, and the reasons for each disposition at each stage of the procedure.

(b) *Confidentiality.* Records regarding the participation of an individual in grievance proceedings shall not be available to staff or other inmates, except to the extent that access for clerical processing of the records is necessary. Such records shall not be available to individuals participating in parole decisions. Records of any testimony or evidence received in connection with a grievance proceeding shall not be made available to staff or other inmates, except to the extent that access for clerical processing is necessary or as hereafter provided. Such records shall not be available to individuals participating in parole decisions. Consistent with ensuring confidentiality, staff and inmates who are participating in the disposition of a grievance shall have access to records essential to the resolution of the grievance.

§ 40.11 Evaluation.

The grievance procedure shall contain a plan for periodic evaluation reports, at least annually, of the performance of the grievance procedure. At a minimum, such evaluation shall report on the inmates' use of the grievance procedure, including year to year trends in inmate use of the grievance procedure, information regarding types of grievances filed, types of remedies granted, implementation of remedies, numbers and types of emergency grievances, and the average time for disposition of standard and emergency grievances. The evaluation report shall include recommendations for improvements in the grievance procedure. The evaluation report shall also contain information regarding the costs generated or saved by compliance with 42 U.S.C. 1997e. Evaluation reports shall be reviewed by a person or entity not under the supervision or control of the institution with specific reference to compliance with the standards set forth in §§ 40.2 through 40.10. Such evaluation and review shall be submitted promptly after their completion to the Attorney General.

Subpart B—Procedures for Obtaining Certification of a Grievance Procedure

§ 40.12 Submissions by applicant.

An application for certification shall be submitted to the Office of Inmate Grievance Procedure Certification, Department of Justice, Main Justice Building, Washington, D.C. 20530, and shall contain the following:

(a) *Written statement.* A written statement describing the grievance procedure, including a brief description of the institution or institutions covered by the procedure, with accompanying plans for or evidence of implementation in each institution.

(b) *Instructional materials.* A copy of the instructional materials for inmates and employees regarding use of the grievance procedure together with a description of the manner in which such materials are distributed, a description of the oral explanation of the grievance procedure, including the circumstances under which it is delivered, and a description of the training provided to employees and inmates in the skills necessary to operate the grievance procedure.

(c) *Form.* A copy of the form used by inmates to initiate a grievance and to obtain review of the disposition of a grievance.

(d) *Information regarding past performance.* For a procedure that has operated for more than one year at the time of the application, the applicant shall submit information regarding the number and types of grievances filed over the preceding year, the disposition of the grievances with sample responses from each level of decision, the remedies granted, evidence of compliance with time limits at each level of decision, and a description of the role of inmates and employees in the formulation, implementation, and operation of the grievance procedure.

(e) *Plan for collecting information.* For a procedure that has operated for less than one year at the time of the application, the applicant shall submit a plan for collecting the information described in paragraph (d) of this section.

(f) *Assurance of confidentiality.* A description of the steps taken to ensure the confidentiality of records of individual use of or participation in the grievance procedure.

(g) *Evaluation.* A description of the plans for periodic evaluation of the grievance procedure, including identification of the group, individuals or individual who will conduct the evaluation and identification of the person or entity not under the control or supervision of the institution who will review the evaluation, together with two copies of the most recent evaluation, if one has been performed.

(h) *Public participation.* A list of all local agencies, interested persons and groups that have received a copy of the grievance procedure submitted to the Attorney General.

§ 40.13 Notice of intent to apply for certification.

The applicant shall publish notice of its intent to request certification in at least one newspaper that receives general circulation in the vicinity of each institution to be covered by the application. The notice shall invite comments regarding the grievance procedure and direct them to the Attorney General. A similar notice shall be posted within each institution to be covered by the application.

§ 40.14 Review by the Attorney General.

The Attorney General shall review and respond to each application as promptly as the circumstances, including the need for independent investigation and consideration of the comments of agencies, and interested groups and persons, permit.

§ 40.15 Conditional certification.

If, in the judgment of the Attorney General, a grievance procedure that has been in existence less than one year is at the time of application in substantial compliance with the standards promulgated herein, the Attorney General shall grant conditional certification for one year or until the applicant satisfies the requirements of § 40.16, whichever period is shorter.

§ 40.16 Full certification.

If, in the judgment of the Attorney General, a grievance procedure that has been in existence longer than one year at the time of application is in substantial compliance with the standards promulgated herein, full certification shall be granted. Such certification shall remain in effect unless and until the Attorney General finds reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the

minimum standards and so notifies the applicant in writing.

§ 40.17 Denial of certification.

If the Attorney General finds that the grievance procedure is not in substantial compliance with the standards promulgated herein, the Attorney General shall deny certification and inform the applicant in writing of the area or areas in which the grievance procedure or the application is deemed inadequate.

§ 40.18 Reapplication after denial of certification.

An applicant denied certification may resubmit an application for certification at any time after the inadequacy in the application or the grievance procedure is corrected.

§ 40.19 Suspension of certification.

(a) *Reasonable belief of non-compliance.* If the Attorney General has reasonable grounds to believe that previously certified grievance procedure may no longer be in substantial compliance with the minimum standards, the Attorney General shall suspend certification. The suspension shall continue until such time as the deficiency is corrected, in which case certification shall be reinstated, or until the Attorney General determines that substantial compliance no longer exists, in which case, except as provided in paragraph (b) of this section, the Attorney General shall withdraw certification pursuant to § 40.20.

(b) *Defect may be readily remedied; good faith effort.* If the Attorney General determines that a grievance procedure is no longer in substantial compliance with the minimum standards, but has reason to believe that the defect may be readily corrected and that good faith efforts are underway to correct it, the Attorney General may suspend certification until the grievance procedure returns to compliance with the minimum standards.

(c) *Recertification after suspension pursuant to paragraph (a).* The Attorney General shall reinstate the certification of an applicant whose certification was suspended pursuant to paragraph (a) of this section upon a demonstration in writing by the applicant that the specific deficiency on which the suspension was based has been corrected or that the information that caused the Attorney General to suspend certification was erroneous.

(d) *Recertification after suspension pursuant to paragraph (b).* The Attorney General shall reinstate the certification of an applicant whose certification has been suspended pursuant to paragraph (b) upon a demonstration in writing that the deficiency on which the suspension was based has been corrected.

(e) *Notification in writing of suspension or reinstatement.* The Attorney General shall notify an applicant in writing that certification has been suspended or reinstated and state the reasons for the action.

§ 40.20 Withdrawal of certification.

(a) *Finding of non-compliance.* If the Attorney General finds that a grievance procedure is no longer in substantial compliance with the minimum standards, the Attorney General shall withdraw certification, unless the Attorney General concludes that suspension of certification under § 40.19(b) of this part is appropriate.

(b) *Notification in writing of withdrawal of certification.* The Attorney General shall notify an applicant in writing that certification has been withdrawn and state the reasons for the action.

(c) *Recertification after withdrawal.* An applicant whose certification has been withdrawn and who wishes to receive recertification shall submit a new application for certification.

§ 40.21 Contemplated change in certified procedure.

A proposed change in a certified procedure must be submitted to the Attorney General thirty days in advance of its proposed effective date. The Attorney General shall review such proposed change and notify the applicant in writing before the effective date of the proposed change whether such change will result in suspension or withdrawal of the certification of the grievance procedure.

§ 40.22 Notification of court.

The Attorney General shall notify in writing the Chief Judges of the United States Court of Appeals and of the United States District Court(s) within whose jurisdiction the applicant is located of the certification, suspension of certification, withdrawal of certification and recertification of the applicant's grievance procedure. The Attorney General shall also notify the court of the certification status of any grievance procedure the request of the court or any party in an action by an adult inmate pursuant to 42 U.S.C. 1983.

§ 40.23 Significance of certification.

Certification of a grievance procedure by the Attorney General shall signify only that on the basis of the information submitted, the Attorney General believes the grievance procedure is in substantial compliance with the minimum standards. Certification shall not indicate approval of the use or application of the grievance procedure in a particular case.

Appendix A—Commentary

Section 40.2 Adoption of Procedures

The essential feature of this standard is the requirement that the grievance procedure be adopted in writing. Written grievance procedures provide assurances to inmates that established procedures exist for processing, reviewing, and resolving their complaints. They also assist institutional administrators and staff by providing guidance regarding the proper handling of inmate complaints.

Section 40.3 Communication of Procedures—written and oral explanation

This standard is intended to ensure that the institution takes reasonable steps to communicate how and when to use the grievance procedure to the inmates. The standard incorporates the requirement of 42 U.S.C. 1997e that inmates and employees participate in the formulation and implementation of the grievance procedure. The type of participation is left to the correctional agency or institution to determine, but it should be of such a nature as to enhance the credibility of the grievance mechanism by fostering a sense of inmate and employee responsibility for the final design and operation of the procedure. For further comment on the need to foster inmate and employee responsibility see Commentary on § 40.7(b) below.

Research on existing grievance mechanisms sheds important light on the need for inmate familiarity with those mechanisms.[1] Many inmates may not develop extensive knowledge of

[1] The relevant research is limited to general surveys of grievance mechanisms presently in use and evaluations of their effects on such factors as inmate and staff attitudes concerning the resolution of complaints, patterns of use by inmates, and dispositions of grievances resolved. Very few of the studies gather extensive empirical data on the operation and effects of grievance mechanisms. Those that do are limited to individual correctional institutions or systems. Thus, extensive empirical comparisons between the effects of different types of grievance mechanisms on prisons and inmates are not available.

Most of the research simply describes the operation of grievance mechanisms, and inmate and staff perceptions of their fairness and efficiency. It is not possible to draw firm conclusions from this research about the effectiveness of grievance mechanisms in reducing levels of tension or violence in institutions, or even about whether there are significant systematic differences among grievance mechanisms in their effects on prisons. Accordingly, discussion of research in this commentary only summarizes the research findings that are related to the central points of discussion and that are strongly supported across the literature cited.

their rights under grievance mechanisms or of the specific procedures used in filing grievances or appealing grievance decisions.[2] Formal orientation involving inmates and staff may reduce apprehension when the grievance mechanisms are introduced, increase awareness of their existence, and stimulate their use in settling disputes.[3]

Thorough orientation and training about grievance mechanisms is necessary for both inmates and staff. Orientation for inmates might involve both inmate and staff participation, and should attempt to increase inmates' knowledge of rules and procedures in filing grievances and appealing grievance decisions. Training for employees and inmates should cover the skills necessary to participate in and, where appropriate, operate the grievance procedure. Active involvement and support by the institutional administration in training and orientation is important.[4]

Section 40.4 Accessibility

An inmate must have access to the grievance procedure, regardless of personal impairments or handicaps. The purposes of a grievance procedure cannot be fulfilled if certain classes of inmates are prevented from using it. The provisions of 42 U.S.C. 1997e apply to adult inmates convicted of crimes. Although juveniles and pretrial detainees are excluded, as a matter of sound policy and equal treatment, institutions containing mixed populations are encouraged to open the grievance procedure to all inmates, despite the ability of inmates not covered by the Act to proceed directly to court.

Section 40.5 Applicability

The range of complaints to which the grievance procedure applies and the types of remedies that the procedure affords are fundamental features of the design of a grievance mechanism. Pursuant to 42 U.S.C. 1997e, a court may stay any inmate action filed under 42 U.S.C. 1983 for 90 days to allow exhaustion of a grievance procedure. If exhaustion is to be a realistic alternative in such cases, the grievance procedure must be applicable to many complaints that could be raised in an action under section 1983 and the relief available under the procedures must approximate the remedies available under the statute. Otherwise, a major purpose of the "Civil Rights of Institutionalized Persons Act"—to permit non-judicial resolution of inmate grievances—may not be realized.

Grievance mechanisms should explicitly state what matters or categories of complaints are subject to review under the procedure in order to ensure proper and necessary use of the procedure. General examples of such matters include institutional policies, applications of the policies, actions by employees or other inmates, and living conditions within the institution. There also should be explicit statements of matters not subject to review. Applicants are encouraged to use the grievance procedure to determine whether a complaint is grievable. The grievance procedure shall not replace disciplinary procedures which are subject to certain constitutional safeguards.

Section 40.6 Remedies

The requirement that grievance procedures afford meaningful remedies is essential. The procedures should clearly specify the types of remedies that are within their scope and authority. Examples of such remedies include monetary relief, restitution of a grievant's property, correction of records, reclassification, and changes in institutional policies or practices that are the subject of grievances. As stated previously, if the purposes of the Civil Rights of Institutionalized Persons Act are to be fulfilled, grievance procedures must be empowered to award a broad range of remedies.

Section 40.7 Operation and Decision

a. *Initiation.* All inmates should be permitted to file grievances. The requisite materials should be readily accessible to every inmate in the institution, regardless of classification or disciplinary status. Since the effectiveness of a complaint may turn on the ability of the inmate to express the compliant in writing, inmates with handicaps or minimal or diminished capacity for written expression must be afforded assistance in presenting their grievances. However, this standard should not be read as requiring the provisions of legal representation for inmates.

In filing grievances, inmates should not be forced to comply with technicalities of form or detail, but should be required only to state their compliant in a simple, straightforward manner. The use of a standard form will assist the simplification of the filing process and assist decision-makers by structuring the presentation of the grievance.

b. *Inmate and Employee Participation.* Taken in conjunction with § 40.2 of this part, this standard requires inmate and employee participation in the formulation, implementation and operation of the grievance procedure. The exact nature of the participation is left to each applicant for certification with the caveat that the participation must be such as to promote the credibility and use of the grievance procedure.

Inmate participation in an advisory capacity is mandated at the most decentralized level reasonably possible. This requirement is intended to ensure that inmates play a role in the initial consideration of their grievances. Such participation will allow full airing of the dispute at the earliest possible time and promote prompt and efficient settlement of grievances.

Examples of inmate involvement include participation in designing grievance procedures, reviewing the overall operation of the grievance system and working with staff to assure the system is successful and credible. Staff and administration involvement may include participation in the design of grievance procedures, and in dispute resolution through the grievance mechanisms. Administrators may also serve in reviewing capacities.

As a reflection of the concern for confidentiality expressed in Standard IV(b), this Standard allows an inmate to request that other inmates not participate in the actual resolution of a grievance filed by the inmate. Barring such a request, inmates may have other inmates participate in an advisory capacity in the resolution of their disputes, although the standard does not require that any inmates have access to confidential records. A request that inmates not participate in the resolution of a dispute shall be made by the inmate who filed the grievance and may be withdrawn before the grievance procedure is completed.

Many existing grievance procedures are designed to include inmate participation. A recent survey indicates that under some programs inmates accept and screen incoming grievances and work together with staff in settling inmates' disputes.[5] The survey also showed that almost one-third of the

[2] California Youth Authority, *Final Evaluation of Ward Grievance Procedure at Karl Holton School*, 26, (1974) (hereinafter cited as California Youth Authority Report).

[3] M. Keating, V. McArthur, M. Lewis, K. Sebelvis, and L. Singer, *Grievance Mechanisms in Correctional Institutions* (1975) (hereinafter cited Keating et al.); J. Hepburn, J. Lave, and M. Becker, *To Do Justice: An Analysis of the Development of Inmate Grievance Resolution Procedures and a Final Report for the Center for Community Justice* (1978) (hereinafter cited as Hepburn et al.).

[4] Keating et al., *supra* note 3, at 30.

[5] Dillingham and Singer, *Complaint Procedures in Prisons and Jails: An Examination of Recent Experience*, pp. 22–23 (1980).

programs that involve prisoner participation and hearings on grievances give prisoners "decision-making" roles.[6]

There is reason to believe that prisoners in programs with participatory grievance mechanisms may be more willing to use the grievance mechanism.[7] A study by Dillingham and Singer suggests that more prisoners feel that complaints are handled fairly and satisfactorily under participatory grievance procedures (those with inmate participation and external review) than do under nonparticipatory procedures.[8] This finding may be due in part to the higher rates of dispositions favoring inmates in correctional systems using participatory grievance procedures.[9]

Another study indicates that prisoners and correctional officers may often feel participatory grievance procedures achieve fair, useful and expeditious resolution of prisoners' complaints.[10] Correctional administrators also feel that, as a general matter, grievance mechanisms are effective in resolving prisoner complaints.[11] Some administrators indicate that prisoner participation in grievance mechanisms enables prisoners to question and challenge policies more easily, more expeditiously, and at lower levels of decision-making within the institution.[12] Hepburn et al. report that line-officers and staff involved in participatory grievance procedures, who may initially resist involvement due to concerns over weakening authority and reduced autonomy, may come to believe that the procedures improve working conditions by (1) reducing prisoner hostility toward staff, (2) clarifying ambiguous or contradictory policies, and (3) effecting change in unpopular or unenforceable institutional rules.[13] In brief, available evidence shows that grievance mechanisms that provide for inmate and staff involvement tend to be perceived as fair and effective, and thus achieve greater credibility.

c. *Investigation and consideration.* A grievance procedure must have a method for investigating the allegations contained in a grievance and establishing the facts necessary to be just resolution. The method need not be modeled on a strict adversarial approach to grievance resolution, but it may be necessary for inmates to be interviewed personally regarding their grievances.

To enhance the impartiality of grievance decisions, the Standard requires that employees and inmates who are the subject of grievances or were involved in the events that produced the grievance not participate in resolving the grievance.

d. *Reasoned, written responses.* The requirement that grievances receive reasoned, written responses may aid in ensuring that grievances are considered carefully by staff and administrators and may inform administrators whether institution policies and procedures are appropriate and are being implemented properly. Equally important is the possible effect upon an inmate of a reasoned, written response. It will give the inmate some assurance that the grievance has been reviewed and should serve to clarify the institutional policy or practice that was the subject of the grievance. Furthermore, the requirement of a written response provides administrators with a document that identifies the outcome of an inmate's grievance. Thus, reasoned, written responses may enhance inmates' perceptions that they have been treated fairly, and may assist administrators in operating the facility.

There is little research concerning responses to grievances. Dillingham and Singer note that summary replies to grievances such as "Request denied—contrary to policy" were often observed in their analysis of grievance records.[14] Dillingham's analysis of the California Youth Authority grievance procedure indicates that mandatory provision for explanations of grievance decisions has resulted in reasoned replies.[15]

e. *Fixed time limits.* The credibility and practical success of grievance procedures may be enhanced if the procedures result in prompt responses to inmates' complaints. Fixed time limits help to ensure inmates that complaints will not be put off by decision-makers. The standard provides that time limits may not be exceeded unless an inmate agrees in writing to an extension. If the inmate has not agreed to an extension and no response is forthcoming during the prescribed period, the inmate may move to the next stage of review. The standard would not affect the ability of correctional systems and institutions to impose stronger penalties for delay among decision-makers.

Surveys of grievance procedures indicate that a great majority impose time limits on replies to inmates' complaints.[16] Many apply these time limits to all levels of the grievance procedure.[17] There is limited information on the comparative efficiency of grievance procedures with fixed time limits and other grievance mechanisms. Dillingham and Singer indicate there may be more complaints filed per prisoner under grievance procedures allowing inmate participation and employing fixed time limits.[18] Hepburn et al. conclude that the grievance procedure with fixed time limits implemented in South Carolina is more efficient than the state ombudsman program handling similar types of complaints.[19]

In spite of fixed time limits, delays in processing grievances may occur in most grievance mechanisms. Failures to comply with time limits in California's Ward Grievance Procedure, for example, occur most frequently during appellate reviews of grievances.[20] Serious delays may also attend upon the introduction of grievance procedures, as was the case following the introduction of a grievance procedure in New York. There, the most frequent delays took place at the initial hearing stages, as a result of heavy filing of grievances and the difficulty of obtaining attendance at hearings of prisoners subject to special conditions of confinement.[21]

f. *Review.* Review of the disposition of inmate grievances may ensure that institutional policies are applied fairly and objectively and that the procedural guarantees of the grievance procedure itself are observed. The standard states two different minimum requirements for review. For grievances that are based on incidents occurring within the institution or that challenge practices, policies or conditions that only pertain in a specific institution, the standard mandates review by a person or entity not under the control or supervision of the institution. For grievances that challenge policies or practices that apply throughout the correctional system, the

[6] *Id.*

[7] Keating et al., *supra* note 3, at 9.

[8] Dillingham and Singer, *supra* note 5, at 51, 56 Table XI, XIII.

[9] Id. at 54.

[10] Dillingham, *Right to Be Heard: An Evaluation of the Ward Grievance Procedure in the California Youth Authority*, at 61, 62 Tables 20–21 (1978); Dillingham and Singer, *supra* note 5, at 51, 52; Keating et al., *supra* note 3, at 49–60. Keating et al.'s analysis of 17 correctional systems indicates that more prisoners in programs with participatory grievance procedures feel that disputes are settled in a timely way than prisoners in programs with other grievance mechanisms.

[11] Dillingham and Singer, *supra* note 5, at 21, 36, 28, 32.

[12] Hepburn et al. *supra*, note 3, at 406–407.

[13] Id. at 406; J. Hepburn and J. Laue, "Prisoner Redress: An Analysis of an Inmate Grievance Procedure," 26 *Crime and Delinquency* 162. Hepburn and Laue suggest that prisoners and staff should have equal roles in resolving grievances.

[14] Dillingham and Singer, *supra* note 5, at 65.

[15] Dillingham, *supra* note 10, at 36–40.

[16] Dillingham and Singer, *supra* note 5, at 23.

[17] *Id.*, at Table V.

[18] *Id.*, at 45 Chart 1.

[19] Hepburn et al., *supra* note 3, at 295–299.

[20] Keating et al., *supra* note 3, at 49–60; Hepburn et al. at 254, 345.

[21] Dillingham, *supra* note 10, at 44 Table 15.

standard requires an independent review—that is, by a person or entity wholly outside the correctional system. The review should ordinarily be a step in the grievance procedure. Evidence from the states' experience shows that this step is rarely invoked. Accordingly, fears that heavy burdens may result from this process appear to be unsupported.

Although correctional administrators are expected to be capable of fair and detached consideration of grievances, a structure that ensures that administrators will not be the only individuals reviewing their own policies will enhance the credibility of the grievance procedure among inmates and will furnish administrators with impartial input into their dispositions of grievances. Although the standard directs correctional agencies to consider the views of the reviewing body or individual, it does not require that the views be binding. Review by a correctional agency of the disposition of a grievance by an institution official will be binding.

It is important to recognize that the standard dictates the minimum level of independence of review. Obviously, independence and its appearance increase as the reviewing authority gains distance from the institution and the correctional structure. For instance, greater independence would be achieved by giving reviewing authority to an individual or group which is separate from the executive branch of government. An example of this would be a legislatively appointed commission or ombudsman. Still greater independence could be achieved by giving the reviewing commission or official binding authority over grievance decisions and other matters pertaining to grievance decisions. While this type of review may be perceived as challenging the authority of correctional administrators, it might improve the credibility of grievance mechanisms among prisoners and result in increased use of the mechanism in settling disputes. No grievance mechanisms currently permit such a degree of independent review of grievance decisions.[22]

A variety of mechanisms exist, however, that employ impartial or "outside" review by individuals or groups not under the direct supervision of the institution or department of corrections. Prisoners may be more likely to use these grievance mechanisms with impartial review and more likely to perceive them as fair and responsive to their complaints than grievance mechanisms with other forms of review.[23] Mechanisms affording impartial review rely on several different types of reviewers: grievance commissions consisting of persons not affiliated with correctional agencies; ombudsmen acting in conjunction with administrative grievance procedures; arbitration panels; and professional arbitrators acting as mediators in the final stage of grievance appeals. Under all grievance mechanisms using outside review, the reviewing bodies make advisory recommendations to correctional administrators with respect to final settlement of grievances.

Section 40.8 Emergency Procedures

A special emergency grievance procedure is necessary to handle matters that will inevitably arise that would result in serious harm to an inmate or a threat to the safety or security of the institution if they were not treated on an expedited basis. It is important, however, that the procedure state explicitly what matters will be subject to emergency treatment so that inmates may avail themselves of the procedure and frivolous filings will be discouraged and screened out quickly when they occur. Emergency grievances must reach a decisionmaker with authority to take corrective action without passing through preliminary levels of substantive review.

Prisoners in systems with emergency provisions may file "emergency" grievances relatively frequently. For example, forty percent of all grievances filed in the California Youth Authority's system in 1977 were initially declared "emergencies."[24] Although the heavy filing of such grievances may be a burden on the operation of the overall grievance mechanism, the provision for handling grievances on an emergency basis may serve as a "safety valve" for prisoners' immediate reactions to institutional problems as well as a mechanism for settling problems which generally require immediate relief.[25]

Section 40.9 Reprisals

Reprisals or fear of reprisals may discourage use of the grievance mechanism. No inmate should be subjected to adverse consequences or threats as a result of having invoked or participated in the grievance procedure. Inmates must, therefore, be given a remedy against possible reprisals, at least to the extent of being permitted to complain of reprisals through the grievance procedure. In addition, employees of the institution should be informed that reprisals against inmates will be viewed seriously by the administrators of the institution and correctional agency and met with specific penalties. And, since employees must also be encouraged to participate freely in the grievance procedure, they should receive assurances against reprisals by administrators.

Research on grievance procedures discloses no evidence of formal reprisals against grievants.[26] Evidence of fear of reprisal among prisoners, however, is clear. Approximately, one-in-six prisoners in the California Youth Authority's initial experiment with grievance procedures reported reluctance to use the procedure due to fear of negative consequences.[27] Similar attitudes have been observed among prisoners in New York and South Carolina.[28] A reprisal feared by many is unfavorable intervention in parole decisions.[29] Such fear may harm the credibility of grievance procedures and limit their usefulness.

Standards for grievance mechanisms cannot be expected to prevent all informal reprisals against grievants, but formal reprisals by staff and administration may be deterred by the remedies discussed above in combination with the safeguards contained in other standards, such as those ensuring the confidentiality of grievance files. To minimize informal reprisals, grievance mechanisms might also provide for immediate independent review of allegations of reprisals.

Section 40.10 Records—Nature; Confidentiality

a. *Nature.* The systematic collection of information regarding the operation of the grievance mechanism is essential for administrators if they are to ensure that the procedure is operating fairly,

[22] Dillingham and Singer, *supra* note 5, at 23, 27; Keating et al., *supra* note 3, at 35–47.

[23] Keating et al., *supra* note 3, at 14; Dillingham and Singer, *supra* note 5, at 43–57. Dillingham and Singer summarize their analysis of interviews with prisoners and staff and examination of records in ten prison systems using different types of grievance mechanisms: "Procedures have a greater chance of success if they include inmates and line staff in resolving complaints, permit appeal to outsiders seen as impartial and adhere to established time limits and other procedural requirements." (at 43) While Dillingham and Singer's findings do not indicate that appellate review by external authorities alone ensures effective dispute resolution, the findings suggest that external review may be necessary to ensure utilization of grievance mechanisms by prisoners and enhance their perception as fair and timely in resolving disputes.

[24] Hepburn et al., *supra* note 3, at 100–101.

[25] *Id.*, at 113.

[26] Hepburn et al., *supra* note 3, at 405.

[27] California Youth Authority Report, *supra* note 2.

[28] Hepburn et al., *supra* note 3, at 162, 281.

[29] Keating et al. *supra* note 3, at 15.

effectively and according to its own internal requirements.

Examples of information which might be collected include types of grievances filed, nature of disputed issues, final dispositions of grievances, levels of review required, compliance with time limits, and reasons for dispositions of grievances.[30]

b. *Confidentiality.* To prevent reprisals, it is important to keep records of individual inmate use and participation in grievance mechanisms out of the reach of fellow inmates and staff. Similarly, to prevent individuals or bodies making parole decisions from considering inmate use or involvement in grievance procedures as a factor in their deliberations, strict precautions must be taken to ensure that such material is not available to them. Fear on the part of inmates that use of or participation in grievance procedures could affect release decisions negatively may restrict use of the grievance procedure. In addition, fear that testimony or evidence produced during grievance proceedings will become known to persons making release decisions may restrict inmate participation in the proceedings and impede efforts to develop fully and accurately the factual bases of grievances.

Although institutional records are exempted from the disclosure requirements of freedom of information acts in many states, it is not the intent of this standard to override such disclosure requirements where they exist under state law.

Section 40.11 Evaluation

Only through periodic evaluations can administrators and outside reviewers guarantee that grievance procedures serve the institutional purposes of administrators while also resolving inmates' grievances fairly. An important concern is the availability of information on grievance processing. Development and implementation of record-keeping as discussed in Standard IX will aid in conducting informed evaluations. The standard requires review of the evaluation by a person or group that is not associated with the institution to assist the administrators of the grievance procedure in maintaining compliance with the standards. The evaluation and the review are to be submitted to the Attorney General to assist him in acquitting his obligation to review certified procedures for continuing compliance with the standards.

An additional concern involves criteria used in evaluations to measure the effectiveness of grievance mechanisms. Criteria should be based upon the specific objectives of the grievance mechanism. Due to the inherent difficulties in determining whether grievance mechanisms meet the general objectives of reducing levels of frustration, tension, and violence among prisoners, Keating et al. recommend that criteria of effectiveness simply reflect prisoners' use of grievance mechanisms and whether such use results in clarification and changes in institutional policies.[31]

2. A new § 0.18 to read as follows, is added to Title 28, Code of Federal Regulations:

§ 0.18 Office of Inmate Grievance Procedure Certification.

The Office of Inmate Grievance Procedure Certification shall be under the direction of a Director. Under the supervision of the Deputy Attorney General, the Director shall review and certify, in accordance with Part 40 of this title, plans for inmate grievance procedures submitted by States or their political subdivisions.

Dated: January 12, 1981.

Benjamin R. Civiletti,

Attorney General.

[FR Doc. 81-1528 Filed 1-15-81; 8:45 am]

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[30] Hepburn et al. *supra* note 3, at 262-264. The standard allows inmates and staff to handle records where necessary for clerical purposes. The most effective method to implement this Standard may be to establish a separate record-keeping system for inmate grievance records. Whenever possible, such records should not be managed or handled by inmates.

[31] Keating et al., *supra* note 3, at 31.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

Walkaround Compensation

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Final rule.

SUMMARY: This document amends 29 CFR 1903.8 to require employers to compensate employees who participate in walkaround inspections and related activities. The requirement will protect the statutory right of employees to participate in inspections of their working conditions with the OSHA inspector and will facilitate walkaround participation, thus increasing the effectiveness of inspections and thereby promoting occupational safety and health.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Office of Public Affairs, Occupational Safety and Health Administration, Third Street and Constitution Avenue, NW., Room N-3641, Washington, D.C. 20210 (Tel. 202-523-6151).

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On November 14, 1980, the Occupational Safety and Health Administration ("OSHA" and the "agency") published in the Federal Register proposed amendments to 29 CFR 1903.8 and 1977 requiring employers to compensate employees who participate in walkaround inspections and related activities. 45 FR 75232. The agency invited the public to submit written data, views and arguments with respect to the proposed amendments and all issues involved therein. Comments were to be postmarked on or before December 29, 1980.

The agency has received numerous comments from businesses, unions, trade associations, law firms and others. In addition, comments relating to the issues in this proceeding were received from OSHA field personnel. All submissions were made part of the record and were duly considered.

B. Statutory Framework

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the "Act" and the "OSH Act"), was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." In order to carry out these purposes, section 8(a) of the Act authorizes the Secretary of Labor ("Secretary") to conduct inspections and investigations of workplaces in order to determine whether violations of the Act are present. An essential feature of such inspections is set forth in section 8(e) of the Act, which provides:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

Thus, the Act grants employer representatives and employee representatives an express right to accompany an OSHA inspector for the purpose of aiding the inspection and provides for consultation with employees by the inspector where there is no authorized employee representative. In addition, section 8(f)(2) of the Act grants employees the right to complain to OSHA compliance officers prior to or during an inspection about possible violations of the Act, and section 8(a)(2) provides that OSHA compliance officers may question employees about workplace conditions. The right to accompany an OSHA inspector may be implemented by the promulgation of regulations pursuant to section 8(e) of the Act. In addition, this provision, as well as other provisions such as sections 8(a)(2), 8(e) and 8(f)(2), may be implemented pursuant to section 8(g)(2) of the Act, which provides:

> The Secretary and the Secretary of Health, Education and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment.

C. History of Walkaround Compensation Regulation

In 1973, the Assistant Secretary of Labor for Occupational Safety and Health, relying in part upon the Solicitor of Labor's opinion that walkaround time was not "hours worked" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(o) (1976), concluded that an employer's failure to pay employees for the time spent with the OSHA inspector was not a *per se* violation of section 11(c). (See 38 FR 2681, 2684 (January 29, 1973) (codified at 29 CFR 1977.21(a) (1975)).

In 1974, a federal district court upheld the Department of Labor's interpretation in a civil action brought by employees to recover wages lost because of participation in an OSHA inspection. *Leone* v. *Mobil Oil Corp.*, 377 F. Supp. 1302 (D.D.C. 1974).

In 1975, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's decision and held that because walkaround time primarily benefits employees and because the walkaround is conducted beyond the employer's control, walkaround time does not constitute "hours worked" under the FLSA. *Leone, supra,* 523 F.2d 1153, 1163–64. Furthermore, the court held that a walkaround payment requirement could not be inferred from the provisions of the Occupational Safety and Health Act. *Id.* at 1159–61.

In 1977, the Solicitor of Labor reevaulated the original legal position and, in September 1977, issued a new opinion, based on further study and the agency's experience, which stated that walkaround time was "hours worked" under the FLSA, that an employer's failure to pay employees for that time was inherently destructive of the walkaround right, and that therefore the failure to pay was discrimination prohibited by section 11(c)(1) of the Act. On September 20, 1977, the Assistant Secretary promulgated a rule declaring that "an employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c)." 42 FR 47344. Because the rule was considered "an interpretive rule and general statement of policy," 42 FR 47344, public participation was not provided in accordance with the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. 553.

In 1978, a federal district court, in an action challenging the validity of the new regulation, concluded that the regulation was interpretive and therefore exempt from the notice-and-comment procedures of the APA. *Chamber of Commerce of the United States of America* v. *OSHA*, 465 F. Supp. 10 (D.D.C. 1978), *rev'd* No. 78–2221, 8 BNA OSHC 1648 (D.C. Cir. 1980). The court held that OSHA did not exceed its statutory authority in issuing the new regulation. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the judgment of the district court and remanded the case to that court with instructions to vacate the regulation. *Chamber of Commerce of the United States of America* v. *OSHA*, F. 2d , No. 78–2221, 8 BNA 1648 (D.C. Cir. 1980). The Court of Appeals held that walkaround time did not constitute "hours worked" within the meaning of the FLSA because the employer did not select or regulate the employee representative during the walkaround, nor was the employer the primary beneficiary of the walkaround. The court also held that the Act itself neither prohibited nor compelled pay for walkaround time. Therefore, according to the court, the regulation was not interpretive but legislative. Because OSHA did not comply with the notice-and-comment procedures of the APA for the promulgation of legislative rules, the court concluded that the walkaround pay regulation was invalid and should be vacated. The court expressed no view on whether the Assistant Secretary could reissue the same rule after complying with the notice-and-comment procedures of 5 U.S.C. 553.

On remand, the district court vacated the regulation. On October 31, 1980, the Assistant Secretary deleted the regulation (45 FR 72118) and instructed OSHA field staff to cease enforcing its provisions.

D. Summary of the Proposed Amendment

On November 14, 1980, OSHA proposed regulations requiring employers to compensate employees who participate in walkaround inspections and related activites. In the preamble to the proposal, the agency noted its disagreement with the *Chamber* decision that walkaround time is not "hours worked" under the FLSA but noted that the proposal was not based on any determination that walkaround time is "hours worked" under the FLSA.

Under paragraph (e)(1)(i) of the proposed additions to 29 CFR 1903.8, the employer would have been required to provide to an authorized representative of the employees walkaround benefits for time during which the representative participates in any OSHA inspection of the workplace, including attendance at the opening and closing conferences. Paragraph (e)(1)(ii) of the proposal stated that if a new employee representative replaces an employee representative then on the inspection team, the employer would be required to provide walkaround benefits to each representative for that portion of the walkaround in which each representative participated. Paragraph (e)(1)(iii) provided that if compliance officers inspect different parts of a workplace at the same time or at different times, one employee representative for each inspection team would be entitled to walkaround benefits. Paragraph (e)(1)(iv) would have required employers to provide to any employee walkaround benefits for time spent in other activities related to the inspection. Paragraph (e)(1)(v) defined walkaround benefits. Paragraph (e)(2) provided the method of enforcement of the regulation. Paragraph (e)(3) provided for an effective date of the regulation.

The proposal would have also added a new 29 CFR 1977.21 to Part 1977 which provided that an employer's failure to pay for walkaround time was *per se* discrimination against employees because of the exercise of employee rights and therefore violative of section 11(c)(1) of the Act. With respect to the proposed amendment to 29 CFR Part 1977, the agency has decided, for the reasons discussed below, not to promulgate the proposal at this time.

As noted earlier, the agency has received numerous comments in

response to the November 14, 1980 Federal Register notice. Several commentors requested public hearings on the proposed amendments. The agency reviewed these requests and determined that public hearings would not be held. Since the proposed regulations at 29 CFR 1903.8 and 1977 are not occupational safety and health standards as defined by section 3(8) of the Act, 29 U.S.C. 652(8), the provisions of section 6(b) of the Act, 29 U.S.C. 655(b), do not apply. Additionally, hearings are not required by the APA when, as here, an agency is engaged in informal rulemaking. 5 U.S.C. 553; *Vermont Yankee Nuclear Power* v. *National Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Accordingly, the agency has determined not to conduct public hearings in this matter.

Many commentors requested that the comment period be extended beyond the December 29, 1980 deadline established in the November 14, 1980 Federal Register Notice of Proposed Rulemaking. Most of these commentors cited Executive Order 12044 (43 FR 12661 (March 24, 1978)) and Department of Labor guidelines (44 FR 5570 (January 26, 1979)) in support of their requests.

First, the instant rulemaking was conducted in conformance with the notice-and-comment requirements of the APA. Neither the Executive Order nor the Department of Labor guidelines require a 60-day comment period in every rulemaking proceeding. Both contemplate situations in which the 60-day period will not be provided and require that in such circumstances the regulation be accompanied by a statement of reasons for the shorter time period. The purpose of the provisions of the Executive Order and the Department guidelines is to assure that full public discussion of the issues in the rulemaking be afforded. Here, we believe that this purpose has been more than adequately achieved. As noted in the Notice of Proposed Rulemaking, 45 FR at 75237, the issues relating to pay for walkaround have already been subject to extensive public discussion since the agency's original interpretation was made several years ago. Moreover, since a notice was published by OSHA on October 31, 1980, (45 FR 72118) deleting the walkaround pay interpretive regulation and stating that OSHA was planning to propose a walkaround compensation regulation shortly, as a practical matter, the public had approximately 60 days to prepare and submit comments from the time OSHA first announced its intention to propose a new regulation. Accordingly, the agency determined that the full 60-day comment period was unnecessary and that the comment period should not be extended.

II. Basis and Purpose of the Regulation

A. Statutory Basis

As noted above, section 8(e) expressly authorizes the Secretary to issue regulations implementing the walkaround requirements of that section. In addition section 8(g)(2) empowers the Secretary to promulgate regulations as he may deem necessary to carry out his responsibilities under the Act, including regulations dealing with inspections. The regulation, an addition to 20 CFR 1903.8, which details procedures for selection of employer and employee walkaround representatives, is based on the Secretary's authority under sections 8(e) and 8(g)(2). As discussed more fully below, compensation for time spent in walkaround and related activities will facilitate employee participation in these activities and as a result will enhance the effectiveness of OSHA's inspections. Thus, the regulation being promulgated is necessary to implement the walkaround requirement of section 8(e) and is necessary to effectively carry out the Secretary's responsibilities to conduct occupational safety and health inspections, in accordance with section 8(g)(2).

B. Importance of Employee Walkaround Representative

In proposing the amendments to 29 CFR 1903.8, the agency noted the crucial importance of employee involvement to the successful enforcement of the Act. The Act itself underscores the importance of employee participation in the inspection process and grants employees an express right to accompany an OSHA inspector for the purpose of aiding the inspection. *See* section 8(e) of the Act, 29 U.S.C. 657(e). Other provisions of the Act also seek to facilitate employee participation by attempting to assure a free and open exchange of information between representatives of the Secretary and employees. Thus, the Act expressly provides in section 8(f)(2) that employees have the right to notify the OSHA inspector prior to or during the inspection itself of violations which they have reason to believe exist in the workplace. In addition, section 8(a)(2) of the Act provides that OSHA compliance officers may question employees about workplace conditions and section 8(e) provides that compliance officers may consult with a reasonable number of employees about occupational safety and health matters where there is no employee representative.

The remarks of Senator Williams, Chairman of the Senate Labor Committee and one of the main sponsors of the OSHA bill, reflect the crucial importance of employee participation in the walkaround process:

> During the field hearings held by the subcommittee on labor, the complaint was repeatedly voiced that under existing safety and health legislation, employees are generally not advised of the content and results of a Federal or State inspection. Indeed, they are often not even aware of the inspector's presence and are thereby deprived of an opportunity to inform him of alleged hazards. Much potential benefit of an inspection is therefore never realized, and workers tend to be cynical regarding the thoroughness and efficacy of such inspections. Consequently, in order to aid in the inspection and provide an appropriate degree of involvement of employees themselves in the physical inspections of their own places of employment, the committee has concluded that an authorized representative of employees should be given an opportunity to accompany the person who is making the physical inspection * * * [T]he inspector should have an opportunity to question employees in private so that they will not be hesitant to point out hazardous conditions which they might otherwise be reluctant to discuss.
>
> *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong. 1st Sess., p. 151 (Committee Print, 1971) (Hereinafter *"Leg. Hist."*).
>
> Certainly no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards. The opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair, and in arriving at the objectives of this legislation I think it is one of the key provisions of the bill * * *
>
> Remarks of Senator Williams, *Leg. Hist.* p. 430; *see also Leg. Hist.*, pp. 852, 1216-17.

In addition to the above statements in the legislative history, it has been the agency's experience that employee participation and cooperation at the inspection stage have proved to be crucial to enforcement efforts under the Act. Throughout the agency's nine-year enforcement experience, employees have provided assistance and information essential to enable representatives of the Secretary to determine whether violations of the Act exist and what abatement action should be taken. Employee participation in the walkaround process and related activities has aided the Secretary in the performance of his duties and responsibilities under the Act to conduct

comprehensive and effective inspections.

The importance of employee involvement in the inspection process is substantiated beyond peradventure by the numerous comments addressing the issue. Numerous OSHA field personnel have documented for the record the many ways in which employee participation has aided the Secretary in the performance of his duties and responsibilities. For example, there have been many instances where employees have informed OSHA during the inspection of hazards which might otherwise not have been detected by the compliance officer. *See,* e.g., Exhibits 3–4 at p. 5; 3–6 at p. 6; 3–7 at pp. 4, 5; 3–8 at p. 5; 3–18 at p. 1; 3–19 at p. 9; 3–27 at p. 1. By virtue of their familiarity with the workplace and its operations, employee representatives have ensured that all locations and all phases of workplace activities are examined for possible hazards. *See,* e.g., Exhibits 3–5 at p. 7; 3–7 at p. 2; 3–8 at p. 2; 3–8 at p. 7; 309 at p. 7; 3–10 at p. 4; 3–35 at p. 1. Employees often explain to OSHA inspectors how machinery operates. *See,* e.g., Exhibits 3–4 at p. 4; 3–6 at p. 2; 3–9 at p. 12; 3–25 at p. 2; 3–33 at p. 2. The increasingly complex nature of workplace hazards, as in the health area, has imposed greater burdens on the Secretary in detecting these hazards and has correspondingly made the need for employee involvement at the inspection stage even more compelling. *See,* e.g., Exhibits 3–8 at p. 4; 3–33 at p. 15. In several instances, compliance officers have found that employee representatives clarify or correct representations made to the inspector by employer representatives. *See,* e.g., Exhibits 3–3 at p. 4; 3–4 at p. 2; 3–19 at p. 28; 3–38 at p. 2. Many OSHA personnel have expressed the view that the presence of the employee representative in the inspection team often serves to encourage other employees to discuss workplace conditions with the OSHA inspector. As a result, the statutorily preferred open channels of communication between the Secretary and employees are better facilitated. *See,* e.g., Exhibits 3–4 at pp. 3, 4; 3–6 at pp. 4, 8; 3–9 at pp. 7, 9; 3–11 at pp. 1, 6; 3–12 at pp. 1, 3; 3–19 at p. 9. One compliance officer indicated that the presence of an employee representative reduces tensions among all parties and results in greater cooperation between the inspector and the employer representative. *See* Exhibit 3–11 at p. 3. Moreover, some OSHA personnel believed that the absence of an employee representative makes the conduct of the inspection more difficult. *See,* e.g., Exhibits 3–6 at p. 3; 3–19 at p. 13; 3–25 at p. 3; 3–28 at p. 1. Other inspectors, on the basis of actual experience, have concluded that inspections without the benefit of employee representatives are more difficult to conduct and less efficient than those in which an employee representative participates. *See,* e.g., Exhibits 3–6 at p. 8; 3–8 at p. 8; 3–19 at pp. 11, 15, 16; 3–23 at p. 1.

The agency's experience that employee participation is an essential part of the inspection process is also supported by the comments submitted by the public. *See,* e.g., Exhibits 2–4; 2–58; 2–61; 2–116; 2–141; 2–146; 2–271. Many commentors expressed the view that the worker is in the best position to understand and identify workplace hazards and their location. *See,* e.g., Exhibits 2–69; 2–109; 2–111; 2–123; 2–146; 2–169; 2–215; 2–282, 2–289. Some commentors noted that hazards may go undetected by OSHA inspectors who do not have the benefit of an employee representative's knowledge and experience. *See,* e.g., Exhibits 2–34; 2–61. Other commentors expressed concern that, in the absence of an employee representative, some employers make incomplete or incorrect representations to the inspector regarding workplace practices or conditions. *See,* e.g., Exhibits 2–69, 2–155, 2–256, 2–267, 2–282, 2–307. Also noted were the views that the presence of an employee representative in the inspection team alerts other employees to the inspector's presence and encourages other workers to express their concerns regarding hazardous conditions to the inspectors. *See.* Exhibits 2–196, 2–217.

In view of the above, the agency concludes that the participation of employee representatives in walkaround and related activities is crucial to effective and efficient enforcement of the Act. In reaching this conclusion, the agency is not unmindful of some comments which question the usefulness of employee representatives. *See,* e.g., Exhibits 2–1; 2–44; 2–78; 2–151; 2–185; 2–186; 2–211; 2–214; 2–253; 2–257; 2–261; 2–265; 2–272; 3–9 at p. 15. However, the overwhelming evidence in the record confirms the value of employee participation in the inspection process substantiating the agency's experience and supporting the above finding.

The agency recognizes that a considerable number of walkaround inspections are conducted without the participation of employee walkaround representatives. However, this fact in no way detracts from the importance of employee involvement in the walkaround. Rather, it indicates that in some instances, particularly in non-union establishments, the selection of an employee walkaround representative would be impractical or would entail complex and time-consuming procedures that would seriously delay the conduct of inspections and effective and efficient enforcement of the Act. Section 8(e) of the Act recognizes that in some situations the participation of an employee representative would not be possible; in those cases, the Act requires that the OSHA inspector consult with a reasonable number of employees at the workplace during the course of the inspection. OSHA field instructions require compliance officers to make every effort to determine if an employee walkaround representative can be designated, and where the selection is "impractical" the inspector is directed to proceed to the inspection, interviewing employees as he or she makes the physical tour of the workplace. *See,* Field Operations Manual, V–8. However, the record overwhelmingly shows that where an employee representative has been selected his or her participation is crucial to effective inspection activity.

C. Pay for Employee Representatives

As noted in the November 14, 1980 proposal, the agency believes that forcing employees to suffer economic detriment through loss of pay or other benefits would constitute a serious disincentive to an employee from participating in a walkaround inspection. As a consequence, the failure to pay for walkaround would interfere with the statutory right of employees to accompany the OSHA inspector and to notify compliance officers of hazards prior to and during inspections, a right expressly granted to employees under section 8(f)(2) of the Act. When employees are discouraged from present and future participation in the walkaround and related activities, the open channels of communication between employees and the Secretary would be seriously impaired. OSHA compliance personnel would be substantially limited to reliance on information provided by employers—the subject of the inspection—thereby reducing the likelihood of obtaining complete, objective and useful information on workplace hazards, as discussed earlier. Thus, the failure to pay for walkaround would be harmful not only to the exercise of employees' protected rights but also to the entire enforcement scheme of the Act.

That an employee would be more reluctant to participate in a walkaround if he or she would lose pay for the time involved is, in the view of the agency, a

matter of common sense in light of experience. This view was corroborated by many comments in the record. Commentors stated that walkaround compensation is essential in order to ensure proper administration and enforcement of the Act. *See*, e.g., Exhibits 2–9, 2–271, 2–276, 2–307. Commentors expressed concern over the chilling and deterring effects that the failure to pay walkaround compensation has on employee participation in the inspection. *See*, e.g., Exhibits 2–9, 2–58, 2–116, 2–175, 2–203, 2–269, 2–283, 2–306. Other commentors have noted the inability of many employees to afford a loss of earnings caused by participation in a walkaround. *See*, e.g., Exhibits 2–34, 2–61, 2–94, 2–109, 2–160, 2–210, 2–290. According to several commentors, employees will choose to remain at their work station when presented a choice between receiving pay or accompanying the OSHA inspector without pay, thereby depriving other employees of representation and the inspector of their assistance. *See*, e.g., Exhibits 2–58, 2–133, 2–155, 2–290. This is especially true when lengthy inspections are conducted and significant amounts of compensation would be lost. *See*, e.g., Exhibit 2–276.

In addition to the above, specific instances noted in the record demonstrate that the failure to pay for time spent during the walkaround discourages employee participation in such activities. In one case, the treasurer of the company refused to pay the union representative for time spent on the walkaround and the representative then chose not to accompany the compliance officer. The inspector noted that not having an employee representative made it difficult to ascertain that all work areas and all operations were seen during the high hazard industry inspection of the large facility. *See* Exhibit 3–6, at p. 8.

In another case, the company refused walkaround pay to any person wishing to accompany OSHA personnel during the walkaround, and the union could not pay any of the plant personnel. The president of the union, not a plant employee, was invited to participate in the walkaround but he declined the offer. The inspector noted several ways in which the effectiveness of the inspection was seriously diminished, including a reluctance of employees to speak to the inspector and a very uncooperative attitude on the part of the employer's supervisory personnel. *See* Exhibit 3–19 at p. 11.

In another instance, a company denied walkaround pay to the representative of a local union. The representative spent a few days participating in the inspection conducted in response to a complaint of worker overexposure to carcinogenic and highly toxic chemicals, but after the third day of the inspection he could no longer afford financially to continue on the walkaround. Because of the size and complexity of the facility, as well as the seriousness of the alleged health hazards, the commentor was convinced that the effectiveness of the inspection was diminished by the lack of union representation on the walkaround. *See* Exhibit 2–276.

In another case, a complaint was filed by a union in response to an explosion that killed eight workers and another incident in which exposure to benzene was allegedly found. The complaint triggered a lengthy, complex inspection which at times consisted of up to five inspection teams in the facility at one time, with one union representative on each team. Two weeks into the inspection, the company announced that it would pay walkaround compensation for only one union representative. Thereafter, the union had to reduce the size of its walkaround representation. *See* Exhibit 2–276.

Another case in which lack of compensation served as a disincentive to employee participation in a walkaround occurred during a recent state inspection that lasted three days a week for seven to eight weeks. Because of a past practice of paying the union representative for internal safety inspections, the company agreed to pay one representative for the safety inspection but would not pay for the health inspection participation. Since the local union could not afford to cover that cost, no employee representative covered the inspections for such hazards as lead, arsenic, and sulfur dioxide. *See* Exhibit 2–310.

Several commentors expressed the view that the agency has not provided sufficient evidence to support its conclusion that lack of pay discourages employee participation in inspection process. *See*, e.g., Exhibits 2–83, 2–104, 2–113, 2–114, 2–119, 2–120, 2–128, 2–137, 2–150, 2–202, 2–216, 2–252, 2–253, 2–254, 2–270, 2–279. More specifically, a number of instances were adduced in the comments where employees participated in the walkaround despite the fact that they were not paid. *See*, e.g., exhibits 3–9 at p. 3; 3–19 at p. 7; 3–26. However, these comments in all cases do not make clear whether the employee was not paid at all for the walkaround, or was not paid by the employer but paid by the union. Indeed, a number of cases were mentioned in the record where employees were paid for the walkaround by the union. *See*, e.g., Exhibits 3–9 at pp. 5, 11, 12; 3–25. If, as may well be the case, the employee in these situations was paid by the union, the facts would *not* establish that failure to pay for walkaround is not a disincentive to participation. On the contrary, such union reimbursement in the face of the employer's refusal to pay indicates a recognition by the union that, without such reimbursement, the employees would be reluctant to act as walkaround representatives; accordingly, the unions voluntarily undertook this obligation in order to eliminate the economic suffering which would result from the employees not being paid, thereby enabling them to participate in the walkaround.

We recognize however that the record does not contain numerous specific instances of employee non-participation in walkaround because of non-payment. There therefore remains the question on this record whether the employer who is being inspected should be required to make this payment, or, as has sometimes been the case, the unions should assume this obligation, or employees should be relied on to participate in walkaround without being paid, presumably out of a sense of public responsibility. For the following reasons, the agency concludes that employers should be required to pay for walkaround pay, and that this critical element in the inspection process should not be left to the vagaries of union payment or employees agreeing to participate in walkaround even though it means a loss of pay. In the first place, there will undoubtedly be many cases where no union exists in the plant where the inspection is taking place. Even where there is a union there will be circumstances where the union is unable for financial reasons to undertake this obligation, particularly where the inspection is lengthy and more than one employee walkaround representative is involved. *See*, e.g., Exhibit 2–276. Also, since the union is supported by employee dues, payment by the union for walkaround time in the last analysis must be viewed as employees paying themselves for participation in the walkaround. Finally, it is uncertain to what extent employees are now willing, and would continue to be willing, to assume the walkaround obligation at the sacrifice of wages, particularly in the context of lengthy inspections.

Our conclusion that employers should be mandated to assume this burden is impelled by yet another critical consideration. We have already stated that the inspection process—and the

walkaround which is integral to effective inspection activity—are essential ingredients in the statutory scheme for abatement of workplace hazards and protection of workers. As has been recognized on numerous occasions, Congress has placed on employers the economic burden of taking the necessary actions to neutralize these dangerous conditions. The Senate Labor Committee in its report made it clear that, "Final responsibility for compliance with the requirements of this Act remains with the employer." *Leg. Hist. supra, 150–51; see Atlantic & Gulf Stevedores, Inc.* v. *OSHRC*, 534 F. 2d 541, 553 (3d Cir. 1976). And Senator Eagleton, a member of the subcommittee which considered the OSHA bill, stated that "[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under the bill are * * * reasonable and necessary costs of doing business." *Leg. Hist.* at 1150; *see also Leg. Hist.* at 444. We conclude that just as employers must under the statutory scheme assume the financial burdens of complying with the standards, so must they be obligated to make payments to employees for walkaround time to assure that this critical aspect of Congress' procedure for effective enforcement is fully carried out and not left to the uncertainties of union payment or voluntary action by unpaid employees.

In a strikingly similar situation, the Court of Appeals for the District of Columbia recently upheld a provision of the lead standard requiring employers who removed employees from areas of excessive lead exposure to maintain the earnings and benefits of the removed employees. *See United Steelworkers of America* v. *Marshall*, No. 79–1048, 8 BNA OSHC 1810, 1835–1842 (D.C. Cir., August 15, 1980). The Court relied on various statutory provisions and statements in the legislative history, in concluding that employers had "general financial responsibility" under the Act. *See also American Federation of Labor, etc.* v. *Marshall*, 617 F. 2d 636, 674–75 (D.C. Cir 1979).

In sum, the record evidence supports the self-evident, common-sense proposition that compensation is critical to the effectuation of employees' walkaround rights, which in turn is crucial to effective inspection activity. Clearly, if employees receive no reimbursement for their time spent in engaging in walkaround and related activities, they will be confronted with the Hobson's choice between promoting safety and health and receiving their regular remuneration. Such a choice is antithetical to the remedial purposes of the Act. And, in light of the record, the statutory scheme and the policy considerations discussed above, the agency further concludes that it is employers who should be required to assume the burden of payment for walkaround time.

It should be emphasized that OSHA's requiring walkaround compensation is not based on the "hours worked" provisions of the Fair Labor Standards Act, as the proposal stated. It is also not based on section 11(c) of the Act, which prohibits discrimination against employees for exercising rights under the Act. In the proposal, the agency concluded that failure to pay for walkaround benefits should be considered *per se* discrimination under section 11(c) because of its chilling effect on employee participation. While the agency continues to believe in the validity of the rationale, it has concluded based on the record that the more appropriate means for enforcement of the walkaround pay obligation is through the amendment of 29 CFR 1903.8 and the issuance of citations, and penalties which are adjudicated through the Review Commission. The provision of alternate routes of enforcement—as proposed—would lead to redundancy and confusion. (See, e.g., Exhibit 2–270)

D. Statutory Objections to Walkaround Compensation Requirement

Employers and industry groups commenting on the proposal argue that OSHA exceeded its authority in promulgating a walkaround compensation regulation (*See*, e.g., Exhibits 2–202, 2–253, 2–254, 2–259, 2–265, 2–270). They contend on the basis of *Leone* v. *Mobil Oil Corporation*, 523 F.2d 1153, 1160–61, (D.C. Cir. 1975) that Congress was silent on the issue of walkaround pay and that therefore OSHA is forbidden to promulgate a regulation dealing with the subject. However, Congressional silence on the issue does not lead to this conclusion. We have already discussed at length the legal and policy basis for this regulation. The Act is silent on most specific safety and health issues, but, as *United Steelworkers of America, supra*, notes, the Act gives OSHA broad remedial powers to effectuate Congressional purposes, including section 8(g)(2), with which *Leone, supra*, did not deal. In the later decision on the issue of walkaround pay, *Chamber of Commerce of the United States of America* v. *OSHA*, No. 78–2221, 8 BNA OSHC 1648, 1653 (D.C. Cir., July 10, 1980), the District of Columbia Circuit specifically left open the question of "* * * whether ordering pay for walkaround time is indeed a statutorily authorized, rational, nonarbitrary, and noncapricious method of supplementing the Act's provisions."

Employers and industry groups also contend that since the Act expressly includes certain employee rights, such as the right to file complaints with OSHA under section 8(f), the right to be parties in Occupational Safety and Health Review Commission proceedings, as well as the right of an authorized employee representative to accompany an OSHA compliance officer during a walkaround inspection, the Act excludes all other types of employee rights, such as walkaround benefits. Thus they rely on the canon of construction *expressio unius est exclusio alterius* ("the expression of one is the exclusion of another"). An argument against medical removal protection benefits based on this canon was rejected in *United Steelworkers of America, supra*, which relied on the following language in *Nat'l Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. denied*, 515 U.S. 951 (1975):

> This maxim (*expressio unius est exclusio alterius*) is increasingly considered unreliable * * * for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.

Thus it is incorrect to say that because Congress expressly granted certain rights, such as the walkaround right, it prohibited OSHA from using its broad section 8 rulemaking authority to provide other employee rights, where it determines, after rulemaking, that such rights are necessary to enable the agency effectively to carry out its responsibilities.

Another argument based on the canon *expressio unius* was made by employers and their associations (*See*, e.g., Exhibits 2–202, 2–253). They contend that the express Congressional inclusion of walkaround pay in section 103(f) of the Federal Mine Safety and Health Act of 1977 indicates that in passing the OSH Act in 1970 the Congress intended to preclude OSHA from requiring walkaround pay. This contention is similar to an argument which was rejected in *United Steelworkers of America, supra*, at 1837. In that case an employer association argued that because Congress provided for earnings protection for miners suffering from pneumoconiosis in the Federal Coal Mine Health and Safety Act of 1969, it was aware of the concept of medical removal protection (MRP) in 1970 when it passed the OSH Act and so its failure to require MRP in the OSH Act or to

expressly delegate to OSHA the authority to require MRP proves that Congress intended that OSHA may not include MRP in any standards. After detailing the difficulties inherent in the *expressio unius* canon, as noted previously, the court noted that the maxim can only apply sensibly when very similar statutes are compared. However, as the court noted, there is a crucial difference between the two laws. In the OSH Act the Congress granted OSHA extremely broad authority to prevent all kinds of safety and health hazards throughout American industry. In the Coal Act the Congress created a sharply focused statute with many detailed standards. As the court stated at 1837:

> Congress may well have avoided all mention of medical removal protection in the OSH Act simply because it thought that mandating such a specific program was inappropriate in a statute so much broader and so much more dependent on agency implementation than the Coal Act.

Likewise, the Federal Mine Safety and Health Act of 1977 (to a certain extent the successor to the Coal Act), which is the basis of the employers' argument in this rulemaking proceeding, is a sharply focused statute with many detailed standards. Congress may well have avoided all mention of walkaround pay in the OSH Act because it thought that mandating such a specific program was inappropriate in a statute so much broader and so much more dependent on agency implementation than the Federal Mine Safety and Health Act of 1977. *See also Marshall* v. *Whirlpool Corp.*, 593 F. 2d 715, 723–26 (6th Cir. 1979), *aff'd* 445 U.S. 1 (1980).

Another contention made by employers and industry groups is that an OSHA requirement of walkaround pay would constitute an unwarranted interference with the collective bargaining process (*See* e.g. Exhibits 20103, 2–113, 2–253, 2–254). This type of argument was also rejected in *United Steelworkers of America, supra*, at 1840. Although MRP is a mandatory subject of collective bargaining under federal law, the court held that this fact does not mean that an OSHA requirement for walkaround pay is precluded. As noted by the court, any issue directly related to worker safety or health is a mandatory subject of collective bargaining; in passing the comprehensive OSH Act Congress knew it was laying a basis for OSHA regulations that would replace or obviate the occupational safety and health provisions of many collective bargaining agreements, the court stated. In the view of the court, there is nothing in the OSH Act or other labor legislation to suggest that Congress removed from OSHA the authority to promulgate a regulation necessary in achieving occupational safety and health simply because such a program could otherwise be established through collective bargaining. Such an inference would contradict the principle that remedial welfare and labor laws are to be liberally construed, the court held. This reasoning, which was applied to sustain a provision for medical removal protection benefits, is directly applicable to a provision for walkaround benefits.

Some commentors who oppose the regulation rely upon the current practice of many employers to pay walkaround compensation. Such industry comments argue that since many employers already provide walkaround compensation the regulation is unnecessary. (*See*, e.g., Exhibits 2–113, 2–254, 2–270). However, there is no guarantee that employers will continue this practice. Further, there still are a number of employers which do not provide walkaround compensation (*See*, e.g., Exhibits 2–202, 2–253D, p. 18).

In conclusion, the Act permits OSHA to require employers to provide walkaround benefits. This imposition of the financial burden on employers is justified as a practical matter by the unpredictability of union reimbursement and of a voluntary employer-paid walkaround compensation program.

III. Summary and Explanation of the Regulation and Particular Issues

The following part discusses individual provisions of the regulation, including analysis of the particular issues involving the individual requirements, the record evidence, and the policy considerations underlying the various provisions of the regulation. The language of the regulation closely follows that of the proposed amendment of 29 CFR 1903.8 except for revisions based on OSHA's review of the rulemaking record.

Section 1903.8(e)(1)(i). This provision sets forth the general requirement that employers provide walkaround benefits to authorized employee representatives who accompany compliance officers during inspections. The rationale for this basic requirement has been discussed previously.

One specific issue that has been raised with respect to this provision is the requirement that the employee representative be paid for attendance at opening and closing conferences. Employers commented that opening and closing conferences are not part of the "physical inspection" mentioned in section 8(e) on walkaround rights and that therefore employee representatives have no right to participate in these conferences. (*See*, e.g., Exhibits 2–104, 2–113, 2–202, 2–216, 2–254, 2–270). To the contrary, opening conferences and closing conferences are integral parts of the physical inspection. During the opening conference the purposes of the inspection and procedures for the rest of the inspection are explained. One comment noted that the effectiveness of employee participation in the rest of the inspection is diminished when employee representatives do not understand the broader context of the inspection and cannot assist in planning the inspection because of their non-attendance at the opening conference. (*See* Exhibit 2–252A). The closing conference is also an important part of the inspection because at that time possible violations and abatement periods are discussed. The OSHA Field Operations Manual notes these important functions of the opening and closing conferences. In particular, the Field Operations Manual states that the compliance officer should conduct joint opening and closing conferences with employer and employee representatives; if such joint conferences are not practical separate conferences with employer representatives and employee representatives are to be conducted. *See* Field Operations Manual V–6.2, V–14. Since the opening and closing conferences are integral parts of physical inspections and employee representatives have the right to attend them, the rationale for employer walkaround compensation for the observation portion of the inspection, discussed previously, applies to walkaround compensation for the opening and closing conferences.

Paragraph (e)(1)(ii). Under this requirement, if a new employee representative replaces an employee representative then on the inspection team, the employer would be required to provide walkaround benefits to each representative for that portion of the walkaround in which each representative participated.

Paragraph (e)(1)(iii). Under this provision, if compliance officers, either individually or in groups inspect different parts of a workplace at the same time or at different times—for example, in a large facility—one employee representative for each inspection team would be entitled to walkaround benefits.

In general the regulation specifies the number of employee representatives which must be compensated. Under the regulation one employee representative

accompanying the compliance officer(s) during a walkaround inspection would be entitled to walkaround benefits. In some situations a group of two or more compliance officers will conduct an inspection jointly. In such circumstances only one employee representative would be entitled to benefits. Many union comments stated that if the compliance officer requests additional employee representatives all should receive walkaround benefits. (*See*, e.g., Exhibits 2-107, 2-181, 2-184, 2-268, 2-271, 2-275). Some industry comments opposed this concept on the grounds that compensating more than one employee representative for a single inspection team would be burdensome and disruptive (*See*, Exhibits 2-216, 2-259, 2-270). OSHA rejects the idea that more than one employee representative per inspection team should be compensated because to do so would be burdensome for employers. A single employee representative at a time can usually provide sufficient information to the compliance officer and any lack of information on his part may be supplied by interviews with individual employees at their worksite. Furthermore, compensating only one employee representative for an inspection would be consistent with section 103(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S. 813(b).

As paragraph (e)(1)(iii) states, if more than one inspection team inspects different parts of a workplace at the same time or at different times, there will be more than one employee representative, but, as stated previously, only one for each team. Concern has been expressed about the number of inspection teams on a worksite at the same time (e.g., Ex. 2-270). As a general rule, more than one team is utilized only in large worksites.

A related issue is the number of employee representatives to be compensated at multi-employer worksites, such as construction sites. Concern has been expressed that payment of one employee representative for each employer would be burdensome. (*See* Exhibit 2-270). On the other hand, some unions have urged that each trade on a building site should have a compensated employee representative. (*See*, Exhibit 2-212). Under section 8(e) of the Act, a representative of the employees of each employer is entitled to accompany the compliance officer. Therefore, the representative of the employees of each employer on a multi-employer worksite shall be compensated. As a practical matter, this solution is helpful to the inspection because in any cases each contractor on the site does a different type of work, e.g. carpentry and plumbing, and an employee representative for each employer could provide information on the employer's individual work processes and hazards. However, compensating an employee representative for each trade, when more than one trade works for a single employer, would be unduly burdensome, for the reasons stated previously with respect to the general question of the number of compensated employee representatives for an inspection team.

It should be stated that 29 CFR 1903.8(a) does make provision for more than one employee representative for an inspection team when the compliance officer deems this necessary. Nothing in this regulation should be construed to affect the operation of that provision. Only compensation is affected by this regulation.

Paragraph (e)(1)(iv). The employer would also be required to provide to any employee walkaround benefits for time spent by employees in other activities related to the inspection. The rationale for this provision has been discussed previously.

Paragraph (v). The requirement that the employer provide walkaround benefits is defined to include maintenance not only of the earnings which the employee would have received if he had performed his work duties, but also of all other benefits, such as seniority and insurance, to which an employee would otherwise be entitled for working. The purpose of this provision is to ensure that the employee suffers no economic loss of any kind because of his participation in the inspection. The final regulation, as compared to the proposal, specifies that an employee be paid at the same wage rate during his walkaround activities as he would have been paid for performing his work duties at that time. (For a discussion of overtime pay see paragraph (e)(1)(vi) below.)

Paragraph (e)(1)(vi). Under the regulation employee walkaround representatives and employees engaged in related activities will be entitled to receive walkaround benefits only for time spent in the walkaround inspection during their regular working hours, or overtime hours, which were assigned or would have normally been assigned for purposes other than the inspection. Thus, for example, an employer would not be required to provide walkaround benefits to a representative whose regular working day has ended and has remained in the workplace or who returns to the workplace solely for the purpose of participating in a walkaround inspection.

Comments were specifically invited on the issue whether walkaround benefits should apply to any time during which an employee representative participates in a walkaround inspection or an employee engages in inspection-related activities. A number of unions supported this concept, saying, for example, that the failure to pay for any time, including unplanned overtime, would constitute a disincentive to participation during unplanned overtime hours. (*See*, e.g., Exhibits 2-190, 2-195, 2-204, 2-213, 2-255, 2-256, 2-260, 2-266, 2-268, 2-269, 2-271). A number of employers and employer groups objected to this idea, saying, for example, that if walkaround compensation is to be paid at all, the only type of overtime which should be the subject of compensation is previously scheduled overtime, that to compensate for unplanned overtime would be unlawful, and that an employee representative leaving his shift may be replaced by another representative. (*See*, e.g., Exhibits 2-113, 2-253, 2-254, 2-270). OSHA has determined that it would be unreasonable to require employers to provide walkaround compensation benefits for unplanned overtime because the employee, if he were denied compensation for such time, would not be losing expected compensation. However when an employee is entitled to overtime pay under this regulation because such overtime has been previously planned, the employee will be paid at his normal overtime rate. Such a requirement is necessary to assure that the employee receives the pay that he normally would expect. Failure to receive such expected payment would act as a disincentive to walkaround participation.

Paragraph (e)(2)(i). This regulation would be enforced like other OSHA regulations, such as those in Part 1904 on recordkeeping and reporting. If violations of the regulation are found, citations would be issued under section 9(a) and civil penalties, if appropriate, would be proposed. The employer would have the right to contest these citations before the Occupational Safety and Health Review Commission (see section 10), whose decisions are subject to review in the courts of appeals (see section 11(a)). The Secretary also has the right to seek enforcement of final Review Commission orders in the courts of appeals (section 11(b)).

Paragraph (e)(2)(iii). Under this provision employers found in violation of the other provisions of this regulation would be required to post a notice setting forth the regulation and stating

that a citation became a final order on a certain date with respect to a denial of walkaround compensation for a named employee and that the employer has complied with and promises to comply with the walkaround compensation regulation.

IV. Regulatory Assessment

In accordance with Executive Order No. 12044 (43 FR 12661, March 24, 1978), OSHA has assessed the potential economic impact of this regulation. Based on the economic identification guidelines of the Department of Labor (44 FR 5570, January 26, 1979), OSHA has concluded that the subject matter of this regulation is not a "major" action which would necessitate further economic impact evaluation and the preparation of a regulatory analysis.

In general, the guidelines provide that a regulatory analysis should be performed, if the regulation is likely to cause or result in:

(1) An increased cost of $100 million or more in any one year for the national economy;

(2) A $50 million or larger increase in costs or total revenues in any one year for a specific segment of the economy such as a specific industry, geographic regions or state or local government;

(3) A direct dislocation of 10,000 jobs or more;

(4) A substantial limitation on competition, marketing, market information or an increase in concentration in a market doing $100 million of business a year or more. (44 FR 5576).

The third and fourth factors are not relevant to the regulation. With regard to the first two factors, OSHA estimates that walkaround benefits will amount to approximately $5.3 million a year. This estimate has been made on the basis of statistics which take into consideration average wage rates, the number of federal and state OSHA inspections a year, and the average length of a federal OSHA inspection. It also assumes that the only increased costs, as a general matter, will be compensation for the employee representative's walkaround time because, according to OSHA's experience, employers generally do not deduct from wages for time spent by employees (who are not walkaround representatives) in the discusson of occupational safety and health matters with compliance officers during inspections. The average hourly earnings of a production of nonsupervisory worker on a private nonagricultural payroll during June, 1980, was $6.61. Bureau of Labor Statistics, "Employment and Earnings, September, 1980," "Vol. 27 No. 9 (Exhibit 3-1).

According to OSHA statistics, there were 146,288 federal and state OSHA safety inspections during fiscal year 1979, the latest year for which figures are available; there were 19,272 federal and state health inspections during that time. (Exhibit 3-2). The average length of a federal safety inspection during that year was 4.4 hours; the average length of a federal health inspection was 8.3 hours (Exhibit 3-39). (For this preliminary analysis, the average length of state inspections is assumed to be the same.) On the basis of these figures, the maximum cost of the proposed regulations would be approximately $5.3 million per year, which is clearly below the threshold for classifying a regulation as a major regulation. Moreover, this is a worst-case estimate since many employers already provide walkaround benefits to employee representatives and since many workplaces do not have authorized employee representatives for walkaround and thus the increased cost to employers from these regulations should be much less than $5.3 million. Accordingly, having considered the comments on the cost of walkaround compensation (*See*, e.g. Exhibits, 2-254 and 2-257), it is determined that preparation of a regulatory analysis is not necessary. The benefits of the proposal are significant. As discussed previously, the proposal will encourage walkaround participation, thus increasing the effectiveness of inspections and thereby promoting occupational safety and health.

V. Effective Date

The regulation will be effective with respect to walkaround benefits for time spent in walkaround or related activities on or after the thirtieth day after the promulgation of this regulation. This provision should give employers sufficient time to prepare for compliance with the new regulation as well as satisfy the legitimate expectations for compensation of employees who participate in inspections.

VI. Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Ave., NW., Washington, D.C. 20210.

Accordingly, pursuant to sections 8(e) and 8(g)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657(e) and 657(g)(2)), 5 U.S.C. 553, and Secretary of Labor's Order 8-76 (41 FR 25059), OSHA amends Part 1903 of Title 29 of the Code of Federal Regulations by adding a new paragraph (e) to § 1903.8, as set forth below.

Signed at Washington, D.C. this 13th day of January 1980.

Eula Bingham,

Assistant Secretary, Occupational Safety and Health.

PART 1903—INSPECTIONS, CITATIONS AND PROPOSED PENALTIES

1. 29 CFR 1903.8 is amended by adding a new paragraph (e) to read as follows:

§ 1903.8 Representatives of employers and employees.

* * * * *

(e) *Walkaround compensation*—(1) *Requirements.* (i) The employer shall provide to the authorized representative of the employees walkaround benefits for the time during which the representative accompanies the Compliance Safety and Health Officer(s) in a walkaround inspection team during any physical inspection of a workplace, including attendance at the opening and closing conferences.

(ii) If a new employee representative replaces an employee representative during a walkaround inspection, each representative is entitled to walkaround benefits for the portion of the inspection in which each representative participated.

(iii) If more than one walkaround inspection team is utilized, the employee representative for each team is entitled to the walkaround benefits required by this section.

(iv) In addition, the employer shall provide walkaround benefits to any employee for the time during which (A) a Compliance Safety and Health Officer, in conducting the inspection consults with or questions the employee concerning matters of safety or health in the workplace; or (B) the employee notifies the Compliance Safety and Health Officer, while conducting the inspection, of an occupational safety or health hazard or violation of the Act which the employee has reason to believe exists in such workplace.

(v) For the purposes of this section, the requirement that an employer provide walkaround benefits means that the employer shall maintain the earnings, seniority, and other employment rights and benefits of an employee as though the employee had been performing work for the employer.

(iv) For the purposes of this section, the time spent by an employee for which the employer shall provide walkaround benefits includes only the regular working hours of the employee, or overtime hours which were assigned or

would otherwise normally have been assigned by the employer for purposes other than the walkaround inspection. The rate of pay will be the rate which normally would be applicable for the time if work duties had been performed.

(2) *Enforcement.* (i) Any employer who fails to comply with paragraph (e)(1) of this section shall be subject to citations, civil penalties, and enforcement of Occupational Safety and Health Review Commission orders in the courts of appeals, in accordance with sections 9, 10, 11 (a) and (b), and 17 of the Act.

(ii) Any citation issued against an employer because of his violation of this regulation shall include in the abatement requirements thereof a requirement that the employer shall post a notice within ten days of the date on which the citation or citation item becomes a final order, setting forth that the ordered walkaround compensation has been paid and the employer will comply with the requirement of the regulation in the future. The citation shall also require that the notice shall be posted in a conspicuous place and will remain in place for sixty days.

(3) Effective date. This regulation will be effective with respect to time spent in walkaround or related activities on or after [insert date 30 days after publication].

(Secs. 8(e) and (g)(2); 84 Stat. 1600, 1603 (29 U.S.C. 657(e) and (g)(2) (5 U.S.C. 553); Secretary of Labor's Order 8-76 (41 FR 25059))

[FR Doc. 81-1746 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

Approval of Supplements to California State Plan

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: The State of California has submitted an Occupational Safety and Health Plan supplement containing the restructuring of Safety Engineer classification used in State service (Cal/OSHA). This document announces the approval of the supplement.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Patricia O. Horn, Project Officer, Office of State Programs, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-8045.

SUPPLEMENTARY INFORMATION:

Background

Part 1953 of Title 29, Code of Federal Regulations, provides procedures under Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter referred to as the Act) for review of changes and progress in the development and implementation of State plans which have been approved in accordance with Section 18(c) of the Act and Part 1902 of this chapter. On August 19, 1977, a notice was published in the **Federal Register** (Vol. 42, No. 161) of a decision to approve the California Plan and the adoption of Subpart K to Part 1952 containing the decision.

The U.S. Civil Service Commission found in January 1976 that the California personnel operations were in conformance with the Standards for a Merit System of Personnel Administration. On July 1, 1979, the State adopted a revised stratification of the Safety Engineer series, including salaries and classification, in order to overcome the difficulty in recruiting a significant number of women and minority candidates in safety engineering jobs. The Division of Occupational Safety and Health has had to rely on recruitment efforts directed almost exclusively at the journey level of Safety Engineer, and these circumstances have hampered the Division in its efforts to develop effective affirmative action and upward mobility programs. In addition to these considerations, questions have arisen concerning the lack of salary parity between the safety engineering series and other engineering series in State service, and the supplement addresses these questions as well. Review of this plan supplement by OSHA indicates that the State regulation conforms to the merit system requirements in effect.

Description of Supplement

This supplement establishes a safety engineering technician series to provide an alternative entry into the professional technician series and an upward mobility opportunity for clerical support staff.

Establishing the safety technician series further delineates the levels of complexity of the safety engineering work.

The revised stratification of the Safety Engineer series relieves existing positions of less technical tasks currently assigned, and raises the level of responsibility at which they function.

Comparisons are also made between the supervisory structure of the Safety Engineering series and existing supervisory classes in various engineering disciplines in other State agencies. In addition, salary increases for supervisory personnel are listed along with their class description.

Location of the Plan and Supplement for Inspection and Copying

A copy of the plan and its supplements may be inspected and copied during normal business hours at the following locations:

Office of the Directorate of Federal Compliance and State Programs, 200 Constitution Avenue, N.W., Room N3619, Washington, D.C. 20210

Office of Regional Administrator, Occupational Health and Safety Administration, 450 Golden Gate Avenue, Room 11349, San Francisco, California 94102

California Occupational Safety and Health Administration, 455 Golden Gate Avenue, San Francisco, California 94102

Public Participation

Under § 1953.2 of this Chapter, the Assistant Secretary may prescribe alternative procedures to expedite the review process or for any other good cause which may be consistent with applicable law. The Assistant Secretary finds that this restructuring is consistent with the merit system (personnel administration) contained in the approved plan which was previously made available for public comments. Good cause is, therefore, found for approval of the supplement without public comment and notice.

Decision

After careful consideration, the California plan supplement described above is hereby approved under Part 1953 of this Chapter. This decision incorporates the requirements of the Act and implementing regulations applicable to State plans generally. Accordingly, Subpart K of 29 CFR Part 1952 is amended by adding a new paragraph (f) to § 1952.175 as follows:

§ 1952.175 Changes to approved plan.

* * * * *

(f) In accordance with Subpart E of 1953 of this Chapter, the revised stratification of the Safety Engineer Series, adopted by California on July 1, 1979, was approved by the Assistant Secretary on January 12, 1981.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Washington, D.C. this 12th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-1732 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

29 CFR Part 1952

Approval of Supplements to the Michigan State Plan

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This notice approves the administrative proceedings for granting variances; regulations for inspections and investigations, citations, and proposed penalties; the procedural rules for the State Board of Health and Safety Compliance and Appeals; procedures for notifying complainants of the disposition of complaints; and the 1979 amendments to the Michigan Occupational Safety and Health Act.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: John M. Kelly, Project Officer, Office of State Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-8081.

SUPPLEMENTARY INFORMATION:

Background

Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter referred to as the Act) for review of changes and progress in the development and implementation of State plans which have been approved under Section 18(c) of the Act and 29 CFR Part 1902. On October 3, 1973 notice was published in the **Federal Register** of the approval of the Michigan plan and of the adoption of Subpart T of Part 1952 containing the decision (38 FR 27391). On November 1, 1977, a notice was published in the **Federal Register** (42 FR 57140) acknowledging the receipt of the supplements containing the procedural rules for Variances; regulations for Inspections and Investigations, Citations, and Proposed Penalties; the procedural rules for the State Board of Health and Safety Compliance and Appeals; and copies of letters for notifying complainants of the disposition of complaints. In a letter dated March 17, 1980, to the Acting Regional Administrator, Region V, the State submitted the 1979 amendments to the Michigan State plan for Occupational Safety and Health. Except for the amendments to the Michigan Occupational Safety and Health Act, all the supplements were made available for public comment.

Description of Plan Supplements

1. *Procedural Rules for Granting Variances, Part 12.* The State submitted rules effective March 1, 1976 which provide for the granting of variances under the Michigan Occupational Safety and Health Act. After review by OSHA, the State amended the Rules in May of 1979 to provide that requests for variances and interim orders include a statement concerning the opportunity for public response and a hearing, as well as notice of intention to modify or revoke a variance, and be published in the LABORegister, a publication of the Michigan Department of Labor. The State also agreed not to consider a request for a temporary variance if the standard from which a variance is requested is in effect at the time of the request, and clarified the requirement that the proponent of a permanent variance demonstrate, by a preponderance of evidence, that the operations proposed to be used will provide protection equivalent to that under the standard.

2. *Regulations for Inspections and Investigations, Citations, and Proposed Penalties, Part 13.* The State submitted regulations, effective November 12, 1976, for the conduct of inspections and investigations, the issuance of citations, and the proposal of penalties. They include provisions for regulating exceptions to the prohibition on advance notice of inspections and investigations.

3. *Procedural Rules for the Board of Health and Safety Compliance and Appeals, Part 4.* The State submitted rules of procedures, effective November 23, 1976, governing contested cases before the Board or a hearing officer. After review by OSHA, the State amended the rules, effective May 7, 1979, to include an indication in the rules that certain additional rights are granted to parties under the Michigan Administrative Procedures Act, such as provisions relating to posting of notices of appeals, and provisions dealing with service and notice to employees and employee representatives.

4. *Notification of the Disposition of Complaints.* The State submitted copies of form letters used to notify complainants of the final disposition of their complaints including provision for requesting an informal review of the determination not to issue a citation based on the complaint.

5. *Amendments to the Michigan Occupational Safety and Health Act, Act 154 Public Acts of 1974 (MIOSHA).* MIOSHA was amended by Act 149 of the Public Acts of 1979, approved on November 17, 1979, and became effective March 27, 1980. The amendments include provisions relating to an employer's obligation to pay for personal protective equipment, employee access to health records, employee attendance at meetings, walkaround pay, red tag procedures, collection of civil penalties, employee attendance at first appeal meetings, trade secrets, and discrimination complaints.

Location of the Plan and Its Supplements for Inspection and Copying

A copy of the plan and the supplements may be inspected and copied during normal business hours at the following locations: the Office of the Regional Administrator, Occupational Safety and Health Administration, 230 South Dearborn Street, Chicago, Illinois 60604; Michigan Department of Labor, State Secondary Complex, 7150 Harris Drive, Lansing, Michigan 48926; Office of State Programs, Occupational Safety and Health Administration, Room N-3613, 3rd and Constitution Avenue N.W., Washington, D.C. 20210.

Public Participation

Interested persons were afforded thirty days to submit written comments or request a hearing concerning all the supplements except the amendments to the Michigan Occupational Safety and Health Act. No public comments or request for a hearing were received. The amendments to the Michigan Occupational Safety and Health Act were adopted in accordance with the procedural requirements of State law and further public participation is not necessary.

Decision

After careful consideration, the Michigan plan supplements described above are approved under Part 1953. This decision incorporates the requirements of the Act and implementing regulations applicable to State plans generally. Accordingly, Subpart T of 29 CFR Part 1952.264 is amended by adding new paragraphs (e) and (f) as follows:

§ 1952.264 Completed developmental steps.

* * * * *

(e) In accordance with § 1952.263(d), Procedural Rules for the granting of Variances, Regulations for Inspections and Investigations, Citations, and Proposed Penalties and Procedural Rules for the Board of Health and Safety Compliance and Appeals, were approved by the Assistant Secretary on January 12, 1981.

(f) In accordance with prior commitments, the Michigan Occupational Safety and Health Act as amended by Act 149 of the Public Acts of 1979, was approved by the Assistant Secretary on January 12, 1981.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Washington, D.C. this 12th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-1730 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

Approval of Supplements to the Michigan State Plan

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This notice approves the State's regulations for reporting of occupational injuries and illnesses; and the operations manuals for the occupational safety program and the occupational health program.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: John M. Kelly, Project Officer, Office of State Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, (202) 523-8081.

SUPPLEMENTARY INFORMATION:

Background

Part 1953 of title 29, Code of Federal Regulations, prescribes procedures under Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter referred to as the Act) for review of changes and progress in the development and implementation of State plans which have been approved under Section 18(c) of the Act and 29 CFR Part 1902. On October 3, 1973, notice was published in the **Federal Register** of the approval of the Michigan plan and of the adoption of Subpart T of Part 1952 containing the decision (38 FR 27391). On February 25, 1977, a notice was published in the **Federal Register** (42 FR 11024) acknowledging receipt of a supplement concerning manuals for compliance operations of the Michigan Department of Labor and Public Health. On November 1, 1977, a notice was published in the **Federal Register** (42 FR 57140) acknowledging the receipt of the supplement containing the rules for recording and reporting occupational injuries and illnesses by employers covered under the Michigan Occupational Safety and Health Act. Both supplements were made available for public comment.

Description of Plan Supplements

1. *Manuals for Compliance Operations of the Michigan Department of Labor and Public Health.* On September 28, 1976, the State submitted compliance manuals for the occupational safety program and for the occupational health program. The manuals provide basic information and guidance for State personnel of the Department of Labor and the Department of Public Health in administering and enforcing the occupational safety and health program according to the provisions of the Michigan Occupational Safety and Health Act. The State has subsequently submitted amendments to the manuals to reflect changes in Federal procedures. This notice does not approve these subsequent amendments.

2. *Rules for Recording and Reporting of Occupational Injuries and Illnesses, Part 11.* The State submitted rules effective March 1, 1976 (amended May 7, 1979), which provide for recording and reporting of occupational injuries and illnesses by employers covered under the Michigan Occupational Safety and Health Act.

Location of the Plan and Its Supplements for Inspection and Copying

A copy of the plan and the supplements may be inspected and copied during normal business hours at the following locations: the Office of the Regional Administrator, Occupational Safety and Health Administration, 230 South Dearborn Street, Chicago, Illinois 60640; Michigan Department of Labor, State Secondary Complex, 7150 Harris Drive, Lansing, Michigan 48926; Office of State Programs, Occupational Safety and Health Administration, Room N-3613, 3rd and Constitution Avenue NW., Washington, D.C. 20210.

Public Participation

Interested persons were afforded thirty days to submit written comments or request a hearing concerning both supplements. No public comment or request for a hearing were received.

Decision

After careful consideration, the Michigan plan supplements described above are approved under Part 1953. This decision incorporates the requirements of the Act and implementing regulations applicable to State plans generally. Accordingly, 29 CFR 1952.264 is hereby amended by adding new paragraphs (g) and (h) as follows:

§ 1952.264 Completed developmental steps.

* * * * *

(g) In accordance with § 1952.263(c), Manuals for Compliance Operations of the Michigan Department of Labor and Public Health were approved by the Assistant Secretary on January 13, 1981.

(h) In accordance with § 1952.263(e), Rules for Recording and Reporting of Occupational Injuries and Illnesses, were approved by the Assistant Secretary on January 13, 1981.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Washington, D.C. this 13th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-1731 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

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29 CFR Part 1952

Certification of Completion of Developmental Steps for Michigan State Plan

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: Michigan, on or before September 24, 1976, submitted documentation attesting to the completion of all structural, developmental aspects of its approved State plan. After extensive review and opportunity for State correction, all developmental plan supplements have now been approved. This notice certifies this completion and the beginning of the final evaluation phase of State plan development. This certification attests only to the fact that Michigan now has in place those structural components necessary for an effective program. It does not render judgment, either positively or negatively, on the adequacy of the State's actual performance. In addition, although original State plan commitments on staffing and resources have been met, these initial commitments may not be interpreted as meeting the ultimate requirements of the Occupational Safety and Health Act of 1970 for "sufficient staff" as redefined by the U.S. Court of Appeals decision in "AFL-CIO v. Marshall", 570 F. 2d 1030 (1978).

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: John M. Kelly, Project Officer, Office of State Programs, Occupational Safety

and Health Administration, 200 Constitution Avenue, N.W., Rm. N3613, Washington, D.C. 20210—(202) 523–8081.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the "Act," 29 U.S.C. 667) provides that States which desire to assume responsibility for the development and enforcement of occupational safety and health standards shall submit for Federal approval a State plan for such development and enforcement. Part 1902 of Title 29, Code of Federal Regulations, sets forth procedures under which the Assistant Secretary of Labor for Occupational Safety and Health ("Assistant Secretary") shall approve such plans. Under the Act and regulations, plan approval is essentially a two-step procedure. A State must first submit its plan for an initial determination under section 18(b) of the Act. If the Assistant Secretary, after reviewing the State's submission, determines that the plan satisfies or will satisfy the criteria set forth in section 18(c) of the Act, a decision of "initial approval" is issued and the State may begin enforcement of its safety and health standards in accordance with the plan and with concurrent enforcement by the Occupation Safety and Health Administration (OSHA).

A State plan may receive initial approval even though at the time of submission not all essential components of the plan are in place. As provided at 29 CFR 1902.2(b), the Assistant Secretary may initially approve the submission as a "developmental plan" and a schedule within which the State must complete specified "developmental steps" is issued as part of the initial approval decision.

When the Assistant Secretary finds that the State has completed all developmental steps specified in the initial approval decision, a notice of such completion is published in the **Federal Register** (see 29 CFR 1902.34 and 35). Certification of completion of developmental steps initiates a thorough evaluation of the State plan by the Assistant Secretary to determine, on the basis of actual operations, whether the plan adequately protects safety and health of the State's workers. Certification does not render judgment as to the adequacy of State performance.

Final approval of the plan under section 18(e) of the Act and 29 CFR Part 1902 may not be granted until at least three years after initial approval and until at least one year after completion of developmental steps. Thereafter, when the Assistant Secretary determines on the basis of actual performance under the plan that the Act's criteria are being applied, a decision of final approval may be granted.

On October 3, 1973, a notice was published in the **Federal Register** (38 FR 27391) of initial approval of the developmental Michigan plan and the adoption of Subpart T of Part 1952 containing the decision, a description of the plan and the developmental schedule. During the three year period ending September 24, 1976, following commencement of State operations, the Designees of the Michigan Department of Labor and the Department of Public Health, submitted documentation attesting to the completion of each State developmental commitment for review and approval as provided in 29 CFR Part 1953. Following Departmental review, opportunity for public comment and subsequent modification of the State's submissions, as deemed appropriate, the Assistant Secretary has approved the completion of all individual Michigan developmental steps.

Completion of Developmental Steps

All developmental steps specified in the October 3, 1973 notice of initial approval have been completed as follows:

a. In accordance with § 1952.263(a), the State on June 19, 1974, submitted a supplement containing its enabling legislation enacted on June 18, 1974. (40 FR 8555, February 28, 1975.) The 1979 amendments to the Michigan Occupational Safety and Health Act, submitted as a State-initiated change supplement to the Michigan State plan, were approved on January 12, 1981, and appear elsewhere in this issue.

b. In accordance with § 1952.263(b), the State has promulgated occupational safety and health standards covering all the issues contained in 29 CFR Part 1910, Subparts D through S, and Part 1926. (The State will not cover Parts 1915, 1916, 1917, and 1918). (40 FR 50583, October 30, 1975; 41 FR 18483, May 4, 1976; 41 FR 53078, December 3, 1976; 43 FR 31457, July 21, 1978).

c. In accordance with § 1952.263(c), the State, on September 28, 1976, submitted compliance manuals for the occupational safety program and for the occupational health program. The State has subsequently submitted amendments to these manuals to reflect changes in Federal procedures. The original submission was approved on January 13, 1981, and appears elsewhere in this issue.

d. In accordance with § 1952.263(d), regulations similar to Parts 1903, 1905, and 2200 became effective November 12, 1976, March 1, 1976, and November 23, 1976, respectively. After review by OSHA, they were approved on January 12, 1981, and appears elsewhere in this issue.

e. In accordance with § 1952.263(e), the State submitted rules effective March 1, 1976 (amended May 7, 1979), for recordkeeping and reporting of occupational injuries and illnesses which were approved on January 13, 1981, and appears elsewhere in this issue.

f. In accordance with § 1952.263(f), an interagency agreement between the Michigan Department of Labor and the Michigan Department of Public Health was signed on September 23, 1974, and approved on September 21, 1975. (41 FR 8555, February 28, 1975).

g. In accordance with § 1952.263(g), Michigan's public employee program was implemented with an effective date of July 1, 1975, and approved on October 17, 1977. (42 FR 57123, November 1, 1977).

h. In accordance with the requirements of § 1952.10, the Michigan State poster was approved by the Assistant Secretary on September 22, 1975. (40 FR 44131, September 25, 1975).

i. The Michigan Departments of Labor and Public Health have established a comprehensive management information system which was approved on October 17, 1977. (42 FR 57123 November 1, 1977).

j. The State submitted revisions to the staffing pattern contained in the State's plan and indicated that the Michigan Departments of Labor and Public Health were in substantial conformity with the revised staffing pattern. The supplement was approved by the Assistant Secretary on October 17, 1977. (42 FR 57123, November 1, 1977).

k. The system of personnel administration in the Michigan Departments of Labor and Public Health has been found to be in substantial conformity with the standards for a merit system in a letter dated August 25, 1980 from the United States Office of Personnel Management. Operation of the State merit system has been found acceptable by OSHA.

This certification covers all occupational safety and health issues covered under the Federal program except for longshoring and maritime standards found in 29 CFR Parts 1915, 1916, 1917 and 1918 (longshoring, ship repairing, ship building, and ship breaking), which are excluded from coverage under the plan. This certification also covers the State's

program covering State and local government employees.

Location of the Plan and Its Supplements for Inspection and Copying

Copies of the supplements, along with the approved plan, may be inspected and copied during normal business hours at the following locations:

Office of the Director of Federal Compliance and State Programs, Occupational Safety and Health Administration, Room N3613, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210

Office of the Regional Administrator, Occupational Safety and Health Administration, Region V, 230 South Dearborn Street, Chicago, Illinois 60604

Michigan Department of Labor, State Secondary Complex, 7150 Harris Drive, Lansing, Michigan 48926

Effect of Certification

The Michigan plan is certified effective January 16, 1981 as having completed all developmental steps on or before September 24, 1976. This certification attests to structural completion, but does not render judgment on adequacy of performance.

The Michigan occupational health and safety program will be monitored and evaluated for a period of not less than one year after publication of this certification to determine whether the State program in operation provides for an effective program of enforcement. The Assistant Secretary will then determine whether Federal authority should be withdrawn with respect to issues covered by the plan pursuant to Section 18(e) of the Act.

Level of Federal Enforcement

In accordance with 29 CFR 1902.35, Federal enforcement authority under sections 5(a)(2), 8, 9, 10, 13 and 17 of the Act (29 U.S.C. 654(a)(2), 657, 658, 659, 662, and 666) and Federal standards authority under section 6 of the Act (29 U.S.C. 655) will not be relinquished during the evaluation period. However, under the terms of an operational status agreement entered into between OSHA and the Michigan Departments of Labor and Public Health on January 6, 1977 (42 FR 15411) the exercise of this authority by the U.S. Department of Labor will continue to be limited to, among other things: complaints about employee discrimination, enforcement of new Federal standards such as temporary emergency standards until adopted by the State; enforcement of standards excluded from plan coverage, investigations for fulfillment of monitoring obligations under Sections 18 (e) and (f) of the Act; and abatement dates from OSHA-issued citations, which extend beyond the date of State assumption of inspection responsibility. Pursuant to 29 CFR § 1954.3(f)(1) the agreement provides for resumption of Federal enforcement activity for failure to substantially comply with the provisions of the agreement, or as a result of evaluation or other factors.

The continuation of this operational status agreement is not to be construed as a determination that the Michigan program has met the requirements of the Act and regulations for a "sufficient number of qualified personnel, as defined in "AFL-CIO v. Marshall," but rather that the State has reached a satisfactory, interim level of staffing. In accordance with this certification, 29 CFR 1952.263 is hereby amended to reflect successful completion of the developmental period by changing the title of the section and by adding paragraph (i) as follows:

§ 1952.263 Completion of developmental steps and certification.

* * * * *

(i) In accordance with § 1902.34 of this chapter, the Michigan occupational safety and health plan was certified effective January 13, 1981 as having completed all developmental steps specified in the plan as approved on September 24, 1973, on or before September 24, 1976.

This certification attests to structural completion, but does not render judgment on adequacy of performance.

(Sec. 18, Pub. L. 91-596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Washington, D.C., this 13th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-1729 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

DEPARTMENT OF EDUCATION

34 CFR Part 300

Assistance to States for Education of Handicapped Children

AGENCY: Department of Education.

ACTION: Technical amendment: Final rule.

SUMMARY: The Secretary issues this regulation to make changes in the definition of "handicapped children" under Part B of the Education of the Handicapped Act, as amended.

(1) The reference to "autistic" children is deleted from the disability category "seriously emotionally disturbed" under the definition of "handicapped children"; and

(2) A reference to "autistic" children is added under the disability category "other health impaired" under the definition of "handicapped children".

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to Congress. They are transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mrs. Beverly E. Brightly, U.S. Department of Education, Office of Special Education and Rehabilitative Services, Division of Assistance to States, 400 Maryland Avenue, S.W. (Room 4932, Donohoe Building), Washington, D.C. 20202, Telephone: (202) 472-7921.

SUPPLEMENTARY INFORMATION: The proposed rules which included the definition of "handicapped children" for the purposes of Part B of the Education of the Handicapped Act, as amended by Pub. L. 94-142, were published December 30, 1976 (41 FR 56966). The final regulations were published August 23, 1977 (42 FR 42474).

Congress did not address autism in developing the statute. When the implementing regulations were published in 1977, autism was placed under the category of "seriously emotionally disturbed", based upon knowledge available to the agency at that time. We now conclude that this original classification of autistic children is inappropriate because not all autistic children are seriously emotionally disturbed. The technical amendment to the regulations reflects our expanded knowledge of autism gained through our contracts with and knowledge provided by the National Society for Autistic Children (NSAC), the National Institute for Neurological and Communicative Disorders and Stroke (NINCDS), and others who have sought to bring to our attention current thinking in the field of autism. The Secretary does not expect this change to affect the number of handicapped children identified as autistic, but only the manner or category in which autistic children will be reported.

Since this amendment does not represent a substantive change in the regulations, the Secretary has determined, in accordance with 5 U.S.C.

553, that public participation in the rulemaking process is unnecessary.

Dated: January 11, 1981.

Shirley M. Hufstedler,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.027; Education of Handicapped Children, Part B)

(The Education of the Handicapped Act, as amended (20 U.S.C. 1401 *et seq.*))

The Secretary amends Part 300 of Title 34 of the Code of Federal Regulations by revising § 300.5(b)(7) and (b)(8)(ii) to read as follows:

§ 300.5 Handicapped children.

* * * * *

(b) * * *

(7) "Other health impaired" means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rhematic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

* * * * *

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

[FR Doc. 81-1587 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

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34 CFR Part 682

Guaranteed Student Loan Program

AGENCY: Department of Education.

ACTION: Final Regulations with Comments Invited.

SUMMARY: Recent laws have added five new provisions for deferment of repayment to the Guaranteed Student Loan Program (GSLP). The Secretary of Education is establishing criteria to implement these new deferments for a GSLP borrower who: (1) Is pursuing a course of study under a rehabilitation training program for disabled individuals; (2) Is serving as an officer in the Commissioned Corps of the United States Public Health Service; (3) Is serving as a full-time volunteer for a tax-exempt organization providing service that is comparable to service in the Peace Corps or full-time service in ACTION agency programs; (4) Is temporarily totally disabled or is unable to secure employment by reason of the care required by a spouse who is temporarily totally disabled; or (5) Is serving an internship required to gain professional recognition required to begin professional practice.

DATES: Comments must be received on or before March 17, 1981. These regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are usually transmitted to Congress several days before they are published in the **Federal Register**. The effective date is changed if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

When these regulations become effective they will apply to all outstanding loans, and borrowers will be entitled to obtain these new deferments for all periods during which they are eligible after the regulations become effective. In the case of the rehabilitation training deferement, coverage also will be retroactive to the date that provision was enacted into law. Therefore, any borrower who has been granted forbearance since November 1, 1978 because he or she was engaged in an approved rehabilitation training program will be able to receive this benefit if the program meets the criteria established by this regulation.

ADDRESS: Comments should be addressed to Jane A. Bryson, Chief, Guaranteed Student Loan Policy Section, Office of Student Financial Assistance, (Room 4310, ROB-3), 400 Maryland Avenue, SW., Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Cheryl Leibovitz or Jane A. Bryson, Telephone (202) 245-2475.

SUPPLEMENTARY INFORMATION:

A. Background

During a deferment period, and until six months after the deferment period ends (post-deferment grace period), the borrower's obligation to repay the principal amount due on a GSLP loan is temporarily suspended. The interest on the principal amount owed continues to accrue during both the deferment and post-deferment grace periods. However, if the borrower was deemed eligible for Federal interest benefits at the time the loan was made, the Federal government pays the interest owed by the borrower during both the deferment and post-deferment grace periods.

The Education Amendments of 1980 (Pub. L. 96-374) added four new deferment provisions to the GSLP. The new deferment provisions permit a borrower to defer repayment during the following periods: (1) Up to 3 years of service as an officer in the Commissioned Corps of the United States Public Health Service; (2) Up to 3 years of full-time volunteer service for an organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1954 if the service provided is comparable to service in the Peace Corps or full-time service in ACTION agency programs; (3) Up to 2 years of internship, the successful completion of which is necessary to receive recognition required to begin professional practice or service; (4) Up to 3 years during which the borrower is temporarily totally disabled, as established by the sworn affidavit of a qualified physician, or during which the borrower is unable to secure employment by reason of the care required by a spouse who is so disabled, as established by the affidavit of a qualified physician.

In addition, the Middle Income Student Assistance Act (Pub. L. 95-566), added a deferment to the GSLP, permitting a disabled borrower to defer repayment on his or her loan if he or she is pursuing a rehabilitation training program that is approved by the Secretary. Accordingly, § 682.508 of the GSLP regulations has been revised to accommodate these changes.

These amendments to § 682.508 provide criteria under which: (1) Service in a volunteer program for an organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954 may be considered comparable to service in the Peace Corps or full-time service in other ACTION agency programs; (2) A borrower can qualify for an internship deferment; and (3) A rehabilitation program can receive the Secretary's approval. The deferments for service in the United States Public Health Service and for temporary total disability are self-implementing and do not require additional rules by the Secretary. In addition, certain changes have been made to the existing regulations governing the deferment for graduate fellowship programs in order to simplify their administration. The procedure by which a borrower may receive each deferment is also specified.

Section 682.508 is part of Subpart E, which sets forth the requirements for the Federal Insured Student Loan Program (FISLP). However, the deferment provisions contained in § 682.508 have been incorporated by reference into § 682.401(b)(10) of Subpart D, which governs guarantee agency programs.

Therefore, these deferment provisions apply equally to guarantee agency programs.

B. Criteria for Approving the Volunteer Service Deferment

Volunteer service for a tax-exempt organization is determined to be comparable to volunteer service in the Peace Corps or full-time service in other ACTION agency programs if: (1) The service is for an organization which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1954; (2) The borrower provides service to low-income persons and their communities to assist them in eliminating poverty and poverty-related human, social, and environmental conditions; (3) The borrower's compensation does not exceed the compensation received by a full-time volunteer in the Peace Corps or in a program administered by the ACTION agency; (4) The borrower, as part of his or her duties, does not give religious instruction, conduct worship services, engage in religious proselytizing or engage in fundraising to support religious activities; and (5) The volunteer has agreed to serve on a full-time basis for a term of at least one year. Service in MEDICO and the International Voluntary Service are examples of such service. To receive this deferment, the borrower obtains a certification of the program's eligibility from a program official and gives it to the lender, as described in the regulations.

These criteria are based on policies established by the Peace Corps and the ACTION agency for the organizations that sponsor their volunteers. The Secretary is seeking public comment on the adequacy of these criteria. In particular, the Secretary requests comments on whether the deferment should be limited to borrowers who serve only the type of populations that Peace Corps and ACTION agency volunteers serve; whether the deferment should be limited to borrowers who earn only as much as Peace Corps and ACTION agency volunteers earn; and whether the deferment should be limited to borrowers who provide direct services to the target populations or should include borrowers serving as support staff in the volunteer agency.

C. Internship Deferment

To qualify for an internship deferment a borrower must: (1) Hold at least a baccalaureate or professional degree; and (2) Be serving in an eligible internship program, the successful completion of which is required to receive recognition required to begin professional practice or service. A medical residency is an example of such an internship, since medical school graduates are required to complete a residency before they can be licensed to practice medicine in most States. The Secretary requests comments on this provision. The Secretary is particularly interested in receiving comments from the public concerning what other types of professions require an internship. To receive this deferment, the borrower gives the lender evidence that he or she is serving in a program which the Secretary has determined is an eligible internship. For programs other than medicine that have internships, program information may be submitted for the Secretary's approval.

D. Graduate Fellowship Deferment

Currently the GSLP regulations specify that, to qualify for a graduate fellowship deferment, a borrower must be enrolled in a program that is approved by the Secretary. To gain approval, the borrower or the graduate fellowship program submits a written request to the Education Department (ED), which reviews the request and provides the graduate fellowship program with a letter of approval. The graduate fellowship program then provides the borrower and/or lender with a copy of the letter of approval. In an effort to respond more quickly to the needs of both borrowers and lenders, the Secretary has simplified the process in these regulations. Under the new procedures, graduate fellows will be required to submit a certification by an official of the fellowship program that the program meets the six regulatory criteria for the Secretary's approval. Experience with the provision since September, 1979 has convinced the Secretary that an individual review of each program is not necessary to prevent abuse of the deferment.

E. Criteria for Approving a Rehabilitation Training Program

A rehabilitation training program is approved if: (1) The provider of the rehabilitation services is recognized by a government agency with specific responsibility for rehabilitation programs in a given area (e.g. a State vocational rehabilitation agency); (2) The provider agrees to develop an individual plan for the borrower's rehabilitation; and (3) The plan the provider has agreed to develop requires that the borrower make a substantial commitment of time or effort toward his or her rehabilitation.

Borrowers in a wide range of circumstances may qualify for the deferment. The regulations provide for approval of drug, alcohol, and mental health rehabilitation programs, as well as more traditional vocational rehabilitation programs. The regulations also have been written to permit deferment for up to three months for a borrower who is scheduled to receive rehabilitation services from a qualified program but who has not actually started his or her program. This provision prevents loan default in situations when the borrower may be required to wait either for his or her injuries to heal prior to starting rehabilitation or for the availability of an opening in a particular rehabilitation program.

The requirement that the program offer the borrower an individual rehabilitation plan is common to most public and private rehabilitation programs. The plan developed for the borrower may be designated as either an Individual Treatment Plan or an Individual Written Rehabilitation program. The latter term is most frequently used in vocational rehabilitation.

The Secretary has included the criterion requiring a substantial commitment of time or effort from the borrower in order to exclude from deferment eligibility a borrower who may be in a type of rehabilitation that occupies the borrower for a relatively short period of time each week and allows the borrower to be regularly employed on a full-time basis. For example, a borrower who visits his or her therapist for only an hour two evenings a week would be excluded. Similarly, a borrower in a drug treatment program whose sole rehabilitation is receiving methadone maintenance would not be eligible for the rehabilitation training program deferment.

The regulations establish a procedure for approval which relies on the expertise of the Veterans Administration and the State rehabilitation agencies designated in the criteria. Under these regulations, the Secretary would accept a certification by one of these agencies that the borrower's program meets the approved criteria. Since these agencies maintain close communication with the various rehabilitation programs in their respective jurisdictions, these agencies are better suited to make decisions concerning both a program's legitimacy and the borrower's situation.

The Secretary requests public comments on these criteria and particularly on whether there are types of programs, excluded under these regulations, which should be included.

Coverage for Borrowers Currently in Rehabilitation

The Secretary has asked, because of the delay in issuing regulations on criteria for approval, that lenders grant forbearance to any borrower seeking relief from payment under this deferment. This deferment coverage will be retroactive, thereby covering any disabled borrower who has been granted forbearance since November 1, 1978 because the borrower was engaged in rehabilitation training, provided that the borrower's program of rehabilitation otherwise qualifies for approval.

Waiver of Proposed Rulemaking Procedures

In accordance with Section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)), it has been the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. The Secretary then reviews these comments and makes appropriate changes before republishing the regulations in final form.

For the reasons described in the following paragraph, the use of that practice in connection with the provisions of these regulations is unnecessary and contrary to the public interest under 5 U.S.C. 553(b). However, the Secretary invites the public to comment on these regulations and will consider appropriate comments before publishing the regulations again.

The Secretary has waived proposed rulemaking procedures because the regulatory changes mainly reflect the statutory changes made by the Education Amendments of 1980 and the Middle Income Student Assistance Act of 1978; the other changes are of a minor or technical nature. The Secretary wishes to enable borrowers to obtain the new deferments that are being implemented by these regulations. In addition, the Secretary wishes to give the higher education and lending communities as much advance notice as possible of these changes. Accordingly, in this instance, the Secretary is publishing these rules as final regulations.

Comments requested: While the Secretary is publishing these rules as final regulations, the Secretary is requesting public comments on the provisions dealing with the new deferments. Issues on which the Secretary is particularly interested in receiving comments are specified in the descriptions of each new deferment in the "Supplementary Information" section of this preamble. The Secretary also is requesting comments regarding whether the definition of "estimated financial assistance" in § 682.200 of the GSLP regulations should be revised to include Veterans' benefits, students' benefits under Social Security, or other social service payments such as Aid to Families with Dependent Children. This revision would avoid duplication of GSLPs with other Federal assistance.

Written comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 4310, ROB-3, 7th and D Streets, S.W., Washington, D.C. between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday of each week except on Federal holidays.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (Pub. L. 96-354, enacted Sept. 19, 1980) requires each Federal agency to prepare an initial regulatory flexibility analysis and a final regulatory flexibility analysis for each regulation that—

(1) Is published as a notice of proposed rulemaking after January 1, 1981, and

(2) Has a significant economic impact on a substantial number of small businesses, small organizations, or small governmental jurisdictions.

Because the Department has not yet established its own definitions of "small organization" and "small governmental jurisdiction", as contemplated by the Act, it is not possible to prepare a full initial regulatory flexibility analysis at this time. Further, since these regulations were required by statute to be published in final no later than May 31, 1981, it is impracticable to delay publication while the necessary definitions are being developed. In these circumstances, the Regulatory Flexibility Act permits a waiver or delay of the initial regulatory flexibility analysis. If it is later determined that these regulations are subject to that Act, the Secretary will prepare the necessary analysis in conjunction with the issuance of later regulations.

As an interim measure, this preamble, to the maximum extent possible, includes information of the kind contemplated by the Regulatory Flexibility Act, including the reasons for the regulations, the objectives and legal basis for the regulations, and any significant issues and alternatives for consideration by the public. To assist the Department in determining whether the Regulatory Flexibility Act applies to these regulations and in complying with the Act's requirements, public comment is especially invited on the following matters: (1) The number and kind of small businesses, small organizations, and small governmental jurisdications affected by the GSLP deferment provisions regulations;

(2) The reporting, recordkeeping, and compliance burdens imposed by these regulations;

(3) The type of professional skills necessary for preparation of any reports or records required by these regulations;

(4) Any Federal rules that may duplicate, overlap, or conflict with these regulations;

(5) Any significant alternatives that would accomplish the purposes of the applicable statute but would minimize any significant economic impact of these regulations on small entities (small business, small organizations, and small governmental jurisdictions). The Secretary is particularly interested in suggestions for alternatives such as the following:

- The establishment of differing reporting or compliance requirements or timetables that take into account the resources available to small entities.
- The clarification, consolidation, or simplification of compliance and reporting requirements for small entities.
- The use of performance rather than design standards.
- An exemption for small entities from coverage of part or all of the regulations.

Citation of Legal Authority

A citation of statutory authority for the regulations is placed in parentheses on the line following each substantive provision of these regulations.

Assessment of Educational Impact

The Department particularly requests comments on whether the regulations in this document would require transmission of information that is already being gathered by or is available from any other agency or authority of the United States.

(Catalog of Federal Domestic Assistance No. 84.032, Guaranteed Student Loan Program)

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

34 CFR Part 682 is amended as follows:

Section 682.508 is revised to read as follows:

§ 682.508 Deferment.

(a) *Borrower eligibility.* (1) Once the repayment period has commenced, a borrower is entitled to have periodic installment payments of principal deferred during authorized periods and during the six months (post-deferment grace period) after the completion of each such period or combination of

periods. Except as provided in paragraph (e)(4) of this section, a period of authorized deferment begins when the condition entitling a borrower to deferment first exists. Interest accrues and is payable by the borrower during the deferment and post-deferment grace periods unless the borrower was determined to be eligible for Federal interest benefits when the loan was made. The borrower shall provide to the lender all documentation required to establish eligibility for a specific type of deferment.

(2) A deferment cannot be denied by a lender when the borrower meets the eligibility criteria, even though the borrower may be delinquent, but not in default, in making required installment payments. The 120- or 180-day period required to establish a default does not run during the deferment and post-deferment grace periods. When the post-deferment grace period expires, a borrower resumes any delinquent status that existed when the deferment period began.

(3) A borrower whose loan is in default is not eligible for a deferment unless the borrower has made satisfactory arrangements with the lender to bring the account current.

(b) *Authorized deferments.* Deferment is authorized during periods when a borrower is engaged in at least one of the following activities:

(1)(i) Full-time study at a participating school, unless the borrower is not a national of the United States and is pursuing a course of study at a school not located in a State; or

(ii) Full-time study at a school which meets the definition of an institution of higher education or a vocational school and is operated by an agency of the Federal government (e.g., the service academies), unless the borrower is not a national of the United States and is pursuing a course of study at a school not located in a State.

(2) Study under an eligible graduate fellowship program, as described in paragraph (c) of this section.

(3) Up to 3 years of active duty service in the United States Armed Forces or of service as an officer in the Commissioned Corps of the United States Public Health Service.

(4) Up to 3 years of volunteer service under the Peace Corps Act.

(5) Up to 3 years of service as a full-time volunteer under Title I of the Domestic Volunteer Service Act of 1973 (ACTION programs).

(6) Up to 3 years of full-time volunteer service which the Secretary has determined is comparable to service referred to in paragraphs (b)(4) and (b)(5) of this section for a tax-exempt organization, as described in paragraph (d) of this section.

(7) Conscientiously seeking but unable to find full-time employment in the United States over a single period of up to twelve months, as described in paragraph (e) of this section.

(8) Pursuing a course of study under a rehabilitation training program for disabled individuals, as described in paragraph (f) of this section.

(9) Up to 2 years of service as an intern, as described in paragraph (g) of this section.

(10) Up to 3 years during which the borrower is temporarily totally disabled, as described in paragraph (h) of this section, or during which the borrower is unable to secure employment because he or she is caring for a spouse who is temporarily totally disabled, as described in paragraph (i) of this section.

(c) *Graduate fellowship deferment.* To qualify for a deferment for study under a graduate fellowship program, a borrower shall provide the lender with a statement from an official of the borrower's fellowship program certifying that—

(1) The fellowship program—

(i) Provides sufficient financial support to graduate fellows to allow for full-time study for at least six months;

(ii) Requires, prior to the award of that financial support, a written statement from each applicant which explains the applicant's objectives; and

(iii) Requires a graduate fellow to submit periodic reports, projects, or other evidence of the graduate fellow's progress; and

(2) The borrower—

(i) Holds at least a baccalaureate degree conferred by an institution of higher education;

(ii) Is engaged in full-time study, that may be independent of an educational or cultural institution, in an academic or professional subject area for which the borrower has shown an interest and ability; and

(iii) Has been recommended by an institution of higher education for acceptance into the graduate fellowship program.

(d) *Full-time volunteer service for a tax-exempt organization deferment.* To qualify for a deferment for full-time volunteer service for a tax-exempt organization comparable to volunteer service in the Peace Corps or full-time volunteer service in a program administered by the ACTION agency, a borrower shall provide the lender with a statement from an official of the borrower's volunteer program certifying that—

(1) The borrower serves in an organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1954;

(2) The borrower provides service to low-income persons and their communities to assist them in eliminating poverty and poverty-related human, social, and environmental conditions;

(3) The borrower's compensation does not exceed the compensation received by a full-time volunteer in the Peace Corps or in a program administered by the ACTION agency. Compensation includes a subsistence allowance, necessary travel expenses and stipends;

(4) The borrower, as part of his or her duties, does not give religious instruction, conduct worship services, engage in religious proselytizing, or engage in fundraising to support religious activities; and

(5) The borrower has agreed to serve on a full-time basis for a term of at least one year.

(e)(1) *Basic eligibility for an unemployment deferment.* (i) For purposes of this section, full-time employment involves at least 30 hours of work per week and is expected to last at least 3 months.

(ii) A borrower is entitled to the deferment whether or not he or she has been previously employed. If previously employed, the borrower is entitled to a deferment regardless of the circumstances under which the employment ended.

(iii) An unemployment deferment is not justified if the borrower has sought employment only in kinds of positions or at salary and responsibility levels for which he or she feels qualified by virtue of education or previous experience.

(2) *Submission of request.* To receive an unemployment deferment, a borrower shall submit a request for the deferment in writing to the holder of the loan. To continue the deferment for more than 6 months, the borrower shall submit a second request by the end of that 6-month period. Each request must be signed and dated and contain the following:

(i) A statement from the borrower describing his or her conscientious search of full-time employment.

(ii) The borrower's latest permanent home address and, if applicable the borrower's latest temporary address.

(iii) Certification that the borrower has registered with a public or private employment agency, if one is accessible, specifying its name and address.

(iv) The borrower's agreement to notify the lender promptly when he or she becomes employed full-time.

(3) *Lender's approval or disapproval of request.* (i) The lender must review the borrower's request and notify the borrower of its decision within one month after receipt of the request.

(ii) The lender may rely upon the written statements provided by the borrower, unless the lender has information to the contrary.

(iii) If the lender is satisfied that the borrower has conscientiously searched for full-time employment and otherwise meets the requirements for an unemployment deferment, the lender shall approve the request.

(iv) If the borrower's request does not justify an unemployment deferment, the lender may grant the borrower forbearance if authorized under § 682.512.

(4) *When the unemployment deferment begins:* An unemployment deferment begins—

(i) On the date that the lender approves the request; or

(ii) On a date not in excess of 60 days prior to the lender's approval if the unemployment existed at the earlier date.

(5) *When the unemployment deferment ends:* An unemployment deferment ends on the earliest of—

(i) The date the lender learns that the borrower has become employed full-time;

(ii) One month after the date when a certification of unemployment deferment eligibility is due from the borrower but has not been received; or

(iii) 12 months after the commencement of the deferment period.

(f) *Rehabilitation training program deferment.* (1) To qualify for this deferment—

(i) The borrower must either be receiving or be scheduled to receive services under a program designed to rehabilitate disabled individuals; and

(ii) The borrower's rehabilitation program must meet the Secretary's criteria for approval.

(2) *Criteria for the Secretary's approval of rehabilitation training programs.* The Secretary approves a rehabilitation training program if the organization providing rehabilitation services to the borrower—

(i) Is licensed, approved, certified or otherwise recognized as providing rehabilitation training to disabled individuals by any of the following agencies—

(A) A State vocational rehabilitation agency;

(B) A State agency for drug abuse treatment;

(C) A State agency for mental health services;

(D) A State agency for alcohol abuse treatment; or

(E) The Veterans Administration; and

(ii) Provides or has agreed to provide that borrower with services for his or her rehabilitation under a rehabilitation plan that is—

(A) Written;

(B) Individualized to meet the borrower's needs;

(C) Specific as to the date on which the services to the borrower are expected to end; and

(D) Structured in a way that requires a substantial commitment by the borrower to his or her rehabilitation. The Secretary considers a substantial commitment by the borrower to be a commitment of time or effort that would normally prevent an individual from engaging in full-time employment either because of the number of hours that he or she must devote to rehabilitation or because of the nature of his or her rehabilitation. For the purpose of this paragraph, full-time employment involves at least 30 hours of work per week.

(3) *Qualification for a rehabilitation training program deferment.* (i) To obtain a rehabilitation training deferment, a borrower shall provide the lender with evidence that he or she qualifies for the defement, in a form approved by the Secretary. The evidence must include—

(A) The statement of the provider of the rehabilitation services certifying that the borrower either is receiving or is scheduled to receive rehabilitation training services from the provider; and

(B) A statement from an agency described in paragraph (e)(2)(i) of this section certifying that the provider from which the borrower is receiving services or is scheduled to receive services meets the requirements of paragraph (e)(2) of this section with respect to that borrower.

(ii) On receipt of the properly completed request, the lender shall grant the borrower a deferment.

(4) *When the rehabilitation training program deferment begins.* The rehabilitation training deferment begins—

(i) In the case of a borrower who is actually receiving rehabilitation services under an approved program on the date specified in the borrower's rehabilitation plan as the beginning date for his or her receipt of services through that program, but no earlier than November 1, 1978; or

(ii) In the case of a borrower who is requesting deferment based on being scheduled to receive rehabilitation services under an approved program, on the date that the borrower provides the lender with a properly completed request.

(5) *When the rehabilitation training program deferment ends.* Unless the borrower re-establishes his or her eligibility to continue a deferment by repeating the request procedure described in paragraph (3), the rehabilitation program deferment ends on the earliest of the following dates:

(i) In the case of a borrower who was granted deferment based on being scheduled to receive rehabilitation services under an approved program, the date the borrower informs the lender that he or she no longer plans to receive rehabilitation services; or

(ii) In the case of a borrower who was granted deferment based on being scheduled to receive rehabilitation services under an approved program, the date three months from the date the borrower submitted a request for a rehabilitation deferment; or

(iii) The date the borrower ceases rehabilitation training; or

(iv) The date specified in the borrower's rehabilitation plan as the date on which rehabilitation services to the borrower are anticipated to end; or

(v) The date twelve months from the date the borrower begins receiving services.

(g) *Internship deferment.* To qualify for an internship deferment, a borrower shall provide the lender with evidence that he or she is serving in an eligible internship, after obtaining a baccalaureate or professional degree, which the Secretary has determined is required to receive professional recognition required to begin professional practice or service. The Secretary has determined that medical residency is an example of such an internship.

(h) *Borrower's temporary total disability deferment.* (1) To qualify for this deferment the borrower shall give the lender an affidavit of a qualified physician stating that the borrower is temporarily totally disabled.

(2) For purposes of this section, a borrower who is "temporarily totally disabled" is one who, by reason of injury or illness, cannot be expected to be able to attend school or to be gainfully employed during an extended period of time needed to recover from such an injury or illness.

(i) *Deferment for a borrower whose spouse is temporarily totally disabled.* In order to qualify for this deferment the borrower shall give the lender—

(1) An affidavit of a qualified physician stating that the borrower's spouse is temporarily totally disabled. For purposes of this section a spouse who is "temporarily totally disabled" is

one who, by reason of injury or illness, cannot be expected to be gainfully employed during an extended period of time needed to recover from such injury or illness and who during that period requires continuous nursing or other similar services; and

(2) A statement from the borrower certifying that he or she is unable to secure employment because he or she is providing this care.

(20 U.S.C. 1077, 1078, 1078–2, 1082, 1085; 42 U.S.C. 5055(e))

[FR Doc. 81–1543 Filed 1–15–81; 8:45 am]

BILLING CODE 4000–01–M

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34 CFR Part 682

Guaranteed Student Loan Program; Refund of Tuition Charges and Other Fees

AGENCY: Department of Education.

ACTION: Final regulation.

SUMMARY: The Secretary of Education is revising the regulations governing the Guaranteed Student Loan Program (GSLP) which set criteria for determining the fairness and equity of a school's policy for refunding tuition charges and other fees. This rule relates to students who either never enroll or do not complete the academic period for which they borrowed under the GSLP. It amends § 682.608(b) of the GSLP regulations by replacing the Federal standards for equity in school refund policies with reliance on State law and the standards developed by the postsecondary education community.

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are usually transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl Leibovitz, GSLP Specialist, or Ms. Jane A. Bryson, Chief, Guaranteed Student Loan Policy Section, Division of Policy and Program Development, Department of Education, 400 Maryland Avenue SW., Washington, D.C. 20202, (202) 245–2475.

SUPPLEMENTARY INFORMATION: The Secretary views the lack of equitable school refund policies and the failure of schools to administer properly their refund policies on a timely basis as one of the major causes of defaults on student loans.

For this reason, the Secretary considers it appropriate that schools participating in the GSLP establish and properly administer "fair and equitable" policies for refunding school charges and fees to students who have borrowed under the GSLP to meet their educational expenses. However, the Secretary is now placing greater reliance on the standards for equitable refund policies which have been developed by the postsecondary education community.

A. Background

A refund policy applicable to GSLP participating schools was first included in the GSLP regulations in 1975. The policy was based on 20 U.S.C. 1082 and 20 U.S.C. 1088f–1. The present amendments on "fair and equitable" refunds result from several actions taken by the Secretary of Education and, previously, the Commissioner of Education. On July 19, 1978, the Commissioner published proposed rules (43 FR 31104–05) inviting public comment on the GSLP requirements regarding school refunds. The language of the 1978 proposed refund rules mirrored the original 1975 language with minor technical changes. On September 17, 1979, the Commissioner published a comprehensive package of final GSLP rules which included the refund provisions of § 682.608 (44 FR 53697), the section now being amended.

The most controversial provision of the refund rules has been § 682.608(b) which sets forth the criteria for the Secretary's determination of whether a school's refund policy is fair and equitable. Many of the commenters on the 1978 proposed rules called this provision an enroachment into school prerogatives and challenged the Commissioner's authority to issue specific rules on school refunds. Still other commenters voiced their objections in terms of specific suggestions for improvement of the provision. However, the Commissioner received strong support for continued regulation on refund equity from student organizations and other concerned citizens.

The September 17, 1979, final regulations for the GSLP modified the proposed regulations as suggested by several commenters. However, the basic Federal criteria were retained. In response to the opposing comments, the Commissioner resolved, in the preamble to those regulations, that the issue of refund policy criteria would be reconsidered in view of the growing efforts of the higher education groups towards viable self-regulation. After further consideration, and in partial fulfillment of the Secretary of Education's commitment to both the public and the Congress to reconsider the refund issue, a proposed regulation was published on July 2, 1980. Comments were received in response to that NPRM from the higher education community, educational institutions, and guarantee agencies. The majority of comments supported the proposed revisions. Consequently, in publishing this final regulation the Secretary is adopting the revisions proposed in the NPRM.

The Senate Report accompanying S. 1839 addressed the issue of the Secretary's authority to establish criteria for determining whether a school's refund policy is "fair and equitable", and endorsed the self-regulation approach contained in these regulations. The Senate Report stated:

> New section 487, like section 497A of current law, authorizes the Secretary to prescribe such regulations as may be necessary to provide for the establishment of reasonable standards of financial responsibility and appropriate institutional capability on the part of an educational institution in its administration of student financial aid funds. The Department of Health, Education, and Welfare has relied on this provision as a basis for specifying factors to be considered in determining whether an institution's policy for refunding tuition, fees, and other charges to a student who terminates his enrollment during an academic term is "fair and equitable."

The Committee believes that the setting of the specific elements on an institutional refund policy is primarily the prerogative of the educational institution. Neither new section 487 nor any other provision of this bill or current law gives the Secretary the authority to prescribe a single national refund policy. At the same time, the Committee recognizes that the lack of a fair and equitable institutional refund policy can easily lead to defaults on student loans made under Title IV of the Higher Education Act. Students who leave school shortly after enrolling may not feel responsible for repaying loans intended to cover most or all of the academic term for which they enrolled. An institutional refund in a reasonable amount under such circumstances could reduce the loan balance and increase the likelihood that the student would repay the remainder of the loan.

Accordingly, the Committee encourages an approach under which the Secretary's review is limited to determining whether an institution's refund policy is in accord with requirements imposed by the State government and with a reasonable policy endorsed by self-regulatory

organizations such as the institution's accrediting agency. This approach, which is authorized by the new section 487, would preserve the principle of minimum Federal involvement in institutional refund policies without compromising the Government's interest in keeping defaults on student loans to an absolute minimum.

B. Community-Developed Standards.

These regulations revise the GSLP regulations by placing increased reliance on standards developed by the postsecondary education community in determining what is fair and equitable in regard to refunds. Where a State enacted laws affecting the school's refund policy, compliance with State law of course is necessary. In addition, the school must demonstrate fairness and equity in its refund policy by establishing a policy that is in accord with standards accepted by the postsecondary education community and the Secretary.

These regulations establish two avenues for compliance, each of which is based on community self-regulation. A school must adhere to criteria approved by the Secretary which are set by the school's nationally recognized accrediting agency. If no such standards exist, the school must adhere either to the standards for fair and equitable refunds set out in Appendix A or to standards that are established by the higher education community through its self-regulating guidelines and approved by the Secretary.

A school may not opt to comply with standards where no standards exist (e.g., by basing its refund policy on an accrediting agency policy that offer no guidance on refunds). These regulations do not require accrediting agencies or other postsecondary organizations to develop refund standards in order to retain eligibility in Federal programs. These regulations simply recognize that some accrediting agencies have already developed such standards and treat those standards as strong evidence of appropriate practice within the postsecondary education community.

The Secretary considers the guidelines on refund policies which were established by the National Association of College and University Business Officers (NACUBO), in conjunction with persons representing a wide range of schools and professional responsibilities, as the closest indication of the higher education community's consensus on fair and equitable refund policies. These guidelines were specifically developed to assist in achieving self-regulation and have received support from fifteen higher education associations. The guidelines have been incorporated in Appendix A to these regulations. A refund policy based on State law and these guidelines is, therefore, in compliance with § 682.608(b) requirements if the school's nationally recognized accrediting agency has not adopted standards approved by the Secretary.

For ease of reference, the entire document has been reproduced. However, the reader should direct his or her attention to guidelines VI, VII, and VIII of the appendix, which relate to fair and equitable refund policies. This document does not affect a school's obligation to comply with State law or with any Department of Education regulation other than § 682.608(b). Refund policies which are based on other guidelines will be accepted if those guidelines receive the Secretary's approval.

The Department of Education has discussed this regulatory approach with various constituent groups. It is the Secretary's belief that the shift toward the reliance on standards developed through initiatives like the one undertaken by NACUBO will not deprive student borrowers or the program in general of the necessary protection against unfair refund policies.

C. Summary of Comments and Responses

Comment. One commenter felt that guideline XII of Appendix A should not be considered as part of the GSLP refund policy because it is not fair and equitable to all students.

Response. Guideline XII is not a part of the GSLP refund policy. Appendix A—*Standards for Acceptable Refund Policies by Participating Schools* was developed and published by the National Association of College and University Business Officers (NACUBO). For purposes of the GSLP, the Secretary considers guidelines VI, VII, and VIII of that document to be acceptable elements of a fair and equitable school refund policy. The document was reproduced in its entirety merely for the convenience of the reader.

Comment. One school commenter said that two programs at his school were governed by a State Board that stipulates that additional students may not enroll in these programs once class has commenced. The commenter felt that since the school was not able to replace drop-outs the school should not be required to refund any money to students who left class after the program began.

Response. In developing its refund policy NACUBO, in conjunction with persons representing a wide range of schools and professional responsibilities, considered situations such as the one described by the commenter. The Secretary feels that it is necessary to require that GSLP-participating schools have a fair and equitable refund policy for the protection of student borrowers. Since NACUBO's refund policy is the closest indication of the higher education community's consensus on fair and equitable refund policies the Secretary has chosen to adopt it.

D. Citation of Legal Authority

A citation statutory or other legal authority for the regulations is placed in parentheses on the line following the text of the regulation.

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

(Catalogue of Federal Domestic Assistance No. 84.032, Guaranteed Student Loan Program)

34 CFR Part 682 is amended as follows:

* * * * *

1. Section 682.608(b) is revised to read as follows:

§ 682.608 Refund policy.

* * * * *

(b) *Fair and equitable refund policy.* A school's refund policy is fair and equitable if that policy conforms with—

(1) The requirements of applicable State law; and

(2)(i) Specific refund standards set by the school's nationally recognized accrediting agency and approved by the Secretary;

(ii) If no such standards exist, other specific refund policy standards, either contained in Appendix A to this Part or set by another association of institutions of postsecondary education and approved by the Secretary.

(20 U.S.C. 1082, 1088f–1(a)(2))

* * * * *

2. An Appendix A to 34 CFR Part 682 is added, to read as follows:

Appendix A—Standards for Acceptable Refund Policies by Participating Schools

For purposes of § 682.608(b), the Secretary considers guidelines VI, VII, and VIII of the following document to be acceptable elements of a fair and equitable school refund policy. The document, which is reproduced in its entirety for the convenience of the reader, was developed by the National Association of College and University Business Officers. The document does not affect a school's obligation to comply with other Department of Education regulations.

Policy Guidelines for Refund of Student Charges

(I) *The governing board of the institution should review and approve the schedule of all institutional charges and refund policies applicable to students.* The pricing of services and refund policies have important consequences to students, parents, the institution, and society; as such, pricing and refund policies should receive board attention and approval.

(II) *Institutions should seek consumer views in the process of establishing and amending charge and refund structures.* Decisions regarding institutional funds are ultimately the sole responsibility of the institution's legally designated fund custodians. However, consumer concerns do affect decision making, and involving consumers in decision making related to charges and refunds is a desirable approach for assessing student needs and creating public awareness of institutional requirements.

(III) *Institutions should publish a current schedule of all student charges, a statement of the purpose for such charges, and related refund policies, and have them readily available free of charge to current and prospective students.* Students and parents have a right to know what charges they will be expected to pay and what will or will not be refunded. They also have a right to know what services accompany payment of the charges. Informational materials published free for students and prospective students are ideal for this purpose.

(IV) *Institutions should clearly designate all optional charges as "optional" in all published schedules and related materials. Clearly, charges that are mandatory and charges that are optional must be plainly differentiated in all printed materials.* Also, the institution should state clearly in its schedule if a charge is optional for some students but required for others. Statements accompanying the schedule may include institutional endorsements of the optional program or service.

(V) *Institutions should clearly identify charges and deposits that are nonrefundable as "nonrefundable" on all published schedules.* Institutions determine on an individual basis which of their charges are refundable or non-refundable. In general, admission fees, application fees, laboratory fees, facility and student activity fees, and other similar charges are not refundable. These fees are generally charged to cover the cost of activities such as processing applications and other student information, reserving academic positions, and establishing the limits of institutional programs and services, reserving housing space, and otherwise setting the fixed costs of the institution for the coming academic periods.

Institutions determine on an individual basis which of their deposits are refundable or nonrefundable. Some deposits will be nonrefundable or will be credited to a student's account (e.g., tuition deposits). Others are refundable according to the terms of the deposit agreement (e.g., deposits for breakage).

(VI) *Institutions should refund housing rental charges, less a deposit, so long as written notification of cancellation is made prior to a well-publicized date that provides reasonable opportunity to make the space available to other students.* Written notification on or before the beginning of the term of the contract is necessary to ensure utilization of housing units. During the term of the contract, room charges are generally not refundable. However, based on the program offered, space availability, debt service requirements, State and local laws, and other individual circumstances, institutions may provide for some more flexible refund guideline for housing.

(VII) *Institutions should refund board charges in full, less a deposit, if written notification of cancellation is made prior to a well-publicized date that falls on or before the beginning of the term of the contract. Subsequent board charges should be refunded on a pro rata basis less a withdrawal fee.* It is reasonable to make a refund for those goods and services not consumed. The withdrawal charge should reflect that portion of an institution's costs that are fixed for the term of the contract.

(VIII) *The institutional tuition refund policy for an academic period should include the following minimum guidelines:*

A. *The institution should refund 100 percent of the tuition charges, less a deposit fee, if written notification of cancellation is made prior to a well-publicized date that falls on or before the first day of classes.*

B. *The institution should refund at least 25 percent of the tuition charge if written notification of withdrawal is made during the first 25 percent of the academic period.* It is reasonable to refund tuition charges on a sliding scale if a student withdraws from his or her program prior to the end of the first 25 percent of the academic period unless state law imposes a more restrictive refund policy.

(IX) *The institution should assess no penalty charges where the institution, as opposed to the student, is in error. The institution should make refunds in cases where the institution has assessed charges in error.* Penalty charges, such as those involving late registration fees, change of schedule fees, late payment fees, should not be assessed if it is determined that the student is not responsible for the action causing the charge to be levied.

(X) *Institutions should advise students that any notifications of withdrawal or cancellation and requests for refund must be in writing and addressed to the designated institutional officer.* A student's written notification of withdrawal or cancellation and request for a refund provides an accurate record of transactions and also ensures that such request will be processed on a timely basis. Acceptance of oral requests is an undesirable practice.

(XI) *Institutions should pay or credit refunds due on a timely basis.* The definition of "timely basis" should include the time required to process a formal student request for refund, to process a check if required, and to allow for mail delivery, when necessary. If an institution has a policy that a refund of an inconsequential amount will not be made, this policy should be published in part of all materials related to refund policies.

(XII) *Institutions should publicize, as a part of their dissemination of information on charges and refunds, that an appeals process exists for students or parents who feel that individual circumstances warrant exceptions from published policy. The informational materials should include the name, title, and address of the official responsible.* Although charges and refund policies should reflect extensive consideration of student and institutional needs, it will not be possible to encompass in these structures the variety of personal circumstances that may exist or develop. Institutions are required to provide a system of due process to their students, and charges and refund policies are legitimately a part of that process. Students and parents should be informed regularly of procedures for requesting information concerning exceptions to published policies.

[FR Doc. 81-1584 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

Office of Educational Research and Improvement

34 CFR Part 735

Minority Institutions Science Improvement Program (MISIP)

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues regulations to implement the Minority Institutions Science Improvement Program.

These regulations will allow accredited two- and four-year institutions of higher education whose enrollments are predominantly (more than 50 percent) American Indian; Alaskan Native; Black, not of Hispanic Origin; Hispanic (including persons of Mexican, Puerto Rican, Cuban, and Central or South American origin); Pacific Islander or any combination of these or other disadvantaged ethnic minorities who are underrepresented in science to become eligible to participate in the program. The program provides support to these minority institutions and certain other nonprofit groups to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities into scientific and engineering careers.

EFFECTIVE DATE: These final regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are usually transmitted to Congress several days before they are published in the **Federal Register**. The effective date is changed if Congress takes certain adjournments. If you want to know the effective date of these final regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT:
Dr. Argelia Velez-Rodriquez, Telephone: (202) 282-7760.

SUPPLEMENTARY INFORMATION: The authority to administer the Minority Institutions Science Improvement Program (MISIP) is firmly rooted in Congressional action. Prior to its transfer to the Department of Education, MISIP was administered by the National Science Foundation under the authority of section 3(a) of the National Science Foundation Act 42 U.S.C. 1862. When the Department of Education was established, MISIP was specifically transferred to it by Congress. (Section 304 of the Department of Education Organization Act and 20 U.S.C. 3444; S. Rep. No. 96-49, 96th Cong., 1st Sess. 50-51) (1979). S. Rep. No. 96-326, 96th Cong., 1st Sess. 50 (1979). These references indicate that Congress recognized the purpose of the program to assist institutions with predominantly minority enrollments and that Congress intended that the Department of Education administer the program in a manner consistent with this purpose.

Finally, section 1303 of the Education Amendments of 1980 specifically amends the General Education Provisions Act to authorize appropriations to carry out the MISIP program during fiscal year 1981. Pub. L. 96-374, § 1303 (1980).

The objectives of MISIP are two-fold: (1) to effect long-range improvement in science education at predominantly minority institutions, and (2) to increase the flow of underrepresented ethnic minorities into scientific careers. In general, predominantly minority institutions lack the extensive financial resources needed to plan for and implement improved programs of science instruction. The students at these institutions represent a large, relatively untapped, reservoir of scientific talent. In addition, many of these students have suffered the pervasive effects of years of discrimination, including economic disadvantage and inferior academic preparation, that have not yet been eradicated by the Civil Rights Act of 1964 and other remedial measures.

For these reasons, students are often poorly prepared for the rigors of science education opportunities at the postsecondary level. With improved science education opportunity these students will be able to redress the current underrepresentation of certain minorities within the scientific and engineering community and make a large contribution to the Nation's need for trained professionals in these fields.

It should also be emphasized that all students that attend predominantly minority institutions—whether or not they belong to a disadvantaged ethnic group currently underrepresented in science and engineering—are expected to benefit from the improved educational opportunities that result from this program. In addition, although the purpose of MISIP is to improve these opportunities at predominantly minority institutions, entities other than minority institutions are eligible to receive a grant and participate in certain types of projects conducted as part of MISIP.

The provisions of these final regulations are substantially the same as the provisions of the notice of proposed rulemaking (NPRM) published in the **Federal Register** on November 5, 1980, 45 FR 73514. Interested persons were given 30 days in which to comment on the NPRM. No comments were received during the comment period which ended December 5, 1980.

Assessment of Educational Impact

On November 14, 1980, the Secretary published a notice in the **Federal Register** of the Department's intent to publish regulations necessary to implement the Education Amendments of 1980. In that notice, the Department listed the existing regulations affected by the new law and requested comments whether those regulations required information that is already being gathered by or is available from any other agency or authority of the United States. The regulations in this document are based on regulations listed in the November 14 notice. Based on any comments received and the Department's own review, it has been determined that the regulations in this document do not require information that is already being gathered by or is available from any other agency or authority of the United States.

Citation of Legal Authority

The reader will find a citation of statutory or other legal authority in parentheses on the line following each substantive provision.

(Catalog of Federal Domestic Assistance No. 84.120, Minority Institutions Science Improvement Program. Part I of OMB Circular A-95 does not apply to this program)

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

The Secretary of Education amends Title 34 of the Code of Federal Regulations to add a new Part 755, reading as follows:

PART 735—THE MINORITY INSTITUTIONS SCIENCE IMPROVEMENT PROGRAM

Subpart A—General

Sec.

735.1 What is the Minority Institutions Science Improvement Program (MISIP)?
735.2 Who is eligible to receive a grant?
735.3 How does a minority institution establish eligibility?
735.4 What regulations apply to the Minority Institutions Science Improvement Program?
735.5 What definitions apply to the Minority Institutions Science Improvement Program?

Subpart B—What Kinds of Projects Does the Department of Education Assist Under This Program?

735.10 What kinds of projects are supported by this program?
735.11 What are institutional projects?
735.12 What are design projects?
735.13 What are special projects?
735.14 What are cooperative projects?

Subpart C—How Does One Apply for a Grant?

735.20 Application procedures.

Subpart D—How Does the Secretary Make a Grant?

735.30 How does the Secretary evaluate an application?
735.31 What selection criteria does the Secretary use?

Subpart E—What Conditions Must a Grantee Meet?

735.40 What are the restrictions on the types of costs a grant may support?

Authority: Sec. 3(a) of the National Science Foundation Act of 1950 as enacted by Pub. L. 81-507, 64 Stat. 149, as amended (42 U.S.C. 1862).

Subpart A—General

§ 735.1 What is the minority institutions science improvement program (MISIP)?

The Minority Institutions Science Improvement Program is designed to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities into scientific careers.

(42 U.S.C 1862)

§ 735.2 Who is eligible to receive a grant?

The following parties are eligible to receive grants:

(a) Public and private, nonprofit minority institutions as defined in § 735.5(b).

(b) Nonprofit science-oriented organizations, professional scientific societies, and all nonprofit, accredited colleges and universities which render a needed service to a group of eligible minority institutions or which provide

in-service training for project directors, scientists, and engineers from eligible minority institutions.

(42 U.S.C. 1862)

§ 735.3 How does a minority institution establish eligibility?

The institution is required to provide the information necessary to establish eligibility to participate in the program, including the data on enrollment furnished by the institution to the Office for Civil Rights, Education Department, for the "Fall Enrollment and Compliance Report of Institutions of Higher Education, 1978" (Higher Education General Information Survey HEGIS XIII: OE Form 2300–2.3).

(42 U.S.C. 1862)

§ 735.4 What regulations apply to the minority institutions science improvement program?

The following regulations apply to the Minority Institutions Science Improvement Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs) and 34 CFR Part 77 (General).

(b) The regulations in this Part 735.

(42 U.S.C. 1862, 20 U.S.C. 3444)

§ 735.5 What definitions apply to the minority institutions science improvement program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR Part 77.

Applicant
Application
Department
Grants
Grantee
Nonprofit
Private
Project
Project period
Resources
Secretary

(20 U.S.C. 1221e–3(a)(1))

(b) *Definitions that apply to this part:*

"Accredited" means currently certified by a nationally recognized accrediting agency or making satisfactory progress toward achieving accreditation.

"Minority" means American Indian, Alaskan Native, black (not of Hispanic origin), Hispanic (including persons of Mexican, Puerto Rican, and Central or South American origin), Pacific Islander or other ethnic group underrepresented in science and engineering.

"Minority institution" means an accredited college or university whose enrollment of a single minority group or a combination of minority groups as defined in § 735.5(b) exceeds fifty percent of the total enrollment.

"Pre-College level" means middle or secondary school.

"Science" means, for the purposes of this program, the biological, engineering, mathematical, physical and social sciences, and the history and philosophy of science; also included are interdisciplinary fields which are comprised of overlapping areas among two or more sciences.

"Underrepresented in science and engineering" means a minority group whose number of scientists and engineers per 10,000 population of that group is substantially below the comparable figure for scientists and engineers who are white and not of Hispanic origin.

(42 U.S.C. 1862)

Subpart B—What Kinds of Projects Does the Department of Education Assist Under This Program?

§ 735.10 What kinds of projects are supported by this program?

The Secretary awards grants under this program for all or some of the following categories of projects:

(a) Institutional projects for implementing a comprehensive science improvement plan as described in § 735.11.

(b) Design projects for developing a long-range science improvement plan as described in § 735.12.

(c) Special projects to support a single activity as described in § 735.13.

(d) Cooperative projects to share facilities and personnel and disseminate information as described in § 735.14.

(42 U.S.C. 1862)

§ 735.11 What are institutional projects?

(a) Institutional project grants support the implementation of a comprehensive science improvement plan, which may include any combination of activities for improving the preparation of minority students for careers in science.

(b) The length of the project period is a maximum of 36 months.

(c) Activities that the Secretary may assist under an institutional project include but are not limited to the following:

(1) Faculty development programs; or

(2) Development of curriculum materials.

(d) Eligible applicants for institutional projects are minority institutions.

(42 U.S.C. 1862)

§ 735.12 What are design projects?

(a) Design project grants assist minority institutions that do not have their own appropriate resources or personnel to plan and develop long-range science improvement programs.

(b) The length of the project period is a maximum of 12 months.

(c) Activities that the Secretary may assist under a design project include but are not limited to the following:

(1) Development of planning, management, and evaluation systems; and

(2) Improvement of institutional research or development offices.

(d) Eligible applicants for design projects are minority institutions that have not received support under this program in prior years.

(42 U.S.C. 1862)

§ 735.13 What are special projects?

(a) Special project grants support a single activity to—

(1) Improve quality training in science and engineering at minority institutions;

(2) Enhance the minority institutions' general scientific research capabilities;

(3) Provide a needed service to a group of eligible minority institutions; or

(4) Provide in-service training for project directors, scientists, and engineers from eligible minority institutions.

(b) The length of the project period is a maximum of 24 months.

(c) Activities that the Secretary may assist under a special project include, but are not limited to, the following:

(1) Advanced science seminars;

(2) Science faculty workshops;

(3) Faculty training to develop specific science research or education skills;

(4) Research in science education;

(5) Programs for visiting scientists;

(6) Preparation of films or audio-visual materials in science;

(7) Development of learning experiences in science beyond those normally available to minority undergraduate students;

(8) Development of pre-college enrichment activities in science; and

(9) Any other activities designed to address specific barriers to the entry of minorities into science.

(d) Eligible applicants for special projects of the type listed in paragraphs (a) (1) and (2) of this section are minority institutions. Eligible applicants for special projects of the type listed in paragraphs (a) (3) and (4) of this section are all applicants eligible for assistance under this program.

(42 U.S.C. 1862)

§ 735.14 What are cooperative projects?

(a) Cooperative project grants assist groups of nonprofit accredited colleges and universities with common problems to work together to conduct a science improvement project.

(b) The length of the project period is a maximum of 36 months.

(c) Activities that the Secretary may fund under cooperative projects include, but are not limited to, the following:

(1) Assisting institutions in sharing facilities and personnel;

(2) Disseminating information about established programs in science and engineering;

(3) Supporting cooperative efforts to strengthen the institutions' science and engineering programs; and

(4) Carrying out a combination of any of the activities in paragraphs (c)(1)–(3) of this section.

(d) Eligible applicants for cooperative projects are groups of nonprofit accredited colleges and universities whose primary fiscal agent is an eligible minority institution as defined in § 735.5(d).

(42 U.S.C. 1862)

Subpart C—How Does One Apply for a Grant?

One applies for a grant under the procedures of EDGAR §§ 75.100 through 75.129.

Subpart D—How Does the Secretary Make a Grant?

§ 735.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 735.31.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(d) For applications of substantially equal quality, the Secretary gives priority to projects that contribute to achieving balance among projects funded by this program within each of the following categories:

(1) Past history of participation in the program;

(2) Geographic location;

(3) Academic discipline; and

(4) Project type.

§ 735.31 What selection criteria does the Secretary use?

The Secretary evaluates applications using the following criteria:

(a) *Plan of operation.* (10 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) Methods of coordination. (See EDGAR 34 CFR 75.581)

(b) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the quality of the key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project.

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as members of a racial or ethnic minority groups, women, handicapped persons, and the elderly.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training, in fields related to the objectives of the project, as well as other information that the applicant provides.

(c) *Budget and cost effectiveness.* (5 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (10 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. (See EDGAR 34, CFR 75.590—Evaluation by the grantee; where applicable)

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(20 U.S.C. 1221(e)—3(a)(1))

(f) *Identification of need for the project.* (10 points)

(1) The Secretary reviews each application for information that shows the identification of need for the project.

(2) The Secretary looks for information that shows—

(i) An adequate needs assessment;

(ii) An identification of specific needs in science; and

(iii) An involvement of appropriate individuals, especially science faculty, in identifying the institutional needs.

(g) *Potential institutional impact of the project.* (15 points)

(1) The Secretary reviews each application to determine the extent to which the proposed project gives evidence of potential for enhancing the institution's capacity for improving and maintaining quality science education for its minority students.

(2) The Secretary looks for information that shows—

(i) For an institutional or cooperative project, the extent to which both the established science education program(s) and the proposed project will expand or strengthen the established program(s) in relation to the identified needs; or

(ii) For a design project, the extent to which realistic long-range science education improvement plans will be developed with the technical assistance provided under the project; or

(iii) For a special project, the extent to which it addresses needs that have not been adequately addressed by any existing institutional science program or takes a particularly new and exemplary approach that has not been taken by any existing institutional science program.

(h) *Institutional commitment to the project.* (15 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to continue the project activities when funding ceases.

(2) The Secretary looks for information that shows—

(i) Adequate institutional commitment to absorb any after-the-grant burden initiated by the project;

(ii) Adequate plans for continuation of project activities when funding ceases;

(iii) Clear evidence of past institutional commitment to the provision of quality science programs for its minority students; and

(iv) A local review statement signed by the chief executive officer of the institution endorsing the project and indicating how the project will accelerate the attainment of the institutional goals in science.

(i) *Expected outcomes.* (10 points)

(1) The Secretary reviews each application to determine the extent to which minority students will benefit from the project.

(2) The Secretary looks for information that shows—

(i) Expected outcomes likely to result in the accomplishment of the program goals;

(ii) Educational value for science students; and

(iii) Possibility of long-term benefits to minority students, faculty, or the institution.

(j) *Scientific and educational value of the proposed project.* (10 points)

(1) The Secretary reviews each application for information that shows its potential for contributions to science education.

(2) The Secretary looks for information that shows—

(i) The relationship of the proposed project to the present state of science education;

(ii) The use or development of effective techniques and approaches in science education; and

(iii) Potential use of some aspects of the project at other institutions.

(42 U.S.C. 1862)

Subpart E—What Conditions Must a Grantee Meet?

§ 735.40 What are the restrictions on the types of costs a grant may support?

Funds may not be used for—

(a) Undergraduate scholarships;

(b) Augmenting the salary rate for faculty members pursuing regularly assigned duties;

(c) Full support of faculty members currently employed by the institutions;

(d) Support for a project director or for faculty members beyond the extent of their participation in project activities. For design grants no more than fifty percent of the academic year salaries may be paid;

(e) Support for faculty members engaged in project activities during summer in excess of two-months of a faculty member's current academic year salary for full-time involvement for an 8-week period;

(f) Fees and expenses for consultants in excess of the established applicant's rate;

(g) Support for student assistants not involved in project activities or in excess of the approved work-study rates in operation at the institution;

(h) Support of any other on-going, regular activity at the institution;

(i) Staff benefits, if they are treated as an item of indirect cost in the negotiation of the institution's indirect cost rate; and

(j) Major renovations of existing physical facilities.

(42 U.S.C. 1862)

[FR Doc. 81-1565 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

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34 CFR Part 757

Law-Related Education Program [1]

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education issues final regulations to implement the Law-Related Education Act of 1978. These regulations govern grant awards to encourage State educational agencies (SEA's), local educational agencies (LEA's), and other public and non-profit private agencies, organizations, and institutions to provide law-related education programs. These regulations replace the final regulations that were issued for the Act on April 24, 1980 (45 FR 27880).

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to the Congress. Regulations are usually transmitted to the Congress several days before they are published in the **Federal Register**. The effective date is changed by statute if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write to the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Elizabeth Farquhar, Telephone (202)-472-4594.

SUPPLEMENTARY INFORMATION:

A. Background

The Law-Related Education Act of 1978 is enacted as Part G of Title III of the Elementary and Secondary Education Act.

The Act authorizes the Secretary to fund discretionary grants or contracts supporting law-related education activities. It defines "law-related education" to mean education to equip non-lawyers with knowledge and skills pertaining to the law, the legal process, and the legal system and the fundamental principles and values on which these are based. The purpose is to enable children, youth, and adults to be more informed and effective citizens.

The Act is premised on congressional findings that—

(1) There is a lack of understanding of how our system of law and legal institutions works;

(2) That understanding is essential in developing faith and appreciation in our democratic system of government and in preparing youth to be knowledgeable, responsible citizens; and

(3) There is an urgent need for Federal involvement to encourage and support the development of law-related education programs.

Under the Act, the Secretary is authorized to fund a variety of law-related education activities, including awareness activities, program support, materials and methods development, pilot and demonstration projects, dissemination, clearinghouse activities, technical assistance, training, research and evaluation, involvement of law-related organizations, and youth internships.

The regulations govern grant and contract awards beginning in Fiscal Year 1981. Regulations are needed—

(1) To clarify the scope of law-related education as defined in the statute;

(2) To establish the types of activities eligible for support;

(3) To authorize priorities for types of activities; and

(4) To indicate criteria governing the selection of grantees.

B. Public Comments on the Proposed Regulations

A notice of proposed rulemaking (NPRM) for the Law-Related Education Act was published in the **Federal Register** of September 22, 1980 (45 FR 62859). The NPRM proposed to replace final regulations issued for the Act on April 24, 1980 (45 FR 27880), and invited public comment. Seven people provided responses. In general, these comments supported the simplification of the regulations and the elimination of cost-sharing and other requirements. A number of specific questions were raised on provisions of the proposed regulations; in many instances, these comments have resulted in changes which are incorporated in the final regulations.

[1] Note: The closing date for applications for new projects under the Law-Related Education Program was published on January 15, 1981 at page 3589.

While the provisions of these final regulations are substantially the same as those of the NPRM, some notable modifications include: alterations in the list of subjects used to illustrate topics eligible for funding under the Act; elimination of the requirement that existing projects include technical assistance activities and consolidation of other sections referring to technical assistance; elimination of a five percent limit on equipment costs. Other changes serve to conform the regulations more closely to the language of the Act, to clarify provisions of the regulations, or to provide additional flexibility for applicant institutions. The paragraphs below summarize the comments and the Secretary's responses to them. They appear in the order of the sections to which they pertain. All references which in the NPRM appeared under the heading Part 161g have been redesignated to refer to the new Part 757; the section numbers, however, remain the same.

§ 757.1 Scope of law-related education

Comment. Two commenters raised questions regarding the list of illustrative activities pertinent to the Act. One commenter recommended that (c)(4) be expanded to include lawmaking processes at the local and State levels as well as the Federal level. Another stated that (c)(6) did not make clear what kinds of rules are covered. The commenter also questioned, in (c)(7), who would determine the "strengths and weaknesses" of our system. It was also suggested that the study of the juvenile justice system be added to that of the criminal and civil systems under that example. A commenter objected to the inclusion, in (c)(8), of "informal law" as a possible invitation for applicants to include the study of morals and ethics. One of the commenters suggested modifications in (c) (9), (11), and (13), adding "equality, rights, and responsibilities" and removing "punishment" ((c)(9)); substituting "housing" for "criminal" ((c)(11)); and substituting "American Indian legal traditions" for "Indian law" in (c)(13).

Response. Some changes have been made. Local, State, and Federal lawmaking processes are now included under (c)(4). The reference to development and administration of rules has been made more specific; it includes rules formulated by government. Paragraph (c)(7) is amended to include the juvenile justice system while the phrase on strengths and weaknesses is deleted to avoid confusion. Paragraph (c)(8) is deleted. The recommended changes in (c) (9), (11), and (13) have not been made; the examples provided under the NPRM are illustrative only; the commenter's suggestions are all legitimate subjects of study under the Act.

§ 757.4 Definitions

Comment. One commenter asked why the definition of "interested groups and individuals" was broader than that mentioned in the Act.

Response. The definition has been eliminated.

§ 757.12 Elementary/Secondary School Project Activities

Comment. One commenter was concerned that by combining awareness and training activities in the same section, the regulations were deviating from the language of the law ((b)(1)). Clarification was sought concerning the phrase "to the extent that they are incidental to training activities" ((b)(2)) and the commenter asked if this qualification applied to all materials or lesson plans only. The commenter expressed a concern over the provisions for technical assistance in ((b) (3) and (5)). This concern included a question as to the recipients of technical assistance and the mandatory inclusion of technical assistance activities by applicants from established programs. The commenter felt that these provisions were unclear and inconsistent with the statute. The commenter asked why the regulations include grants involving activities to mobilize financial and programmatic support ((b)(4)), while a second commenter suggested a rewording of this section to place additional emphasis on community participation.

Response. Several changes have been made to conform the regulation more closely to the language of the Act. Awareness and training activities have been separated into two discrete provisions, with each identifying participants as stated in the Act. With respect to the comment requesting an explanation of (b)(2) on materials development, the section applies to all materials listed. It is included so that materials development does not become the major focus of elementary/secondary programs. There is evidence that a diversity of curriculum materials for elementary/secondary education already exists; there are far greater needs for program development and institutionalization within the schools. At the same time, we recognize that existing materials must be adapted to serve local needs. For this reason, curriculum development is permitted as an adjunct activity to training in this section, while § 757.13, exemplary projects, permits an exclusive focus on curriculum development for neglected areas within law-related education.

The two provisions on technical assistance have been combined into one so as to make it clear that the regulatory intent, like that of the Act, is for technical assistance to be extended to both individuals (such as teachers) and groups and organizations. In addition, the reference to technical assistance requirements of multiyear projects has been deleted. The Act is designed to encourage the development of law-related education programs throughout the Nation. Its authorized funding level cannot provide direct funding for more than a small number of programs. It must, therefore, encourage funded projects with developed expertise to offer assistance to other developing programs to achieve the statutory purposes. At the same time, the Secretary realizes that the law authorizes, but does not mandate, technical assistance activities and for that reason a change is made.

The provision for the mobilization of financial and programmatic support is retained with a minor change. Part of the overall strategy in this program is to fund seed or incentive grant projects that will eventually become self-sustaining programs. It is critical that projects seek other sources of funding for their long-term operation. Insufficient attention paid to future sources of support for federally funded programs will impede the process of program development authorized by the Act and may contribute to the problem of programs ending when Federal funds are exhausted. With respect to the comment suggesting a greater emphasis on community participation in this section, no change is deemed necessary; the Secretary hopes that community involvement will be a strong component of any such activities, but does not consider it appropriate to mandate that approach within the regulations.

§ 757.13 Exemplary Projects

Comment. One commenter suggested, under (a), removal of the requirement that exemplary projects propose approaches that have "not been taken by any law-related education program," stating that this was too prescriptive and not very realistic.

Response. A change has been made in accordance with the comment.

§ 757.20 Private School Participation.

Comment. A commenter requested that the regulations place additional emphasis on the need for LEAs and SEAs to involve private school officials in developing applications under the Act

so that children in these schools can be served by funded projects.

Response. A change has been made. This provision is unformly maintained for all ED programs by §§ 75.650 and 76.650–652. The more complete section from Part 76 is now referenced in the regulation and will be part of the application package for the program. No special provisions, however, will be added for these regulations in order to retain a consistent policy throughout the Department.

§ 757.30 Award Decisions

Comment. One commenter asked why the Secretary might not fund a project if it comes within a priority of another Federal agency, and asked whether other existing Federal programs overlap with this one.

Response. No change has been made. The Secretary believes that the Department should be certain to use appropriated funds in a manner that does not duplicate activities of other Federal agencies. In general, law-related education has not been a major concern of any Federal agency. Two agencies—the National Endowment for the Humanities (NEH) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP)—have funded a small number of projects in law-related education. NEH defines jurisprudence as a discipline of the humanities; OJJDP is concerned with law-related education's potential role in delinquency prevention. To insure wise expenditure of Federal funds, the ED program is closely coordinated with relevant programs in these other agencies. it is for this reason that the provision is maintained.

§ 757.31 Evaluation Criteria

Comment. One commenter asked why the regulations refer to gains in students' attitudes, when the law only refers to knowledge and skills.

Response. A change has been made to conform the criterion to the language of the Act.

Comment. The same commenter asked why, in (a)(4), "on-site" training was specified, and, in (a)(iii), why "on-site" technical assistance was required.

Response. Changes have been made: under training, the criterion has been made less prescriptive, but it retains the idea that training should be conducted in a manner and place accessible to trainees. No changes have been made in the reference to technical assistance. There is evidence that program quality will be enhanced when the project includes some provisions for attention to the specific, on-site needs of the recipients of technical assistance. Studies of educational innovations clearly demonstrate that the implementation of innovations takes place over time within the classroom and school building. Technical assistance away from the implementor's site is likely to be less effective than when it occurs at that site. It should be noted, however, that both these passages are not program requirements; but simply one means of evaluating the likely quality of a proposed project.

Comment. The commenter asked why, in (a)(5)(i) and (c)(2), the regulation appears to require commitment from organizations likely to participate in law-related education activities, when the law simply encourages their involvement.

Response. A change has been made. Involvement of repesentative organizations in law-related education is not a requirement of the regulation. It is simply one way of judging the likely quality of proposed activities. Just as the law encourages the involvement of organizations in law-related education programs, the selection criteria encourage applicants to make provisions for participation. The language of the criterion has been modified, however, to reflect more closely the language of the Act.

Comment. The commenter asked for clarification of provisions for technical assistance under (d)(1)(ii) and (d)(3).

Response. Changes have been made in order to clarify and consolidate these sections.

Comment. One commenter asked, in response to paragraph (b)(v)(D), how elementary and secondary school projects could include access for the elderly. Another commenter requested inclusion, under plan of operation, (b)(2)(v), of immigrant groups and those of limited English-speaking ability.

Response. No change has been made. This criterion applies to all ED programs and should be employed to the extent to which it is appropriate. Immigrant groups and others mentioned by the second commenter would be included as members of racial or ethnic minority groups. In the first year of the program, one of the grants went to an immigrant refugee group from Southeast Asia and several others involved American Indians and handicapped persons with limited English-speaking facility.

§ 757.32 Evaluation Criteria

Comment. A commenter suggested that, under (g), an organization with a potentially significant contribution to make but limited experience in law-related education would be at a competitive disadvantage.

Response. A change has been made. The applicant must have knowledge of law-related education, but if it lacks experience in the field it can make provision for obtaining assistance from those with appropriate background in law-related education.

§ 757.33 Duration of Support

Comment. A commenter asked for explanation of the rationale for the optional two-year project period and whether after completion of a two-year project, a grantee would be able to compete for another award.

Response. No change has been made. The recommended two-year project period is designed to provide programs with some stability over the short term and to reduce administrative burdens. The recipient of a two-year project would certainly be eligible to compete for another project upon expiration of the first one.

§ 757.40 Allowable Costs

Comment. A commenter asked why the regulation limits equipment costs to five percent of the grant amount.

Response. The section has been deleted.

Citation of Legal Authority

A citation of statutory or other legal authority has been placed in parentheses on the line following each provision.

(Catalog of Federal Domestic Assistance Number 84.123, Law-Related Education Program)

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

The Secretary of Education amends Title 34 of the Code of Federal Regulations by adding a new Part 757 reading as follows:

PART 757—LAW RELATED EDUCATION

Subpart A—General

Sec.
757.1 The Law-Related Education Program.
757.2 What regulations apply to the Law-Related Education Program?
757.3 Who is eligible to apply?
757.4 Definitions.

Subpart B—What Kinds of Activities Does the Secretary Support Under This Program?

757.10 What are the eligible projects; priorities?
757.11 Non-duplication of procurements.
757.12 Elementary and secondary school projects.
757.13 Exemplary projects.

Subpart C—How Does One Apply for a Grant?

757.20 What limitations apply to applications?

Subpart D—How Is a Grant Made?

757.30 How does the Secretary evaluate an application?
757.31 What criteria are used to evaluate applications for elementary and secondary school projects?
757.32 What criteria are used to evaluate applications for exemplary projects?
757.33 What is the duration of support?

Subpart E—What Conditions Must Be Met by a Grantee?

757.40 What are the limitations on allowable costs?

Authority: Part G of Title III of the Elementary and Secondary Education Act of 1965, as amended by Pub. L. 95–561, 92 Stat. 2216 (20 U.S.C. 3001–03).

Subpart A—General

§ 757.1 The Law-Related Education Program.

(a) The Law-Related Education Program is designed to give persons knowledge and skills pertaining to the law, the legal process, and the legal system, and the fundamental principles and values on which these are based.

(b) The purpose of law-related education is to enable non-lawyers, including children, youth, and adults, to be more informed and effective citizens.

(c) Law-related education may include a variety of learning approaches in such subject areas as—

(1) Fundamental legal principles and the values on which they are based;

(2) The Bill of Rights and other constitutional law;

(3) The role and limits of law in a democratic society both past and present;

(4) The Federal, State, and local lawmaking process;

(5) The role of law in avoiding and resolving conflicts;

(6) Development and administration of specific rules of law by Federal, State or local government and examination in a general or theoretical way of how rules of governance are developed and administered;

(7) The administration of the criminal, civil and juvenile justice systems;

(8) Issues of authority, freedom, enforcement, and punishment;

(9) Law as a vehicle to illuminate and resolve social and political issues;

(10) Areas of law that affect the daily lives of citizens (e.g., criminal, consumer, labor, education, administrative, environmental, and family law);

(11) Comparative law that examines law and its role in different societies and cultures;

(12) Indian law; and

(13) The application of the above and other law-related subject areas to school policies and practices.

(d) Law-related education does not include direct training for careers in law. It does not include programs designed exclusively or primarily to provide information to persons preparing for or working in a particular profession on a specific law or set of laws that affect that profession.

(20 U.S.C. 3001, 3002; S. Rep. No. 95–856, Pages 41–42)

§ 757.2 What regulations apply to the Law-Related Education Program?

The following regulations apply to grants under the Law-Related Education Act: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs) and 34 CFR Part 77 (General); and (b) The regulations in this part 757.

(20 U.S.C. 1221e–3, 3001, 3002)

§ 757.3 Who is eligible to apply?

A State educational agency (SEA), local educational agency (LEA), or other public or nonprofit private agency, organization, or institution may apply for a grant. An applicant may apply singly or jointly with another eligible applicant, as provided in §§ 75.127 through 75.129 of EDGAR.

(20 U.S.C. 3002(a))

§ 757.4 Definitions.

As used in these regulations—

"Act" means the Law-Related Education Act of 1978 that is enacted by Pub. L. 95–561 as Part G of Title III of the Elementary and Secondary Education Act of 1965.

(20 U.S.C. 1221e–3(a)(1), 3001)

Subpart B—What Kinds of Activities Does the Secretary Support Under this Program?

§ 757.10 What are the eligible projects; priorities?

(a) *Eligible projects.* The Secretary awards grants to support any law-related education activities authorized under the Act.

(b) *Annual priority areas.* The Secretary annually may reserve funds to support some, all, or a combination of the following types of projects: (1) Projects to support law-related education programs in elementary or secondary schools or both, as described in § 757.12. In this area, the Secretary may reserve funds for—

(i) Projects to plan and establish new law-related education programs;

(ii) Projects to strengthen or expand established law-related education programs;

(iii) Projects to provide technical assistance from established law-related education programs to other organizations in one or more States;

(2) Projects to carry out exemplary activities in any area authorized by the Act, as described in § 757.13.

(20 U.S.C. 3002)

§ 757.11 Non-duplication of procurements.

The Secretary does not fund a grant to support activities that duplicate any procurement activities under the Act.

(20 U.S.C. 3002)

§ 757.12 Elementary and secondary school projects.

(a) *Purposes.* The Secretary awards grants to support law-related education programs that serve elementary or secondary schools or both in a State, school district, or combination of school districts to—

(1) plan and establish a new program; or

(2) strengthen or expand an already established program—or provide technical assistance from the program to other organizations in one or more States—or both.

(b) *Activities.* To carry out these purposes the Secretary awards grants that support:

(1) The planning and implementation of awareness activities such as conferences or workshops for educators, law-related personnel, and the public;

(2) The planning and implementation of training activities—such as workshops, seminars, courses, or institutes—for educators and law-related personnel;

(3) The planning, development, and adaptation of curriculum and resource materials such as curriculum guides, resource publications, and lesson plans to the extent that they are incidental to training activities;

(4) Technical assistance to help individual participants (such as teachers) plan and implement the law-related education program in elementary or secondary schools and classrooms—or technical assistance to other agencies or organizations to help them identify and use available resources in initiating or conducting law-related education programs—or both; and

(5) Activities to mobilize and coordinate financial and programmatic support in the community for the grantee's program.

(20 U.S.C. 3002(d); S. Rep. No. 95–856, pages 41–42)

§ 757.13 Exemplary projects.

(a) *General.* The Secretary awards grants under this section to support innovative activities at any level of education and in any area of law-related education authorized under the Act. The

project shall address needs that have not been adequately addressed by any law-related education program or take a particularly new and exemplary approach to law-related education.

(b) *Significance of project.* The project must be of national or regional significance by—

(1) Carrying out activities that are national or regional in scope;

(2) Developing a model program or product that can be used, copied, or adapted by other agencies and institutions in other places; or

(3) Addressing a particularly critical need in law-related education.

(20 U.S.C. 3002(d); S. Rep. No. 95-856, pages 41-42)

Subpart C—How Does One Apply for a Grant?

§ 757.20 What limitations apply to applications?

(a) An application from an LEA must comply with the requirements in §§ 75.138 through 75.141 of EDGAR concerning an open meeting on the application.

(b) An application from an LEA or SEA must document compliance with Section 302(b) of the Elementary and Secondary Education Act, as implemented by §§ 75.650 and 76.650-662 of EDGAR, concerning the opportunity for participation by private school children.

(c) An application for the second year of an approved two-year project must comply with § 75.118 of EDGAR and—

(1) Provide a budget for the second year;

(2) Detail any proposed project changes, as described in § 75.110 of EDGAR; and

(3) Provide a detailed project description for the second year—as required in § 75.110 of EDGAR—if this description was not fully provided in the original project application.

(20 U.S.C. 3002(c))

Subpart D—How Is a Grant Made?

§ 757.30 How does the Secretary evaluate an application?

(a) Within any established funding reservations, the Secretary decides whether or not to fund an application based on the following factors: (1) The criteria for evaluating applications in § 757.31 (Elementary and secondary school projects) or § 757.32 (Exemplary projects), as applicable.

(i) The maximum possible score for an application is 100 points. The maximum possible score for each criterion reflects the degree of importance assigned to that criterion by the Secretary and is indicated in parentheses.

(ii) In evaluating an application under the appropriate criteria from an applicant that previously received a grant under the Act, the Secretary places great emphasis on the success of the previously funded project in reaching its objectives.

(2) Whether funding the proposed project will contribute to the widest possible distribution of law-related education programs throughout the United States.

(b) The Secretary may decline to fund a project if it comes within a priority of another Federal agency.

(20 U.S.C. 3001, 3002)

§ 757.31 What criteria are used to evaluate applications for elementary and secondary school projects?

In evaluating applications to plan and initiate, to strengthen or expand, or to provide technical assistance to law-related education programs under § 181g.12, the Secretary considers the following: (a) *Quality of the project.* (25 points) The quality of the applicant's law-related education project. In applying this criterion, the Secretary considers—

(1) Evidence of success of the applicant's materials, programs, or approaches in law-related education and in the types of activities proposed in the project;

(2) The applicant's and the staff's experience in and knowledge of law-related education, or provisions to obtain training and technical assistance from persons or groups experienced in law-related education;

(3) How the project addresses a diversity of learning approaches that are—

(i) Appropriate to the students to whom the project is directed;

(ii) Designed to address gains not only in students' knowledge, but also in their skills;

(iii) Balanced and based on sound scholarship and do not advocate particular legal or political viewpoints.

(4) The nature and scope of proposed training activities for participating individuals, including the extent of continuing training in a manner and place accessible to trainees.

(5) The likely quality of proposed technical assistance activities under § 757.12 (b)(4), including—

(i) In the case of technical assistance to other agencies and organizations, the applicant's plans for identifying the communities to receive technical assistance services and for involving representative educational, law-related, and other organizations in these communities as participants in the projects;

(ii) The applicant's capacity and plans to respond to the needs and interests of individuals and local communities to be assisted;

(iii) The nature and scope of the proposed technical assistance activities, including the extent of continuing, on-site technical assistance and the extent to which recipients of technical assistance will be exposed to a variety of law-related education models, materials, and approaches.

(b) *Plan of operation.* (12 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective;

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(vi) If the applicant is an SEA or LEA, how the applicant will provide an opportunity for the participation of children in private schools.

(c) *Likelihood of sustaining program.* (20 points) The likelihood that the project will help the applicant or organizations that receive technical assistance sustain a viable law-related education program. In applying this criterion, the Secretary considers the adequacy of the applicant's plan for institutionalizing law-related education or for assisting other organizations to institutionalize law-related education, including evidence of: (1) A plan for integrating law-related education as a regular part of the school curriculum;

(2) The participation of interested groups and individuals in planning and implementing the project;

(3) A realistic plan for developing financial support to continue the program after Federal funding expires, or, with respect to technical assistance to other agencies or organizations, for

helping recipients develop this support for their programs.

(d) *Need for support.* (13 points) (1) With respect to an application to initiate or strengthen a law-related education program—

(i) The need and rationale for the applicant's program at the site and grade levels at which it is directed; and

(ii) The financial need of the applicant's program and the extent to which the project is likely—both directly and indirectly—to strengthen the program's financial capacity to sustain law-related education activities.

(2) With respect to an application from an established program that requests funding only to provide technical assistance to other agencies or organizations, the need and interest of communities to receive technical assistance from the project, as documented in the application.

(3) Applications designed both to strengthen an existing program and also to provide technical assistance to other agencies or organizations are evaluated under (d)(1) and (2) of this section.

(e) *Breadth of the proposed programs.* (5 points) The breadth of the law-related education programs likely to be developed as a result of the project. In applying this criterion, the Secretary considers—

(1) The numbers of students, teachers, and schools proposed to be served by the applicant's program and by programs given technical assistance; and

(2) The extent to which the project will increase the capacity of State or local organizations to offer law-related education at a variety of grade levels and educational settings.

(20 U.S.C. 3001, 3002)

(f) *Quality of key personnel.* (12 points) (1) The Secretary reviews each application for information that shows the quality of key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (f)(2)(i) and (ii) of this section plans to commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(g) *Budget and cost effectiveness.* (5 points) (1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(h) *Evaluation plan.* (5 points) (1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. (See 34 CFR § 75.590—Evaluation by the grantee.)

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(i) *Adequacy of resources.* (3 points) (1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(20 U.S.C. 3001, 3002)

§ 757.32 What criteria are used to evaluate applications for exemplary projects?

In evaluating applications for exemplary grants, the Secretary considers—

(a) *Importance of need.* (18 points) The importance of the need addressed by the project, as documented by objective evidence in the application. In applying this criterion, the Secretary considers the extent to which the project—if successful—contributes to the Act's purposes to expand opportunities for law-related education throughout the United States and to improve the quality of law-related education programs.

(b) *Innovativeness.* (13 points) The extent to which the proposed project addresses needs that have not been adequately addressed by any law-related education program or the extent to which the proposed project uses a particularly new and exemplary approach to law-related education.

(c) *Quality of activities.* (16 points) The quality of the law-related education activities in the project. In applying this criterion, the Secretary considers how the project addresses the need for sound scholarship, quality control, and a balanced curriculum that does not advocate particular legal or political viewpoints.

(d) *Plan of operation.* (10 points) The Secretary evaluates an application on the basis of the criterion in § 757.31(b).

(e) *Evaluation plan.* (12 points) The Secretary evaluates an application on the basis of the criterion in § 757.31(h).

(f) *Quality of key personnel.* (13 points) The Secretary evaluates an application on the basis of the criterion in § 757.31(f).

(g) *Applicant's experience.* (10 points) The applicant's knowledge of and experience in law-related education, or specific provision for obtaining assistance from individuals or groups expert in the field.

(h) *Budget and cost effectiveness.* (5 points) The Secretary evaluates an application on the basis of the criterion in § 757.31(g).

(i) *Adequacy of resources.* (3 points) The Secretary evaluates an application on the basis of the criterion in § 757.31(i).

(20 U.S.C. 3001, 3002)

§ 757.33 What is the duration of support?

The Secretary approves a project for a period of up to two years. A multi-year application must comply with § 75.117 of EDGAR. Approval of a project for more than a year and the award of continuation grants within the project period are subject to the provisions in §§ 75.250 through 75.254 of EDGAR.

(20 U.S.C. 1221e-3)

Subpart E—What Conditions Must Be Met by a Grantee?

§ 757.40 What are the limitations on allowable costs?

Allowable costs under a grant are direct and indirect costs incurred by the grantee in carrying out the approved project, subject to the applicable cost principles provided or referenced in §§ 75.530 through 75.534 of EDGAR, except that construction and other capital costs are not allowable.

(20 U.S.C. 1221e-3)

[FR Doc. 81-1586 Filed 1-15-81; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[A-9-FRL 1722-1]

California Plan Revision: Redesignation of Air Quality Control Regions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: The EPA takes final action to approve the redesignation of seven Air Quality Control Regions (AQCR's) and the designation of two additional AQCR's in California, as requested by the California Air Resources Board (ARB). The intended effect of these designations and redesignations is to promote more efficient and effective air quality management.

EFFECTIVE DATE: February 17, 1981.

ADDRESS: A copy of the redesignation request is located at: The Office of the Federal Register, 1100 "L" Street NW., Room 8401, Washington, D.C. 20408.

FOR FURTHER INFORMATION CONTACT: Louise P. Giersch, Director, Air and Hazardous Materials Division, EPA Region IX, 215 Fremont Street, San Francisco, California 94105, Attn: Douglas Grano, (415) 556-2938.

SUPPLEMENTARY INFORMATION:

Background

Under Section 107 of the Clean Air Act, as amended, 11 AQCR's in California were designated by the Administrator. Boundaries of these AQCR's are described in the following sections of 40 CFR Part 81:

Sec.
81.17 Metropolitan los Angeles AQCR.
81.21 The San Francisco Bay Area Intrastate AQCR.
81.159 Great Basin Valley intrastate AQCR.
81.160 North Central Coast Intrastate AQCR.
81.161 North Coast Intrastate AQCR.
81.162 Northeast Plateau Intrastate AQCR.
81.163 Sacramento Valley intrastate AQCR.
81.164 San Diego Intrastate AQCR.
81.165 San Joaquin Valley Intrastate AQCR;
81.166 South Central Coast Intrastate AQCR.
81.167 Southeast Desert Intrastate AQCR.

Altogether, the AQCR's listed above include the entire state. At the time they became effective their boundaries coincided with those of the California Air Basins as defined in the California Administrative Code. Since then the boundaries of several air basins have been changed, and additional air basins have been created.

Changes that have been made by the ARB to the original air basins are as follows:

1. On May 18, 1971, northeastern Solano County was transferred from the San Francisco Bay Area Air Basin to the Sacramento Valley Air Basin.
2. On May 18, 1971, northern Sonoma County was transferred from the San Francisco Bay Area Air Basin to the North Coast Air Basin.
3. On July 21, 1971, western Siskiyou County was transferred from the North Coast Air Basin to the Northeast Plateau Air Basin.
4. On September 15, 1971, a portion of Kern County in the vicinity of Tehachapi was transferred from the San Joaquin Valley Air Basin to the Southeast Desert Air Basin.
5. On June 21, 1974, the Mountain Counties Air Basin was created from five counties (Plumas, Sierra, Nevada, Placer, and El Dorado) of the Sacramento Valley Air Basin and four counties (Amador, Calaveras, Tuolumne, and Mariposa) of the San Joaquin Valley Air Basin.
6. On July 19, 1974, the Lake County Air Basin, consisting of all of Lake County (previously in the North Coast Air Basin), was created.
7. On December 30, 1975, the Lake Tahoe Air Basin, comprising the Lake Tahoe watershed in Placer and El Dorado Counties, was created from part of the Mountain Counties Air Basin.
8. On August 31, 1976, Ventura County and southern Santa Barbara County were transferred from the South Coast Air Basin (Metropolitan Los Angeles AQCR) to the South Central Coast Air Basin.
9. On July 1, 1977, eastern San Diego County was transferred from the Southeast Desert Air Basin to the San Diego Air Basin.

As a result of these changes, there are now 14 State-designated air basins in California, of which two (North Central Coast and Great Basin Valleys) remain as originally established. Of the remaining 12, three (Mountain Counties, Lake County, and Lake Tahoe) are new and nine have been changed since their original establishment.

The Redesignation

On September 11, 1978, the Executive Officer of the ARB requested the EPA's approval of seven redesignated and two additionally designated (new) AQCR's in California.

The seven redesignated AQCR's in the State's proposal are as follows:

1. Northeast Plateau
2. North Coast
3. Sacramento Valley
4. San Francisco Bay Area
5. San Joaquin Valley
6. Southeast Desert
7. San Diego

The two new AQCR's proposed by the State are as follows:

1. Lake County
2. Mountain Counties

Two AQCR's in the State's proposal are unchanged from their original designation and thus remain as now designated, as follows:

1. Great Basin Valley
2. North Central Coast

Two AQCR's continue to differ from the corresponding air basins. Although the boundary between the South Central Coast and the South Coast Air Basins was changed in 1976 (see change #8 under Background, above), redesignation of the South Central Coast and the Metropolitan Los Angeles (South Coast) AQCR's is not being proposed at this time.

Another discrepancy between the air basins designated by the ARB and their proposed redesignation of AQCR's is the exclusion of the Lake Tahoe basin from the proposed Mountain Counties AQCR without a separate proposal of Lake Tahoe as an AQCR, although the basin was designated as an air basin by the ARB in 1975 (see change #7 under Background, above).

As indicated in the ARB's Staff Report No. 78-14-3, the Lake Tahoe basin presents unique regulatory and administrative problems because the airshed is shared by California and Nevada. In view of the possibility of designation of the Lake Tahoe basin as an Interstate AQCR, intrastate designation was not proposed by the ARB.

Under section 107(b)(2) of the Clean Air Act, as amended, the Lake Tahoe situation is being remedied by the EPA's designation of the basin as an intrastate AQCR. This action, which the EPA now takes, does not preclude any future designation of the Lake Tahoe area by California or by California and Nevada.

Effects of Redesignation

The redesignation AQCR's in California should begin to eliminate much of the confusion and misunderstanding which have occurred because of the differences between the State air basins and the Federal AQCR's. With this approval by the EPA of the redesignation (including designation of the Lake Tahoe AQCR), the geographic applicability of local, State, and Federal regulations will be more uniform and thus more easily understood.

As a result of these designations and redesignations of AQCR's, many changes are being made to the *Code of Federal Regulations* (CFR). In Part 81, most of the California AQCR descriptions are being revised, and newly designated AQCR's are being added. As a consequence of those Part 81 changes, numerous revisions are being made in Part 52, Subpart F (§§ 52.220–52.280).

Many of the changes in Part 52 are of a classificatory nature, where either (1) certain APCD's are being reclassified as to the AQCR in which they are located, or (2) references to AQCR's are being removed from the CFR; §§ 52.231, 52.233, 52.234, 52.236, 52.240, 52.269, 52.271, 52.272, 52.273, 52.275, and 52.280 are so revised.

In other sections (§§ 52.246, 52.252, 52.253, 52.254, and 52.255), which contain Federal requirements, the AQCR's to which the regulations apply are being defined "as of July 1, 1979" ("old" AQCR's), so that the Federal requirements in affected areas are not changed.

On April 20, 1979 [44 FR 23544] the EPA published a Notice of Proposed Rulemaking, proposing to approve the redesignation and to designate on its own the Lake Tahoe AQCR, and inviting public comments.

One comment, a letter from the Nevada Department of Conservation and Nautral Resources, Division of Environmental Protection, was received. That letter objected to the EPA's proposed designation of the California portion of the Lake Tahoe Basin as an intrastate AQCR and advocated designation of an interstate AQCR to include the entire Basin, in California and Nevada.

As noted in the Notice of Proposed Rulemaking, the ARB excluded the Lake Tahoe Basin from the Mountain Counties AQCR but did not propose the designation of a Lake Tahoe Intrastate AQCR, nor have the two states proposed an interstate AQCR for Lake Tahoe. As provided in section 107(b)(2) of the Clean Air Act, as amended, "the portion of such State which is not part of any such designated region shall be an air quality control region . . ."

This action by the EPA does not preclude the future designation of the Lake Tahoe Basin as an interstate AQCR. The EPA would publish a proposal to that effect as soon as the States of California and Nevada jointly request such a redesignation.

The EPA is approving this redesignation because it meets the requirements of section 107(e) of the Clean Air Act, as amended, which requires that the redesignation be for purposes of improved air quality management.

The EPA has determined that this action is "specialized" and therefore not subject to the procedural requirements of Executive Order 12044.

(Secs. 107, 110, 310(a), Clean Air Act, as amended (42 U.S.C. 7407, 7410, and 7601(a))

Dated: January 12, 1981.

Douglas M. Costle,

Administrator.

Note.—Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1980.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Subpart F—California

1. Section 52.220, paragraph (c)(61) is added as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(61) Redesignation of AQCR's in California, submitted on September 11, 1978, by the Governor's designee.

* * * * *

2. In section 52.221, three new AQCR's are added to the classification table, as follows:

§ 52.221 Classification of regions.

The California plan is evaluated on the basis of the following classifications:

Air quality control region	Pollutant				
	P.M.	SO_x	NO_x	CO	O_x
* * *					
San Diego Intrastate	II	III	III	I	I
Lake County Intrastate	II	III	III	III	III
Lake Tahoe Intrastate	II	III	III	I	I
Mountain Counties Intrastate	II	III	III	I	I

* * * * *

3. To correct a misprint in 40 CFR Part 52 of July 1, 1979, section 52.224(a)(1) is amended by revising paragraphs (iv) through (viii) and removing paragraph (ix) as follows:

§ 52.224 General requirements.

(a) * * *

(1) * * *

(i) * * *

(ii) * * *

(iii) * * *

(iv) Del Norte County APCD.

(v) Humboldt County APCD.

(vi) Mendocino County APCD.

(vii) Northern Sonoma County APCD.

(viii) Trinity County APCD.

(2) * * *

* * * * *

4. The title of section 52.226 is revised to read as follows:

§ 52.226 Control strategy and regulations: Particulate matter, San Joaquin Valley and Mountain Counties Intrastate Regions.

* * * * *

5. The title of section 52.230 is revised to read as follows:

§ 52.230 Control strategy and regulations: Nitrogen dioxide.

* * * * *

6. In section 52.231, paragraphs (a)(3) and (b)(1) are revised to read as follows:

§ 52.231 Regulations: Sulfur oxides.

(a) * * *

(3) Mountain Counties Intrastate Region.

* * * * *

(b) * * *

(1) Lake County Intrastate Region.

* * * * *

7. In section 52.233, paragraphs (c), (d), (f)(1)(i), and (g)(1) are revised as follows:

§ 52.233 Review of new sources and modifications.

* * * * *

(c) The requirements of § 51.18 (a) and (c) of this chapter are not met in the following Air Pollution Control Districts since the regulations of the APCD's do not provide the means to prevent construction of sources which would violate applicable portions of the control strategy or would interfere with the attainment or maintenance of a national standard.

(1) Mariposa County APCD.

(2) Santa Barbara County APCD.

(d) The requirements of § 51.18(c) of this chapter are not met in the following Air Pollution Control Districts since the regulations of the APCD's do not include a means to prevent construction or modification if such construction or modification would interfere with the attainment or maintenance of a national standard.

(1) Amador County APCD.

(2) Calaveras County APCD.

(3) El Dorado County APCD.

(4) Fresno County APCD.

(5) Glenn County APCD.

(6) Humboldt County APCD.

(7) Kern County APCD.

(8) Kings County APCD.

(9) Lake County APCD.

(10) Lassen County APCD.

(11) Madera County APCD.

(12) Mendocino County APCD.

(13) Merced County APCD.

(14) Modoc County APCD.
(15) Monterey Bay Unified APCD.
(16) Nevada County APCD.
(17) Northern Sonoma County APCD.
(18) Placer County APCD.
(19) Plumas County APCD.
(20) San Joaquin County APCD.
(21) Shasta County APCD.
(22) Sierra County APCD.
(23) Siskiyou County APCD.
(24) Stanislaus County APCD.
(25) Sutter County APCD.
(26) Tulare County APCD.
(27) Tuolumne County APCD.
(28) Yolo-Solano APCD.

* * * * *

(f) * * *
(1) * * *
(i) Any stationary source in the APCD's listed below, the construction or modification of which is commenced after the effective date of this regulation.
(*a*) Mariposa County APCD.
(*b*) Sacramento County APCD.
(*c*) Santa Barbara County APCD.
(*d*) Ventura County APCD.

* * * * *

(g) * * *
(1) The requirements of this paragraph are appliable to any stationary source in the APCD's listed below, the construction or modification of which is commenced after the effective date of this regulation.
(i) Amador County APCD.
(ii) Calaveras County APCD.
(iii) El Dorado County APCD.
(iv) Fresno County APCD.
(v) Glenn County APCD.
(vi) Humboldt County APCD.
(vii) Kern County APCD.
(viii) Kings County APCD.
(ix) Lassen County APCD.
(x) Madera County APCD.
(xi) Mendocino County APCD.
(xii) Merced County APCD.
(xiii) Modoc County APCD.
(xiv) Monterey Bay Unified APCD.
(xv) Nevada County APCD.
(xvi) Placer County APCD.
(xvii) Plumas County APCD.
(xviii) San Joaquin County APCD.
(xix) Shasta County APCD.
(xx) Sierra County APCD.
(xxi) Siskiyou County APCD.
(xxii) Stanislaus County APCD.
(xxiii) Sutter County APCD.
(xxiv) Tulare County APCD.
(xxv) Tuolumne County APCD.
(xxvi) Yolo-Solano APCD.

* * * * *

8. In section 52.234, paragraphs (a) and (e) are amended as follows:

§ 52.234 Source surveillance.

(a) * * *
(1) Amador County APCD.
(2) Bay Area AQMD.
(3) Calaveras County APCD.
(4) Del Norte County APCD.
(5) El Dorado County APCD.
(6) Humboldt County APCD.
(7) Imperial County APCD.
(8) Lake County APCD.
(9) Mariposa County APCD.
(10) Mendocino County APCD.
(11) Nevada County APCD.
(12) Northern Sonoma County APCD.
(13) Placer County APCD.
(14) Plumas County APCD.
(15) Sierra County APCD.
(16) Trinity County APCD.
(17) Ventura County APCD.

* * * * *

(e) * * *
(1) Amador County APCD.
(2) Bay Area AQMD
(3) Calaveras County APCD.
(4) El Dorado County APCD.
(5) Imperial County APCD.
(6) Kern County APCD.
(7) Kings County APCD.
(8) Los Angeles County APCD.
(9) Mariposa County APCD.
(10) Monterey Bay Unified APCD.
(11) Nevada County APCD.
(12) Placer County APCD.
(13) Plumas County APCD.
(14) San Bernardino County Desert APCD.
(15) San Diego County APCD.
(16) San Joaquin County APCD.
(17) San Luis Obispo County APCD.
(18) Santa Barbara County APCD.
(19) Sierra County APCD.
(20) South Coast AQMD.
(21) Stanislaus County APCD.
(22) Tulare County APCD.
(23) Ventura County APCD.

* * * * *

9. In § 52.236, paragraphs (a), (b), (c), (e), and (f) are amended as follows:

§ 52.236 Rules and regulations.

(a) * * *
(1) Imperial County APCD.
(i) Rule 114.5, submitted on November 10, 1976.
(ii) Rule 148.D(3), submitted on November 10, 1976.
(b) * * *
(1) San Luis Obispo County APCD.
(i) Rules 401(B)(4) and 401(B)(6), submitted on November 10, 1976.
(2) Sacramento County APCD.
(i) Rule 7(b)(5), submitted on November 4, 1977.
(3) Glenn County APCD.
(i) Section 77(e), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).
(4) Mariposa County APCD.
(i) Rule 203(G), submitted on June 6, 1977.
(5) Kern County APCD.
(i) Rules 402(c) and 402(e), submitted on; November 10, 1976.
(6) Fresno County APCD.
(i) Rules 402(c) and 402(e), submitted on October 23, 1974.
(ii) Rules 402(c) and 402(e), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).
(7) Tulare County APCD.
(i) Section 402(c), submitted on November 10, 1976, and previously approved under 40 CFR 52.223 (42 FR 47556).
(8) Madera County APCD.
(i) Rules 402(c) and 402(e), submitted on January 10, 1975, and previously approved under 40 CFR 52.223 (42 FR 42219).
(c) * * *
(1) Merced County APCD.
(i) Rule 102(hh), submitted on June 30, 1972, previously approved under 40 CFR 52.223, and deleted by the August 2, 1976 submittal, is retained.

* * * * *

(e) * * *
(1) Mendocino County APCD.
(i) Rule 130(p4), submitted on November 10, 1976. (Part III–49, previously submitted on February 21, 1972, and approved in 40 CFR 52.223, is retained).
(ii) Rule 130(s3), submitted on November 10, 1976. (Part III–55, previously submitted on February 21, 1972, and approved in 40 CFR 52.233, is retained).
(2) Shasta County APCD.
(i) The definition of "modification" in Rule 1:2, *Definitions*, submitted on October 13, 1977, is disapproved.
(3) San Bernardino County Desert APCD.
(i) Rule 103, *Definition of Terms*, submitted on November 4, 1977, is disapproved with respect to the deletion of the following terms: "Distilling type heater", "Noncomplying orchard heater", "Pipe line systems", and "Return stack heater". (Rule 2, *Definitions*, submitted on February 21, 1972 and approved in 40 CFR 52.223, is retained for the above terms.)
(f) * * *
(1) El Dorado County APCD.
(i) Rule 201, submitted on November 4, 1977, is disapproved. (The previously approved Rule 49, submitted on June 30, 1972, is retained for Federal enforcement purposes.)

* * * * *

10. In section 52.240, paragraphs (a) and (d)(1) are revised to read as follows:

§ 52.240 Compliance schedules.

(a) The requirements of § 51.15(c) of this chapter are not met in the following Air Pollution Control Districts since the regulations cited do not provide

increments to progress toward compliance.

(1) Rules 50–A, 52–A, 53–A(a), 53–A(b), 53–A(c), 53.2, 53.3, 54.A, 58.A, 62.1, 68, 69, 70, and 71 of the San Bernardino County APCD.

(2) Rules 53, 72.1, and 72.2 of the Riverside County APCD.

(3) Rules 53, 66.c, and 68.a of the Orange County APCD.

(4) Rule 39.1 of the Santa Barbara County APCD.

(5) Rule 59 of the Ventura County APCD.

(6) Rule 66(c) of the Los Angeles County APCD.

(7) Rule 4.5 of the Siskiyou County APCD.

(8) Rule 64(c) of the Northern Sonoma County APCD.

(9) Rule 409 of the Tulare County APCD.

* * * * *

(d) *Regulation for increments of progress.* (1) The requirements of this paragraph are applicable to any stationary source in the following Air Pollution Control Districts subject to the indicated regulations.

(i) Rules 50–A, 52–A, 53–A(a), 53–A(b), 53–A(c), 53.2, 53.3, 54.A, 58.A, 62.1, 68, 69, 70, and 71 of the San Bernardino County APCD.

(ii) Rules 53, 72.1, and 72.2 of the Riverside County APCD.

(iii) Rules 53 and 66.c of the Orange County APCD.

(iv) Rule 39.1 of the Santa Barbara County APCD.

(v) Rule 59 of the Ventura County APCD.

(vi) Rules 66(c) and 68 of the Los Angeles County APCD.

(vii) Rule 4.5 of the Siskiyou County APCD.

(viii) Rule 64(c) of the Northern Sonoma County APCD.

(ix) Rule 409 of the Tulare County APCD.

* * * * *

11. In section 52.246, paragraph (b) is revised to read as follows:

§ 52.246 Control of dry cleaning solvent vapor losses.

* * * * *

(b) This section is applicable in the Metropolitan Los Angeles, Sacramento Valley, San Joaquin Valley, and San Francisco Bay Area Intrastate Air Quality Control Regions (the "Regions"), as described in 40 CFR Part 81, dated July 1, 1979, except as follows:

* * * * *

12. In section 52.252, paragraph (b) is revised to read as follows:

§ 52.252 Control of degreasing operations.

* * * * *

(b) This section is applicable in the Metropolitan Los Angeles, Sacramento Valley, San Joaquin Valley, and San Francisco Bay Area Air Quality Control Regions (the "Regions"), as described in 40 CFR Part 81, dated July 1, 1979, except as follows:

* * * * *

13. In section 52.253, paragraph (b) is revised to read as follows:

§ 52.253 Metal surface coating thinner and reducer.

* * * * *

(b) This section is applicable in the Metropolitan Los Angeles, San Diego, Sacramento Valley, San Joaquin Valley, and San Francisco Bay Area Intrastate Air Quality Control Regions (the "Regions"), as described in 40 CFR Part 81, dated July 1, 1979, except as follows:

* * * * *

14. In section 52.254, paragraph (a) is revised to read as follow:

§ 52.254 Organic solvent usage.

(a) This section is applicable in the Sacramento Valley, San Francisco Bay Area, and San Joaquin Valley Intrastate Air Quality Control Regions (the "Regions"), as described in 40 CFR Part 81, dated July 1, 1979, except as follows:

* * * * *

15. In section 52.255, the introductory text of paragraph (b) is revised to read as follows:

§ 52.255 Gasoline transfer vapor control.

* * * * *

(b) This section is applicable in the Metropolitan Los Angeles, Sacramento Valley, and San Joaquin Valley Intrastate Air Quality Control Regions, as described in 40 CFR Part 81, dated July 1, 1979, with the following exceptions:

* * * * *

16. In section 52.267, an error in the description of the Sacramento Valley Air Quality Maintenance Area is corrected by revising subparagraph (a)(1) to read as follows:

§ 52.267 Maintenance of national standards.

(a) * * *

(1) Sacramento Valley Air Quality Maintenance Area.

(i) Pollutants for which the area is identified: Carbon monoxide and photochemical oxidants.

(ii) Geographical compostion of area:

Sacramento County
Yolo County
That portion of Solano County lying in the Sacramento Valley Air Basin, as defined in the plan.
That portion of Placer County lying west of the easterly line of Range 7 East, and that portion of Placer County lying south of the northerly line of Township 11 North, Mount Diablo Base and Meridian.

* * * * *

17. In Section 52.269, paragraph (b)(1) is revised to read "Mountain Counties Intrastate Region". Paragaraph (b)(1-1), "San Joaquin Valley Intrastate Region", is inserted following paragaraph (b)(1)(ii)(B). Paragraphs (b)(1)(iii) through (viii) are redesignated (b)(1-1)(i) through (vi), respectively.

18. In § 52.271(a), paragraphs (a)(1) through (8) are revised, and all paragraphs (a)(9) through (a)(35) are added to read as follows:

§ 52.271 Malfunction regulations.

(a) * * *

(1) Amador County APCD.

(i) Rule 404, submitted on April 21, 1976.

(ii) Rule 4f, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(2) Bay Area APCD.

(i) Regulation 2, Section 3212, and Regulation 3, Section 3203, submitted on April 21, 1976.

(ii) Regulation 2, Section 3212, submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(3) Calaveras County APCD.

(i) Rules 110 and 402(f), submitted on July 25, 1973.

(ii) Rule 404, submitted on October 13, 1977.

(4) Colusa County APCD.

(i) Rule 4.4g, submitted on July 25, 1973, and Rule 4.4g, submitted on June 30, 1972, and previously appoved under 40 CFR 52.223 (37 FR 19812).

(5) Del Norte County APCD.

(i) Rule 540, submitted on November 10, 1976.

(ii) Rule 45, submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(6) Fresno County APCD.

(i) Rule 110, submitted on June 30, 1972, and previously approved under 40 CFR 52.223.

(ii) Rules 110 and 402(f), submitted on October 23, 1974.

(7) Glenn County APCD.

(i) Rules 95.2 and 95.3, submitted on January 10, 1975.

(8) Great Basin Unified APCD.

(i) Rule 403, submitted on June 6, 1977.

(ii) Rule 617, submitted on November 4, 1977.

(9) Humboldt County APCD.

(i) Rule 540, Submitted on November, 10, 1976.

(ii) Rule 59, Submitted on February 21, 1972 and previously approved under 40 CFR 52.223 (37 FR 10842).

(10) Kern County APCD.

(i) Rule 111, submitted on July 19, 1974.

(11) Kings County APDC.

(i) Rule 111, submitted on July 25, 1973, and Rule 111, submitted on July 30, 1972, and previously approved under 40 CFR 52.223.

(ii) Rule 111, submitted on November 4, 1977.

(12) Lake County APCD.

(i) Chapter III, Article I, Section 500, and Article II, Sections 510 and 511, submitted on February 10, 1977.

(ii) Part VI, Sections 1 and 2, submitted on June 30, 1972, and previously approved under 40 CFR 52.223.

(13) Los Angeles County APCD.

(i) Rule 430, submitted on June 6, 1977.

(14) Madera County APCD.

(i) Rule 402(f), submitted on January 10, 1975, and Rule 110, submitted on June 30, 1972, and previously approved under 40 CFR 52.223.

(ii) Rule 110, submitted on January 10, 1975.

(15) Mariposa County APCD.

(i) Rule 203(j), submitted on January 10, 1975, and Rule 4.3(g), submitted on February 21, 1972, and previously approved under 40 CFR 52.223.

(ii) Rule 404, submitted on June 6, 1977.

(16) Mendocino County APCD.

(i) Rule 540, submitted on November 10, 1976.

(ii) Sections 1 and 2 of Part VI, submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(17) Merced County APCD.

(i) Rule 109, submitted on August 2, 1976.

(ii) Rule 109, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(18) Nevada County APCD.

(i) Rule 55(f), submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(19) Northern Sonoma County APCD.

(i) Rule 540, submitted on November 10, 1976.

(20) Placer County APCD.

(i) Rule 55(f), submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(ii) Rule 404, submitted on October 13, 1977.

(21) Plumas County APCD.

(i) Rule 203(j), submitted on January 10, 1975.

(ii) Rule 404, submitted on June 6, 1977.

(22) Riverside County APCD.

(i) Rule 430, submitted on June 6, 1977.

(23) San Bernardino County APCD.

(i) Rule 430, submitted on June 6, 1977.

(ii) Rule 55, submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(24) San Joaquin County APCD.

(i) Rule 110, submitted on October 23, 1974, and Rule 110, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(25) San Luis Obispo County APCD.

(i) Rule 107, submitted on November 10, 1976.

(ii) Rule 102, submitted on February 21, 1972, and previously approved under 40 CFR 52.223 (37 FR 10842).

(26) Shasta County APCD.

(i) Rule 3:10, submitted on July 19, 1974.

(ii) Rule 3:10, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(27) Sierra County APCD.

(i) Rule 51, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812), and Rule 203(j), submitted on January 10, 1975, and previously approved under 40 CFR 52.223 (42 FR 23805).

(ii) Rule 404, submitted on June 6, 1977.

(28) Southern California APCD.

(i) Rule 430, submitted on February 10, 1977.

(29) Stanislaus County APCD.

(i) Rule 110, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812), and Rule 110, submitted on July 19, 1974.

(30) Tehama County APCD.

(i) Rule 417, submitted on July 19, 1974.

(ii) Rule 4:1g, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(31) Trinity County APCD.

(i) Rule 540, submitted on November 10, 1976.

(ii) Rule 44, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(32) Tulare County APCD.

(i) Rules 111 and 402(f), submitted on November 10, 1976.

(33) Tuolumne County APCD.

(i) Rule 404, submitted on February 10, 1977, and Rule 402(f), submitted on June 30, 1972, and previously approved under 40 CFR 52.223.

(34) Ventura County APCD.

(i) Rule 32, submitted on July 19, 1974.

(ii) Rule 32, submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(35) Yuba County APCD.

(i) Rule 4.5, submitted on July 25, 1973.

* * * * *

19. In section 52.272, a sentence is added to the introduction text of paragraph (a), paragraphs (a)(1) through (a)(5) are revised, and all other paragraphs (a)(6) through (a)(9) are added to read as follows:

§ 52.272 Research operations exemptions.

(a) * * * Therefore, the following regulations are disapproved:

(1) Bay Area APCD.

(i) Regulation 2, Division 1, sections 1214 to 1214.3, submitted on July 25, 1973.

(ii) Regulation 3, Division 1, sections 1205 to 1205.3, submitted on July 25, 1973.

(2) El Dorado County APCD.

(i) Rule 203(D), submitted on November 4, 1977.

(3) Great Basin Unified APCD.

(i) Rule 423, submitted on November 4, 1977.

(4) Los Angeles County APCD.

(i) Rule 441, submitted on June 6, 1977.

(5) Placer County APCD.

(i) Rule 203(D), submitted on October 13, 1977.

(6) Riverside County APCD.

(i) Rule 441, submitted on June 6, 1977.

(7) Sacramento County APCD.

(i) Rule 30, submitted on January 22, 1974.

(8) San Bernardino County APCD.

(i) Rule 441, submitted on June 6, 1977.

(9) Southern California APCD.

(i) Rule 441, submitted on August 2, 1976.

20. In section 52.273, paragraphs (a)(1) through (a)(9) and (b)(1) through (b)(9) are revised, and all other paragraphs (a)(10) through (a)(25) and (b)(10) through (b)(18) are renumbered and revised to read as follows:

§ 52.273 Open burning.

(a) * * *

(1) Amador County APCD.

(i) Rules 308 and 312, submitted on April 21, 1976.

(ii) Rule 304, submitted on October 13, 1977.

(2) Calaveras County APCD.

(i) Rules 304 and 322, submitted on October 13, 1977.

(3) Del Norte County APCD.

(i) Rule 410(c)(2) and the following portions of Regulation 2: General prohibitions (all of page 1), paragraph (f) of Article I, paragraphs (f) and (g) of Article V, and paragraph (f) of Article VI, submitted on November 10, 1976.

(4) El Dorado County APCD.

(i) Rules 302(C), 304, 307, 319, and 322, submitted on November 4, 1977.

(5) Fresno County APCD.

(i) Rules 416.1(e)(1), (e)(3), and (e)(4), submitted on October 23, 1974.

(ii) Rule 416.1(c)(1), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(6) Humboldt County APCD.

(i) Rule 410(c)(2) and the following portions of Regulation 2: General prohibitions (all of page 1), paragraph (f) of Article I, paragraphs (f) and (g) of Article V, and paragraph (f) of Article VI, submitted on November 10, 1976.

(7) Kern County APCD.

(i) Rule 417(I)(A), submitted on November 10, 1976.

(8) Madera County APCD.

(i) Rules 416.1(e)(1), (e)(3), and (e)(4), submitted on January 10, 1975.

(ii) Rule 416.1(c)(1), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(9) Mariposa County APCD.

(i) Rules 302(C), 304, 319, and 322, submitted on June 6, 1977.

(10) Mendocino County APCD.

(i) Rule 410(c)(2) and the following portions of Regulation 2: General prohibitions (all of page 1), paragraph (f) of Article I, paragraphs (f) and (g) of Article V, and paragraph (f) of Article VI, submitted on November 10, 1976.

(11) Merced County APCD.

(i) Rule 416(h), submitted on August 2, 1976.

(ii) Rules 416.1(III)(A), (V)(A), (V)(B), (V)(C), and (V)(D), submitted on August 2, 1976. (Rule 416.1(c)(2), submitted on June 30, 1972, and previously approved, is retained. Rule 416.1(a)(1), submitted on June 30, 1972, and previously approved, is retained for the purpose of enforcing Rule 416.1(c)(2).)

(12) Monterey Bay Unified APCD.

(i) Rules 409(a), 409(a)(5), and 410(b)(1), submitted on January 10, 1975.

(13) Nevada County APCD.

(i) Rules 302(C), 307, 314, and 322, submitted on April 10, 1975.

(ii) Rules 304 and 319, submitted on June 6, 1977.

(14) Northern Sonoma County APCD.

(i) Rule 410(c)(2) and the following portions of Regulation 2: General prohibitions (all of page 1), paragraph (f) of Article I, paragraphs (f) and (g) of Article V, and paragraph (f) of Article VI, submitted on November 10, 1976.

(15) Placer County APCD.

(i) Rules 302(C), 302(G), 304, 307, 314, 319, and 322, submitted on October 13, 1977.

(16) Plumas County APCD.

(i) Rule 314, submitted on January 10, 1975.

(ii) Rules 302(C), 304, 307, 319, and 322, submitted on June 6, 1977.

(17) Sacramento County APCD.

(i) Rule 96(a), submitted on November 10, 1976.

(ii) Rule 96(a), submitted on November 4, 1977.

(18) San Joaquin County APCD.

(i) Rule 402(e), submitted on November 10, 1976.

(ii) Rule 416.1(c)(1), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(iii) Rules 416.1(D)(1) and (D)(2), submitted on October 23, 1974.

(19) Santa Barbara County APCD.

(i) Rules 40(4)(a) and 40(4)(1), submitted on July 25, 1973. (The analogous Rules 40(4)(a) and 40(4)(g), previously approved in the February 21, 1972 submittal, are retained.) Rule 40(4)(c), submitted on July 25, 1973, is also disapproved.

(ii) Rule 22, submitted on January 22, 1974. (The analogous Rule 22, previously approved in the February 21, 1972 submittal, is retained.) Rules 24.1 and 24.2, submitted on January 22, 1974, are also disapproved.

(20) Shasta County APCD.

(i) Rule 2:6, sections (1)(b)(iii) (a ,b, and d), (1)(c)(viii), 2(c), 3(f), 4(e), 5(c), and 5(d). (Previously approved Rule 2:6, sections (2)(c), (3)(f), and (4)(e), submitted on July 19, 1974, are retained.)

(21) Sierra County APCD.

(i) Rules 302(C), 319, and 322, submitted on June 6, 1977.

(22) Trinity County APCD.

(i) Rule 410(c)(2) and the following portions of Regulation 2: General prohibitions (all of page 1), paragraph (f) of Article I, paragraphs (f) and (g) of Article V, and paragraph (f) of Article VI, submitted on November 10, 1976.

(23) Tulare County APCD.

(i) Rule 402(e), submitted on November 10, 1976.

(ii) Section 417(III)(A), submitted on June 30, 1972, and previously approved under 40 CFR 52.223 (37 FR 19812).

(iii) Section 417.1(e)(1), (e)(3), and (e)(4), submitted on January 10, 1975.

(24) Tuolumne County APCD.

(i) Rule 322, submitted on February 10, 1977.

(25) Yolo-Solano APCD.

(i) Rules 2.8(c) (4) and (5), 6.3, and 6.5(a), submitted on July 25, 1973.

(ii) Rules 6.1(a), (e)(6), and (g), submitted on January 10, 1975. (Rules 4.1 (a) and (g), submitted on February 21, 1972, and previously approved under 40 CFR 52.223, are retained.)

(b) * * *

(1) Del Norte County APCD.

(i) Regulation 2, Article I, paragraph (e), submitted on November 10, 1976.

(ii) Rule 410(c)(2), submitted on May 7, 1979.

(2) Fresno County APCD.

(i) Rule 416.1(c)(1), submitted on October 23, 1974.

(ii) Rule 416.1(g), submitted on November 4, 1977.

(3) Humboldt County APCD.

(i) Regulation 2, Article I, paragraph (e), submitted on November 10, 1976.

(ii) Rule 410(c)(2), submitted on May 7, 1979.

(4) Imperial County APCD.

(i) Rule 422, submitted on November 4, 1977. (The requirements of Rule 115, submitted on February 21, 1972, and previously approved under 40 CFR 52.223, are retained as applicable to the burning of wood waste.)

(ii) Regulation VII (Rules 701 to 706), submitted on November 4, 1977. (Regulation VII (Rules 200 to 206), submitted on July 25, 1973 and previously approved under 40 CFR 52.223, is retained.)

(5) Kings County APCD.

(i) Rules 416.1 and 417.1, submitted on November 4, 1977.

(6) Lake County APCD.

(i) Sections 435, 436, 1003, and 1200(A), submitted on February 10, 1977.

(ii) Section 435, submitted on January 2, 1979.

(7) Los Angeles County APCD.

(i) Rule 444, submitted on June 6, 1977. (Rules 57.1, 57.2, 57.3, and 57.4, submitted on June 30, 1972, and previously approved under 40 CFR 52.223, are retained.)

(8) Madera County APCD.

(i) Rule 416.1(c)(1), submitted on January 10, 1975.

(9) Mendocino County APCD.

(i) Regulation 2, Article I, paragraph (e), submitted on November 10, 1976.

(ii) Rule 410(c)(2), submitted on May 7, 1979.

(10) Merced County APCD.

(i) Rule 416.1(I)(A)(2), submitted on August 2, 1976.

(11) Northern Sonoma County APCD.

(i) Regulation 2, Article I, paragraph (e), submitted on November 10, 1976.

(ii) Rule 410(c)(2), submitted on may 7, 1979.

(12) San Bernardino County Desert APCD.

(i) Rule 444 and the definition of "Agricultural Burning" in Rule 102, submitted on November 4, 1977. (Rule 57, submitted on February 21, 1972, and previously approved under 40 CFR 52.223, is retained.)

(13) San Diego County APCD.

(i) Rules 102(e) and 103(g), submitted on October 13, 1977.

(14) San Luis Obispo County APCD.

(i) Rule 501(B), submitted on November 10, 1976, and Rule 501(A)(7), submitted on November 4, 1977. (Previously approved Rule 115(2), submitted on February 21, 1972, is retained.)

(15) Santa Barbara County APCD.

(i) Rules 2(b), 40(3), and 40(4)(e), submitted on July 25, 1973. (Analogous Rules 2(b), 40(3), and 40(4)(c), submitted

on February 21, 1972, and previously approved, are retained.)

(16) Shasta County APCD.

(i) Rule 2:8, submitted on October 13, 1977. (Rule 2:8, submitted on July 19, 1974, and July 22, 1975, and previously approved, is retained.)

(17) Siskiyou County APCD.

(i) Rule 4.3(2), submitted on January 2, 1979.

(18) Trinity County APCD.

(i) Regulation 2, Article I, paragraph (e), submitted on November 10, 1976.

(ii) Rule 410(c)(2), submitted on May 7, 1979.

21. In section 52.275, paragraphs (a)(1) and (2) and (b)(1) through (b)(5) are revised, and paragraphs (b)(6) through (b)(14) are added to read as follows:

§ 52.275 Particulate matter control.

(a) * * *

(1) Lake County APCD.

(i) Part III–50 and Part V–1B, submitted on October 23, 1974, and previously approved under 40 CFR 52.223.

(2) San Luis Obispo County APCD.

(i) Rule 113, submitted on February 21, 1972, and previously approved under 40 CFR 52.223.

(b) * * *

(1) Amador County APCD.

(i) Rules 211 and 212, submitted on April 21, 1976. (Regulation V, Rules 13 and 14, submitted on June 30, 1972, and previously approved, are retained.)

(ii) Rules 207 and 212, submitted on October 13, 1977. (The analogous Rules 10 and 14 of Regulation V, submitted on June 30, 1972, and previously approved, are retained and shall remain in effect for Federal enforcement purposes.)

(2) Calaveras County APCD.

(i) Rule 211, submitted on October 13, 1977. (Rule 211, submitted on July 22, 1975, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(3) Del Norte County APCD.

(i) Rules 410(c)(7) and 420(e), submitted on November 10, 1976.

(ii) Rules 420(e) and (f), submitted on November 4, 1977.

(4) El Dorado County APCD.

(i) Rule 212, submitted on April 10, 1975, and Rule 211, submitted on August 2, 1976. (The analogous Rule 55, submitted on February 21, 1972, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(5) Humbolt County APCD.

(i) Rules 410(c)(7) and 420(e), submitted on November 10, 1976.

(ii) Rules 420(e) and (f), submitted on November 4, 1977.

(6) Mariposa County APCD.

(i) Rule 211, submitted on June 6, 1977. (Rule 211, submitted on January 10, 1975, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(7) Mendocino County APCD.

(i) Rule 410(c)(7), submitted on November 10, 1976.

(ii) Rules 420(e) and (f), submitted on November 4, 1977.

(8) Nevada County APCD.

(i) Rule 212, submitted on April 10, 1975, and Rule 211, submitted on April 21, 1976. (Rule 52.1, submitted on June 30, 1972, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(9) Northern Sonoma County APCD.

(i) Rule 420(e), submitted on november 10, 1976.

(ii) Rules 420(e) and (f), submitted on October 13, 1977.

(10) Placer County APCD.

(i) Rule 211, submitted on October 13, 1977. (The analogous Rule 61, submitted on June 30, 1972, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(11) Plumas County APCD.

(i) Rule 211, submitted on June 6, 1977. (The analogous Rule 211, submitted on January 10, 1975, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(12) San Luis Obispo County APCD.

(i) Rule 403, submitted on November 10, 1976.

(13) Sierra County APCD.

(i) Rule 211, submitted on June 6, 1977. (The analogous Rule 211, submitted on January 10, 1975, and previously approved, is retained and shall remain in effect for Federal enforcement purposes.)

(14) Trinity County APCD.

(i) Rules 410(c)(7) and 420(e), submitted on November 10, 1976.

(ii) Rules 420(e) and (f), submitted on November 4, 1977.

22. In section 52.280, paragraph (a)(1) is revised to read as follows:

§ 52.280 Fuel burning equipment.

(a) * * *

(1) Mountain Counties Intrastate AQCR:

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

Subpart B—Designation of Air Quality Control Regions

23. In section 81.21, the title and description are revised to read as follows:

§ 81.21 San Francisco Bay area intrastate air quality control region.

* * * * *

In the State of California: Alameda County, Contra Costa County, Marin County, Napa County; San Francisco County, San Mateo County, Santa Clara County.

Solano County—that portion of Solano County which lies south and west of a line described as follows:

Beginning at the intersection of the westerly boundary of Solano County and the ¼ section line running east and west through the center of Section 34, T. 6 N., R. 2 W., M.D.B.&M., thence east along said ¼ section line to the east boundary of Section 36, T. 6 N., R. 2 W., thence south ½ mile and east 2.0 miles, more or less, along the west and south boundary of Los Putos Rancho to the northwest corner of Section 4, T. 5 N., R. 1 W., thence east along a line common to T. 5 N. and T. 6 N. to the northeast corner of Section 3, T. 5 N., R. 1 E., thence south along section lines to the southeast corner of Section 10, T 3 N., R. 1 E., thence east along section lines to the south ¼ corner of Section 8, T. 3 N., R. 2 E., thence east to the boundary between Solano and Sacramento Counties.

Sonoma County—that portion of Sonoma County which lies south and east of a line described as follows:

Beginning at the southeasterly corner of the Rancho Estero Americano, being on the boundary line between Marin and Sonoma Counties, California; thence running northerly along the easterly boundary line of said Rancho Estero Americano to the northeasterly corner thereof, being an angle corner in the westerly boundary line of Rancho Canada de Jonive; thence running along said boundary of Rancho Canada de Jonive westerly, northerly and easterly to its intersection with the easterly line of Graton Road; thence running along the easterly and southerly line of Graton Road, northerly and easterly to its intersection with the easterly line of Sullivan Road; thence running northerly along said easterly line of Sullivan Road to the southerly line of Green Valley Road; thence running easterly along the said southerly line of Green Valley Road and easterly along the southerly line of State Highway 116, to the westerly line of Vine Hill Road; thence running along the westerly and northerly line of Vine Hill Road, northerly and easterly to its intersection with the westerly line of Laguna Road; thence running northerly along the westerly line of Laguna Road and the northerly projection thereof to the northerly line of Trenton Road; thence running westerly along the northerly line of said Trenton Road to the easterly line of Trenton-Healdsburg Road; thence running northerly along said easterly line of Trenton-Healdsburg Road to the easterly line of Eastside Road; thence running northerly along said easterly line of Eastside Road to its intersection with the southerly line of Rancho Sotoyome; thence running easterly along said southerly line of Rancho Sotoyome to its intersection with the township line common to Townships 8 and 9 North, Mt.

Diablo Base and Meridian; thence running easterly along said township line to its intersection with the boundary line between Sonoma and Napa Counties, State of California.

24. In section 81.161, the description is revised to read as follows:

§ 81.161 North coast intrastate air quality control region.

* * * * *

In the State of California: Del Norte County, Humboldt County, Mendocino County, Trinity County.

Sonoma County—that portion of Sonoma County which lies north and west of a line described as follows:

Beginning at the southeasterly corner of the Rancho Estero Americano, being on the boundary line between Marin and Sonoma counties, California; thence running northerly along the easterly boundary line of said Rancho Estero Americano to the northeasterly corner thereof, being an angle corner in the westerly boundary line of Rancho Canada de Jonive; thence running along said boundary of Rancho Canada de Jonive westerly, northerly and easterly to its intersection with the easterly line of Graton Road; thence running along the easterly and southerly line of Graton Road, northerly and easterly to its intersection with the easterly line of Sullivan Road; thence running northerly along said easterly line of Sullivan Road to the southerly line of Green Valley Road; thence running easterly along the said southerly line of Green Valley Road and easterly along the southerly line of State highway 116, to the westerly line of Vine Hill Road; thence running along the westerly and northerly line of Vine Hill Road, northerly and easterly to its intersection with the westerly line of Laguna Road; thence running northerly along the westerly line of Laguna Road and the northerly projection thereof to the northerly line of Trenton Road; thence running westerly along the northerly line of said Trenton Road to the easterly line of Trenton-Healdsburg Road; thence running northerly along said easterly line of Trenton-Healdsburg Road to the easterly line of Eastside Road; thence running northerly along said easterly line of Eastside Road to its intersection with the southerly line of Rancho Sotoyome; thence running easterly along said southerly line of Rancho Sotoyome to is intersection with the township line common to Townships 8 and 9 North, Mt. Diablo Base and Meridian; thence running easterly along said township line to its intersection with the boundary line between Sonoma and Napa Counties, State of California.

25. In section 81.162, the description is revised to read as follows:

§81.162 Northeast Plateau intrastate air quality control region.

* * * * *

In the State of California: Lassen County, Modoc County, Siskiyou County.

Shasta County—that portion of Shasta County which lies east and north of a line described as follows:

Beginning at the Shasta-Siskiyou County boundary and running south along the range line common to R. 2 E. and R. 1 E., Mt. Diablo Base and Meridian, to the southwest corner of T. 35 N., R. 2 E; then east along the township line common to T. 35 N. and T. 34 N. to the northwest corner of T. 34 N., R. 3 E.; then south along the range line common to R. 3 E. and R. 2 E. to the southwest corner of T. 33 N., R. 3 E.; then east along the township line common to T. 33 N. and T. 32 N. to the northwest corner of T. 32 N., R. 4 E.; then south along the range line common to R. 4 E. and R. 3 E. to the point of intersection with the northwest corner of the Lassen Volcanic National Park boundary; then east along the north boundary of Lassen Volcanic National Park to the point of intersection with the Lassen-Shasta County boundary.

26. In section 81.163, the description is revised to read as follows:

§ 81.163 Sacramento Valley intrastate air quality control region.

* * * * *

In the State of California: Butte County, Colusa County, Glenn County, Sacramento County, Sutter County, Tehama County, Yolo County, Yuba County.

Shasta County—that portion of Shasta County which lies west and south of a line described as follows:

Beginning at the Shasta-Siskiyou County boundary and running south along the range line common to R. 2 E. and R. 1 E., Mt. Diablo Base and Meridian, to the southwest corner of T. 35 N., R. 2 E.; then east along the township line common to T. 35 N. and T. 34 N. to the northwest corner of T. 34 N., R. 3 E.; then south along the range line common to R. 3 E. and R. 2 E. to the southwest corner of T. 33 N., R. 3 E.; then east along the township line common to T. 33 N. and T. 32 N. to the northwest corner of T. 32 N., R. 4 E.; then south along the range line common to R. 4 E. and R. 3 E. to the point of intersection with the northwest corner of the Lassen Volcanic National Park boundary; then east along the north boundary of Lassen Volcanic National Park to the Point of intersection with the Lassen-Shasta County boundary.

Solano County—that portion of Solano County which lies north and east of a line described as follows:

Beginning at the inersection of the westerly boundary of Solano County and the ¼ section line running east and west through the center of Section 34, T. 6 N., R. 2 W., M.D.B.&M., thence east along said ¼ section line to the east boundary of Section 36, T. 6 N., R. 2 W., thence south ½ mile and east 2.0 miles, more or less, along the west and south boundary of Los Putos Rancho to the northwest corner of Section 4, T. 5 N., R. 1 W., thence east along a line common to T. 5 N. and T. 6 N. to the northeast corner of Section 3, T. 5 N., R. 1 E., thence south along section lines to the southeast corner of Section 8, T. 3 N., R. 2 E., thence east to the boundary between Solano and Sacramento Counties.

27. In section 81.164, the description is revised to read as follows:

§ 81.164 San Diego intrastate air quality control region.

* * * * *

In the State of California: San Diego County.

28. In section 81.165, the description is revised to read as follows:

§ 81.165 San Joaquin Valley Intrastate Air Quality Control Region.

* * * * *

In the State of California: Fresno County, Kings County, Madera County, Merced County, San Joaquin County, Stanislaus County, Tulare County.

Kern County—that portion of Kern County which lies west and north of a line described as follows:

Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Liebre Land Grant to the point of intersection with the range line common to R. 15 W. and R. 16 W., San Bernardino Base and Meridian; then north along the range line to the northwest corner of Section 2, T. 32 S., R. 32 E., Mount Diablo Base and Meridian; then east along the township line common to T. 32 S. and T. 31 S.; then north along the range line common to R. 35 E. and R. 34 E.; then east along the township line common to T. 29 S. and T. 28 S.; then north along the range line common to R. 36 E. and R. 35 E.; then east along the township line common to T. 28 S. and T. 27 S.; then north along the range line common to R. 37 E. and R. 36 E. to the Kern-Tulare County boundary.

29. In section 81.167, the description is revised to read as follows:

§ 81.167 Southeast Desert Intrastate Air Quality Control Region.

* * * * *

In the State of California: Imperial County.

Kern County—that portion of Kern County which lies east and south of a line described as follows:

Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Liebre Land Grant to the point of intersection with the range line common to R. 15 W. and R. 16 W., San Bernardino Base and Meridian; then north along the range line to the northwest corner of Section 2, T. 32 S., R. 32 E., Mount Diablo Base and Meridian; then east along the township line common to T. 32 S. and T. 31 S.; then north along the range line common to R. 35 E. and R. 34 E.; then east along the township line common to T. 29 S. and T. 28 S.; then north along the range line common to R. 36 E. and R. 35 E.; then east along the township line common to T. 28 S. and T. 27 S.; then north along the range line common to R. 37 E. and R. 36 E. to the Kern-Tulare County boundary.

Los Angeles County—that portion of Los Angeles County which lies north and east of a line described as follows:

Beginning at the Los Angeles-San Bernardino County boundary and running west along the township line common to T. 3 N. and T. 2 N., San Bernardino Base and Meridian; then north along the range line common to R. 8 W. and R. 9 W.; then west along the township line common to T. 4 N. and T. 3 N.; then north along the range line common to R. 12 W. and R. 13 W. to the southeast corner of Section 12, T. 5 N.; R. 13 W.; then west along the south boundaries of Sections 12, 11, 10, 9, 8, and 7, T. 5 N., R. 13 W. to the boundary of the Angeles National Forest which is collinear with the range line common to R. 13 W. and R. 14 W.; then north and west along the Angeles National Forest boundary to the point of intersection with the township line common to T. 7 N. and T. 6 N. (point is at the northwest corner of Section 4 in T. 6 N., R. 14 W.); then west along the township line common to T. 7 N. and T. 6 N.; then north along the range line common to R. 15 W. and R. 16 W. to the southeast corner of Section 13, T. 7 N., R. 16 W.; then along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, T. 7 N., R. 16 W.; then north along the range line common to R. 16 W. and R. 17 W. to the north boundary of the Angeles National Forest (collinear with the township line common to T. 8 N. and T. 7 N.); then west and north along the Angeles National Forest boundary to the point of intersection with the south boundary of the Rancho La Liebre Land Grant; then west and north along this land grant boundary to the Los Angeles-Kern County boundary.

Riverside County—that portion of Riverside County which lies east of a line described as follows:

Beginning at the Riverside-San Diego County boundary and running north along the range line common to R. 4 E. and R. 3 E., San Bernardino Base and Meridian; then east along the township line common to T. 8 S. and T. 7 S.; then north along the range line common to R. 5 E. and R. 4 E.; then west along the township line common to T. 6 S. and T. 7 S. to the southwest corner of Section 34, T. 6 S., R. 4 E.; then north along the west boundaries of Sections 34, 27, 22, 15, 10, and 3, T. 6 S., R. 4 E.; then west along the township line common to T. 5 S. and T. 6 S.; then north along the range line common to R. 4 E. and R. 3 E.; then west along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, T. 5 S., R. 3 E.; then north along the range line common to R. 2 E. and R. 3 E.; then west along the township line common to T. 4 S. and T. 3 S. to the intersection with the southwest boundary of partial Section 31, T. 3 S., R. 1 W.; then northwest along that line to the intersection with the range line common to R. 2 W. and R. 1 W.; then north to the Riverside-San Bernardino County line.

San Bernardino County—that portion of San Bernardino County which lies east and north of a line described as follows:

Beginning at the San Bernardino-Riverside County boundary and running north along the range line common to R. 3 E. and R. 2 E., San Bernardino Base and Meridian; then west along the township line common to T. 3 N. and T. 2 N. to the San Bernardino-Los Angeles County boundary.

30. Section 81.273 is added as follows:

§ 81.273 Lake County Intrastate Air Quality Control Region.

The Lake County Intrastate Air Quality Control Region consists of the territorial area encompassed by the boundaries of the following jurisdictions or described area (including the territorial area of all municipalities (as defined in section 302(f) of the Clean Air Act, 42 U.S.C. 1857h(f)) geographically located within the outermost boundaries of the area so delimited):

In the State of California: Lake County.

31. Section 81.274 is added as follows:

§ 81.274 Mountain Counties Intrastate Air Quality Control Region.

The Mountain Counties Intrastate Air Quality Control Region consists of the territorial area encompassed by the boundaries of the following jurisdictions or described area (including the territorial area of all municipalities (as defined in section 302(f) of the Clean Air Act, 42 U.S.C. 1857h(f)) geograpically located within the outermost boundaries of the area so delimited):

In the State of California: Amador County, Calaveras County, Mariposa County, Nevada Country, Plumas County, Sierra County, Tuolumne County.

El Dorado County—all of El Dorado County except that portion within the drainage area naturally tributary to Lake Tahoe including said Lake.

Placer County—all of Placer County except the following described area:

That portion of Placer County within the drainage area naturally tributary to Lake Tahoe including said Lake, plus that area in the vicinity of the head of the Truckee River described as follows: commencing at the point common to the aforementioned drainage area crestline and the line common to Townships 15 North and 16 North, Mount Diablo Base and meridian (M.D.B.&M.), and following that line in a westerly direction to the northwest corner of Section 3, Township 15 North, Range 16 East, M.D.B.&M., thence south along the west line of Sections 3 and 10, Township 15 North, Range 16 East, M.D.B.&M., to the intersection with the said drainage area crestline, thence following the said drainage area boundary in a southeasterly, then northeasterly direction to and along the Lake Tahoe Dam, thence following the said drainage area crestline in a northeasterly, then northwesterly direction to the point of beginning.

32. Section 81.275 is added as follows:

§ 81.275 Lake Tahoe Intrastate Air Quality Control Region.

The Lake Tahoe Intrastate Air Quality Control Region consists of the territorial area encompassed by the boundaries of the following jurisdictions or described area (including the territorial area of all municipalities (as defined in Section 302(f) of the Clean Air Act, 42 U.S.C. 1857h(f)) geographically located within the outermost boundaries of the area so delimited:

In the State of California:

El Dorado County—that portion of El Dorado County within the drainage area naturally tributary to Lake Tahoe including said Lake.

Placer County—that portion of Placer County within the drainage area naturally tributary to Lake Tahoe including said Lake, plus that area in the vicinity of the head of the Truckee River described as follows: commencing at the point common to the aforementioned drainage area crestline and the line common to Townships 15 North and 16 North, Mount Diablo Base and Meridian (M.D.B.&M.), and following that line in a westerly direction to the northwest corner of Section 3, Township 15 North, Range 16 East, M.D.B.&M., thence south along the west line of Sections 3 and 10, Township 15 North, Range 16 East, M.D.B.&M., to the intersection with the said drainage area crestline, thence following the said drainage area boundary in a southeasterly, then northeasterly direction to and along the Lake Tahoe Dam, thence following the said drainage area crestline in a northeasterly, then northwesterly direction to the point of beginning.

[FR Doc. 81-1712 Filed 1-15-81; 8:45 am]

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DEPARTMENT OF LABOR

41 CFR Part 29-70

Public Contracts and Property Management; Federal Standards for Federally Funded Grants and Agreements

Correction

In FR Doc. 80-39059 appearing in the issue for Tuesday, December 16, 1980, make the following corrections:

(1) On page 82828, in the first column, in the "**SUMMARY**", 2nd paragraph, in the 17th line, "Circular A-122" should have read "OMB Circular A-122".

(2) On page 82828, in the third column, in the fourth line, "70.216-1(a)" should have read "70.216a-1(a)".

(3) On page 82828, in the third column, in paragraph i, in the first line, the word "required" should have been "requires".

(4) On page 82834 in the middle column, in paragraph (7), (contract clause contained in § 29-70.216-13(b)(6)), in the 18th line, the word "which" should have read "with".

(5) On page 82838, in the first column, in § 29–70.216b–1, paragraph (c)(2), in the last line "sec. 122(k)" should have read "sec. 121(k)".

BILLING CODE 1505–01–M

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

Payment of Membership Fees and Other Expenses to Private Organizations

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: This rule amends 41 CFR Part 60–1 by adding a new § 60–1.11 to prohibit Federal contractors under Executive Order 11246, as amended, from paying membership fees and other expenses for employee participation in discriminatory private clubs or organizations except where the contractor can provide evidence that such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin. The rule requires OFCCP to provide contractors with the opportunity to present evidence in defense of their actions, and requires that contractors' fee payment policies be administered without regard to employees' race, color, religion, sex, or national origin. The rule is designed to address the problems facing employees excluded from contractor sponsored membership in discriminatory private clubs or organizations because of their race, color, religion, sex, or national origin, and to ensure that the contractor conducts business related activities and provides employee benefits in an environment free of discrimination.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: James W. Cisco, Acting Director, Division of Program Policy, Office of Federal Contract Compliance Programs, U.S. Department of Labor, Washington, D.C. 20210, telephone (202) 523–9426.

SUPPLEMENTARY INFORMATION: The Office of Federal Contract Compliance Programs (OFCCP) administers three programs which prohibit employment discrimination by Federal contractors and subcontractors. Executive Order 11246, as amended, prohibits employment discrimination based on race, color, religion, sex, and national origin; Section 503 of the Rehabilitation Act of 1973 prohibits handicap-based discrimination; and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 prohibits discrimination based on veteran status.

The rule published today covers practices under Executive Order 11246, but not under either Sections 402 or 503. The matter of payment of membership fees first arose under the Executive Order, and most concerns have revolved around the employment impact of exclusion from discriminatory clubs upon minorities and women. Only one commentator expressed the opinion that coverage of the rule should be extended to qualified handicapped persons under Section 503. However, if OFCCP becomes aware of problems in this area, consideration will be given to further rulemaking.

OFCCP has no jurisdiction over the membership practices of private organizations, and does not seek any through this rule. The regulation does not prohibit contractors from making direct contributions unrelated to employment to charitable, service, or other private organizations. Neither does the regulation prohibit employees from maintaining membership in any organization for which they elect to pay membership or other fees not reimbursed by the contractor.

I. Background—Summary of the Proposed Rule.

The proposal published January 22, 1980 (45 FR 4953) would have made it a violation of Executive Order 11246 for contractors to pay membership fees or other expenses to organizations which bar, restrict, or limit membership on the basis of race, color, religion, sex, or national origin where such restrictions or limitations impacted upon employees' promotional opportunities, status, compensation, or other terms and conditions of employment. The proposal would have established a procedure through which the contractor would conduct an analysis of its membership fee payment policy to determine whether any employees were maintaining contractor sponsored membership in a discriminatory organization which conferred a business or professional advantage affecting excluded employees. Nothing in the proposal would have prohibited contractors from paying membership fees to organizations which confer no business or professional advantage.

The proposed regulation contained an analysis composed of five steps designed to enable the contractor to determine whether its fee payment policy was nondiscriminatory, which organizations to which it paid fees had discriminatory membership practices, which employees maintained employer paid memberships in such discriminatory organizations, whether these employees received any business or professional advantage by virtue of their membership in such discriminatory organizations, and whether such advantage impacted upon the employment opportunities or status of those similarly situated. The sixth step of the process would have required the cessation of payments to any discriminatory organization which the contractor's analysis determined to be conferring a business or professional advantage having an employment impact.

II. Analysis of Comments Received

During the comment period ending March 24, 1980, OFCCP received an unduplicated count of 203 comments broken down into the following categories of commentators: members of Congress or the Senate, 4; women's groups, 6; minority groups, 2; public interest groups, 4; religious groups, 3; service clubs, 21; other clubs, 31; club "industry" associations, 7; banks and savings and loan associations, 20; other contractors and companies, 15; contractor associations, 7; state agencies, 1; individuals, 82. Comments OFCCP considered as substantive numbered 35 of the unduplicated total. Of the 202 commentators expressing an opinion on the proposal, 41 supported the proposal, while 161 opposed it. OFCCP reviewed and considered comments received after the close of the comment period, but these are not reflected in the figures given above. The major concerns raised in the comments are considered below.

A. *Justification for the rule.* One of the most frequently expressed comments by opponents to the proposal was the belief that the proposal is unwarranted. While some of these commentators agreed that OFCCP had a role in prohibiting employment discrimination, they argued that the purpose of a contractor's payment of membership fees was not to discriminate in employment, but to further the contractor's business interests.

But membership fees are generally paid, to quote one corporate commentator, " as a perquisite and adjunct to the company's compensation program or for business purposes to contact officers [of other businesses] with the understanding that the membership will be used for business cultivation and direct business purposes." It is then reasonable to conclude that in furthering the business through membership, company

sponsored members further their own careers as well. It is also reasonable to conclude that those excluded from membership in clubs or organizations used to further the business are correspondingly impeded in advancing their careers in the same manner as their company sponsored member colleagues. Evidence gathered in various compliance reviews by the Department of the Treasury as a contract compliance agency, testimony provided before the Senate Committee on Banking, Housing and Urban Affairs, and information received by the Department of Labor both before and after the proposal's publication provide sufficient cause for OFCCP to conclude that exclusion from contractor sponsored membership in a discriminatory private organization may affect employment.

B. *Determining effects on employment.* The basis of the proposal was that employees provided with contractor sponsored membership in a discriminatory private organization receive an employment advantage not available to employees excluded from membership in the discriminatory organization. The analysis in proposed paragraph (b), through a progression of steps, was intended to identify those situations in which membership conferred an employment advantage leading to disparities in employment opportunities, status, compensation, or other terms and conditions of employment.

Paragraph (b)(4) would have required contractors to "determine any direct or indirect benefits received by employees from their membership in . . . exclusionary clubs or organizations which serve to enhance their employment opportunities or which give to them an employment or professional advantage over employees who are excluded from such membership."

To determine whether the employment advantage was accompanied by actual disparities in employment opportunities, the proposal contained a paragraph (b)(5), which required the contractor to "compare the promotion rate, compensation, and other job benefits of employees who maintain contractor sponsored membership in . . . exclusionary clubs or organizations with those of employees who are excluded from such clubs or organizations. . . ." In paragraph (b)(6) the contractor, "upon determining that there exists any employment or professional advantage," was to "immediately cease the reimbursement or payment of membership fees for participation in the exclusionary club or organization."

In speaking of proposed paragraph (b)(4), some commentators went to great lengths to produce hypothetical situations for which contractors would have difficulty determining whether the club conferred an employment advantage. Few other commentators on this paragraph spoke as much on the specifics of paragraph (b)(4) as on the reasons employers pay membership fees. Some opponents of the rule who answered questions relating to why contractors pay membership fees stated that they do not pay fees to confer any employment advantage or to discriminate, but instead to further business, make contacts, and establish relationships with potential customers—all activities which would be likely to have some effect upon the contractor sponsored employee's opportunities for career advancement.

Supporters of the rule found fault with proposed paragraph (b)(5). They believed that the comparison of promotion rates, compensation, etc. required by this paragraph would be meaningless because it could not consider the fact that two employees of unequal ability and perseverance could achieve the same level of success—one through contacts made at a discriminatory private club, the other through harder work and greater talent.

The fact that one employee would have had to work harder than the other to achieve the same level of success would indicate discrimination, but such discrimination would be hidden from the analysis in paragraph (b)(5). Other commentators simply believed that the procedure of (b)(5) was too complex to be feasible.

The analytical process of paragraph (b), particularly the payment cessation requirement of (b)(6), received criticism from many commentators because of their belief that it presumed the employer "guilty" of employment discrimination without any evidence of "guilt." Opponents believed that the existence of the opportunity to continue paying fees to discriminatory organizations upon establishing that no employment impact would result was insufficient assurance that the analysis raised no issue of "guilt" or "innocence."

As stated above, the purpose of the analysis was to provide a means of identifying those instances of fee payment which conferred a business or professional advantage having an effect on the employment opportunities or status of similarly situated employees. OFCCP, following the guidance provided by the Department of Justice, had concluded that such identification was necessary to restrict the impact of the regulation to those situations where employment was affected by the contractor's fee payment policy.

Partly because of the realization that it is the furtherance of business which is at the heart of fee payments, and partly because of the complexities associated with the analysis of the proposal, OFCCP has removed the analysis process of proposed paragraph (b), and has simply stated the conditions under which a violation of the Executive Order exists. The rule published today also ensures that "OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions" in implementing its membership fee policy.

C. *Determining discriminatory membership.* Paragraph (b) of the proposal contained a provision that required the contractor to determine which, if any, of the organizations to which payments are made maintain membership policies which bar, restrict, or limit membership on the basis of race, color, religion, sex, or national origin. Most of the 27 commentators expressing opinions on this portion of the proposed regulation were opposed to the requirement. They believed either that OFCCP intended contractors to "investigate" private organizations or that the provision provided insufficient guidance for contractors to know what was intended.

It was never the intention of OFCCP that either contractors or the Government would conduct "investigations" of private organizations. Although the determination procedure would have been left to contractors, OFCCP envisioned a simple process in which the contractor would generally determine an organization's membership practices by requesting a policy statement from an officer of the organization or by checking the organization's by-laws.

D. *Per se violation.* At the end of the preamble to the proposal appeared a note stipulating that EEOC disagreed with OFCCP's position regarding the regulation, and inviting "comment on the alternative position which, under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, would absolutely prohibit payment by employers of fees to such discriminating clubs."

Seventeen commentators expressed opinions on the question EEOC raised. Although opposition to any rule in this area was generally widespread, 15 of the 17 commentators who specifically discussed the *per se* violation question

supported EEOC's position that contractors' payments of membership fees to a discriminatory organization should be prohitibed absolutely. These commentators viewed any contractor payment to any discriminatory organization as abetting discrimination. They believed that any employee excluded from contractor sponsored membership in a discriminatory organization would suffer diminished employment opportunities and status.

In its two opinions, however, the Department of Justice advised the Department of Labor that employment discrimination under Executive Order 11246 does not exist simply because a contractor pays membership fees for employee participation in a discriminatory organization. The 1976 opinion stated that the Department of Labor could not assume that all membership fee payments were made to clubs to transact business and make business contacts, and that therefore Labor could also not assume that membership in all clubs automatically affects promotion and advancement potential of employees. The 1977 opinion clarified Justice's earlier position by stating that the Department of Labor could assert that a contractor's payment of dues to a discriminatory organization violates Executive Order 11246 so long as the contractor is provided the opportunity to show that its policy and the effects of its policy on employment are nondiscriminatory. In electing to follow the advice of the Department of Justice on this issue of authority under the Executive Order, OFCCP in no way asserts that EEOC is similarly limited in interpreting Title VII.

E. *Exemption of types or organizations.* The proposal provided for no exemptions from the rule for either specific organizations or organizations of particular "types." Among the questions OFCCP asked in the preamble was whether any "types" of organizations should be exempted and how one would characterize an organization as being of a particular "type" (for example, a religious society, service club or social club).

Most of the comments advocating exemptions came from organizations or their industry associations. Although most of these commentators opposed promulgation of any rule, they sometimes qualified their opposition by stating that should OFCCP finalize a rule on membership fees, their type of organization should be exempt from the rule. Service clubs and their members were generally of the opinion that no connection between employment opportunity and membership in a service club could be shown, and that the rule would discourage employers from sponsoring their employees for membership. They expressed the opinion that the effect of the rule would be to diminish their memberships substantially, with resulting reduction in the services the community would receive. None of the two minority groups and only one of the six women's groups filing comments advocated an exemption for organizations established to increase the employment opportunities of women or minorities.

Some determination as to "type" would be necessary to categorize what kinds of organization should be exempt from the rule. Few commentators provided any guidance on how one determines whether an organization is of a particular "type" other than to say that the "type" of organization is dependent upon its purpose. Considering organizations as being of a particular "type" according to their purpose rather than their function, however, leaves unanswered the question of what consideration should be given to the effect that contractor sponsored membership in that organization might have upon employment.

In adopting a rule without exemptions, OFCCP recognizes that participation in various organizations will have varying impacts upon employment. Some organizations are established primarily to provide an environment in which to further business, and function to do so. Others are established for nonbusiness purposes, but have memberships and activities which function to further the business interests of their members. Others have neither business purposes nor functions. Therefore, the rule adopted today will not affect payments made to organizations when the contractor can demonstrate that no effect upon employment results.

III. The Rule Explained.

The rule adopted today is divided into two paragraphs. Paragraph (a) requires that the contractor's fee payment policy be applied without discrimination, and establishes the general principle that payment of membership fees and other expenses for participation in a discriminatory private club or organization is a "a violation of Executive Order 11246 except where the contractor can provide evidence that such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin." The paragraph also ensures that "OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions." Paragraph (b) requires the contractor to determine whether an organization to which it pays fees maintains a discriminatory membership policy or practice.

A. *Principle of the Rule.* Paragraph (a)(1) requires that the contractor administer its policy or practice of paying membership fees or other expenses for employee participation in private clubs or organizations without regard to the race, color, religion, sex, or national origin of employees. This paragraph merely applies the existing nondiscrimination requirements of Section 202(1) of the Executive Order to the specific policy or practice of paying membership fees.

Paragraph (a)(2) establishes that "payment or reimbursement by contractors of membership fees and other expenses for participation by their employees in a private club or organization which bars, restricts or limits its membership on the basis of race, color, religion, sex, or national origin constitutes a violation of Executive Order 11246 except where the contractor can provide evidence that such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin." The paragraph also ensures that "OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions."

As has been discussed above, OFCCP's assertion of violation arises from the conclusion that contractors pay membership fees and other expenses either to further the interests of the business or to provide benefits to employees, and that both types of actions have employment effects. The interests of the business may be furthered by the use of a club or organization in activities such as the following: Use of a club to confer with, transact business with, or entertain clients; use of a club to hold business meetings and company functions; use of the social activities of an organization to establish and maintain contacts on behalf of the contractor; or participation in activities of the organization to enhance the goodwill of the employer within the community.

Although not all employment benefits automatically affect one's employment opportunities, compensation, status, or other terms and conditions of employment, some benefits are career

enhancing. A career enhancing benefit is one which may advance the career or business interests of the employee, including meeting with members of the employee's profession or business, participating in activities which provide information on business related or professional fields (such as lectures on the employee's profession or on local business or the economy), or participating in activities designed to improve the employment or career opportunities of the employee (such as use of job banks, directories, libraries, etc. and participation in job seminars).

OFCCP does not expect, however, that membership in every club or organization will automatically abridge the terms and conditions of employment of employees or applicants excluded from membership. Therefore, the contractor is afforded the opportunity to provide evidence that no effect has resulted. In determining the adequacy of the contractor's demonstration of no effect, OFCCP will review any evidence the contractor may present, and compare this evidence against its own analyses for adverse impact, disparate treatment, or other evidence of employment effect.

B. *Consideration of terms.* Much of the controversy arising over the proposed regulation surrounded the interpretation of terms, particularly those relating to membership and requirements placed upon contractors. Therefore, several of the key terms are described here to provide guidance.

1. *Membership fees and other expenses.* Although the rule is often discussed as affecting *membership fees*, expenses other than the fees themselves are covered. *Membership fees* are those expenses levied by a club or organization for the privilege of association through membership. *Other expenses* are expenses incurred incidental to membership and which are paid or reimbursed by the employer. Generally such expenses include entertainment expenses, facility usage fees, tuition for organization sponsored courses or training, admission and event participation fees, and convention registration and associated convention or meeting expenses. Expenses the employee pays on his or her own behalf are not *other expenses* covered by this regulation.

2. *Discriminatory private club or organization.* A discriminatory private club or organization is one which "bars, restricts or limits its membership on the basis of race, color, religion, sex, or national origin." Such restrictions may arise either from the organization's *policy* or *practice*.

Policy means a written statement (in the by-laws, for example) or verbal agreement among the membership by which members and officers of the organization determine who is eligible for membership. *Practice* means a method of operating the club, including verbal agreements among the members or tradition recognized by the members, which has the effect of determining who is eligible for membership.

Universal eligibility for membership is not a criterion for considering a club or organization as nondiscriminatory. Clubs or organizations which select members according to any criterion other than race, color, religion, sex, or national origin are not considered discriminatory for the purposes of this regulation. For example, an organization which requires candidates for membership to receive a certain minimum level of income or to have attained a certain standard of professional achievement is not considered discriminatory solely on the basis of these membership criteria.

A nondiscriminatory club or organization need not necessarily make all of its facilities available to all of its members. For example, athletic clubs would not be discriminatory if they maintained separate locker rooms, lodgings, and exercise facilities for men and women.

B. *Determining nondiscrimination of membership policies.* As paragraph (b) of the rule states, "the contractor has the responsibility of determining whether the club or organization restricts membership on the basis of race, color, religion, sex, or national origin. The contractor may make separate determinations for different chapters of an organization, and where it does so, may limit any necessary corrective action to the particular chapters which observe discriminatory membership policies and practices."

Although OFCCP prescribes no procedure for complying with the rule, the contractor may find it most efficient to place the responsibility for determining the membership policies of an organization to which the payment of fees and expenses is contemplated with the management official who authorizes the expenditure. The determination may be based upon certification from an officer of the club, from an examination of the organization's by-laws, or from any other evidence that enables the contractor to determine the organization's membership policies and practices in accordance with the rule.

Unless the contractor receives indications of a change in the membership policies or practices of a given club or organization, the determination of an organization's or club's membership policies need be made only once to cover payments of fees for all eligible employees to participate in that club or organization. (Of course, the contractor may elect to make determinations more than once, such as annually or in advance of paying each employee's fees for participation in that club or organization.) OFCCP may verify that the determination for each club or organization is both correct and current by contacting the club on its own.

IV. Expected Impact of the Rule

In the preamble to the proposed regulation, OFCCP asked several questions relating to how widespread the practice of paying membership fees is and what the likely impact of a rule on membership fees would be. No commentator answered these questions with sufficient useful information to allow OFCCP to make more than rough estimates of the extent of the practice of paying membership fees or the costs to contractors of complying with the rule. Only one commentator expressed an opinion which attempted to judge the actual costs of the rule as proposed. Some commentators argued that a regulatory analysis should be conducted.

With deletion of the analysis procedure contained in the proposal, the rule published today imposes only incidental new requirements upon contractors. The actions required to comply with the rule can be conducted coincidental to the contractor's established procedure for authorizing expenditures for membership fees and other expenses. The Department has therefore determined that no regulatory analysis is necessary.

This document was prepared by OFCCP's Division of Program Policy under the direction and control of Weldon J. Rougeau, Director, Office of

Federal Contract Compliance Programs. Staff from the Office of the Solicitor provided assistance.

Accordingly, a new § 60–1.11 is added to Part 60–1, Title 41, Code of Federal Regulations, as set forth below to take effect February 17, 1981.

Dated: January 13, 1981 at Washington, D.C.

Ray Marshall,

Secretary of Labor.

Donald Elisburg,

Assistant Secretary, Employment Standards Administration.

Weldon J. Rougeau,

Director, OFCCP.

§ 60–1.11 Payment or reimbursement of membership fees and other expenses to private clubs.

(a)(1) A contractor which maintains a policy or practice of paying membership fees or other expenses for employee participation in private clubs or organizations shall ensure that the policy or practice is administered without regard to the race, color, religion, sex, or national origin of employees.

(2) Payment or reimbursement by contractors of membership fees and other expenses for participation by their employees in a private club or organization which bars, restricts or limits its membership on the basis of race, color, sex, religion, or national origin constitutes a violation of Executive Order 11246 except where the contractor can provide evidence that such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin. OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions.

(b) The contractor has the responsibility of determining whether the club or organization restricts membership on the basis of race, color, religion, sex, or national origin. The contractor may make separate determinations for different chapters of an organization, and where it does so, may limit any necessary corrective action to the particular chapters which observe discriminatory membership policies and practices.

[FR Doc. 81–1597 Filed 1–15–81; 8:45 am]

BILLING CODE 4510–27–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, and 90

[PR Docket No. 79–338; RM–3470; FCC 80–753]

Temporary Licensing for Multiple Licensed Mobile Relay Systems Operating in the Business Radio Service in the 450–470 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule (order).

SUMMARY: The Commission adopts an order denying the Petition for limited reconsideration filed by the General Electric Company to delay the implementation date of a temporary licensing procedure available to some users in the Business Radio Service. The Commission further provides for an interim form to be used for this procedure due to the temporary unavailability of Form 572, the temporary licensing form.

EFFECTIVE DATE: December 29, 1980.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Gay Ludington, Private Radio Bureau, (202) 634–2443.

SUPPLEMENTARY INFORMATION:

In the matter of amendment of Parts 1, 2, and 90 of the Commission's rules and regulations to implement a system of temporary licensing for multiple licensed mobile relay systems operating in the Business Radio Service in the 450–470 MHz band, PR Docket No. 79–338, RM–3470.

Order

Adopted: December 18, 1980.

Released: December 29, 1980.

By the Commission: Commissioners Quello and Jones absent.

1. We have before us a petition filed by the General Electric Co. (GE) to reconsider the decision we took in our Report and Order in this proceeding to create a temporary licensing system for some users in the Business Radio Service.[1]

2. The gist of the GE petition is that the effective date of the rules adopted in the Report and Order should be delayed from January 1, 1981, to March 4, 1981.

3. In support GE has expressed concern that the proposed change will have adverse repercussions on the highly competitive equipment marketplace, because it will necessitate major changes in the way GE and some other radio equipment manufacturers market their products. GE contends that most dealers presently do not maintain an inventory to enable them to sell radio equipment off the shelf. Instead, the dealer orders the necessary radio equipment from the manufacturer who then assembles and delivers it to the dealer. The lag time has historically coincided with the time between application submission and license grant and arrangements have usually been made to have the equipment delivered to the dealer about the same time that a license is issued to the user. The new licensing procedure, however, will eliminate this delay. Dealers will be faced with a demand from customers to purchase and install equipment immediately. GE contends that such a change in customer demand characteristics will require dealers to stock inventory in order to remain competitive and thus may require local dealers to procure financing to purchase equipment, insurance, rent storage space, etc. GE therefore requests we delay implementation of our new rules to provide a longer period of time for manufacturers and dealers to alter or adjust their marketing procedures to assimilate this change.

4. We have considered GE's arguments. The issues it raises are merely reiterations of its earlier arguments in this proceeding and were considered and disposed of in our Report and Order.[2] GE has presented no new evidence or arguments in its Petition for Reconsideration to support its request, and has essentially restated the position it took in its comments in the earlier phase of this proceeding. GE does not contend there has been any change of conditions or circumstances which requires our reconsideration of these matters. Accordingly, there is no apparent basis for reconsideration action.[3]

5. In view of the foregoing, it is ordered that General Electric Co.'s petition for reconsideration is denied.

6. The form originally designated for use in this temporary licensing program will not be available on January 1, 1981, the effective date of the rules. We have, however, developed an interim procedure utilizing an existing form, a copy of the submitted FCC Form 400, that does not require the submission of any additional information. This interim procedure was described in a Public Notice issued on December 8, 1980, attached as an Appendix to this order.

[1] *See Report and Order*, Docket No. 79–338, FCC 80–487, adopted August 1, 1980, released September 4, 1980.

[2] *Id.*, at paragraphs 12–13.

[3] *See* 47 CFR 1.429.

7. Therefore, it is further ordered, That until FCC Form 572 is available, eligible applicants may obtain temporary permits by following the interim procedure set out in the attached Appendix below. This interim procedure shall be effective January 1, 1981. It is determined that 30 days notice is not required for the adoption of this interim procedure because it is of a procedural nature; it conforms with existing policy; and expedited implementation is required in the public interest.

8. The Secretary shall cause this order to be published in the **Federal Register.**

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

FCC Form 572 Temporarily Unavailable; FCC Provides Interim Procedure To Allow Implementation of Temporary Licensing System in the Business Radio Service on January 1, 1981, as Scheduled.

December 8, 1980

On September 4, 1980, the FCC released a Report and Order in PR Docket 79-338 which created a system of temporary licensing for add-on users of existing multiple licensed shared stations in the Business Radio Service (for example, a community repeater, or a radio or wireline controlled shared base station facility) in the frequency bands 30-50 MHz, 150-170 MHz and 450-470 MHz. The program becomes effective January 1, 1981. However, due to processing delays, the temporary permit form itself will not be available on January 1, 1981. We are aware that manufacturers and equipment dealers alike have relied on the January 1 effective date in their planning and production schedules. The Commission has therefore provided for an interim "form" which will substitute for the temporary permit form (#572) until it becomes available.

Applicants in the Business Radio Service eligible to use the temporary licensing system when it begins on January 1, 1981, may use as a substitute for the temporary permit the Form 400 work sheet, or a photo copy or other duplicate of the completed FCC Form 400 being used to apply for Commission authorization. This copy should be signed, dated and posted at every control point or station covered by the application. Do not mail the copy to the FCC.

We caution applicants who use the temporary licensing system that eligibility provisions remain the same as outlined in the Report and Order.

(1) Applicants may use a copy of a completed Form 400 as an interim temporary permit only if he or she wants to operate on an existing licensed facility in the 30-50 MHz, 150-170 MHz, or 450-470 MHz band while the original Form 400 is being processed by the Federal Communications Commission.

(2) An applicant may not be temporarily licensed under this system if he or she operates an individual non-shared station.

(3) An applicant will not qualify for a temporary permit until he or she has complied with frequency coordination requirements under Section 90.175 of the FCC rules.

(4) The applicant must certify that he or she:

(a) is not a representative of a foreign government;

(b) is eligible in the Business Radio Service under Section 90.75 of the FCC Rules;

(c) has not had a license denied or revoked by the FCC;

(d) is not the subject of legal action concerning the operation of a radio station;

(e) has mailed a completed Form 400 to the FCC;

(f) has complied with the frequency coordination requirements under Section 90.175 of the FCC rules.

The applicant must clearly label the copied Form 400 as a "Temporary permit to operate a business radio station" in the space marked "Special Conditions." Also, the applicant will construct a temporary call sign consisting of the letters "WT" plus his or here local business telephone number, and will use that call sign until a permanent call sign is assigned by the FCC. The temporary call sign should be written in the space marked "call sign" on the copied Form 400.

This interim procedure will be valid only so long as the temporary permit Form 572 is unavailable. A Public Notice will be issued when the form is available.

[FR Doc. 80-1618 Filed 1-15-81; 8:45 am]

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47 CFR Part 73

[Docket No. 20642; FCC 80-725]

Radio Broadcast Services; Clear Channel Broadcasting in the Standard Broadcast Band

AGENCY: Federal Communications Commission.

ACTION: Final rule (Memorandum Opinion and Order.)

SUMMARY: This action addresses petitions for reconsideration of the *Report and Order* in Docket No. 20642, *Clear Channel Broadcasting in the AM Broadcast Band.* Petitions for reconsideration filed by Great Southern Broadcasting Company, Inc., KBMR Radio, Inc., Peidmont Broadcasting Company, Inc., National Black Media Coalition, American Broadcasting Companies, Inc., Midwest Television, Inc., and Midwest Radio-Television, Inc., are denied. Section 73.37(e)(2) of the Commission's rules is amended in response to the petition of Clear Channel Broadcasting Service, which petition is otherwise denied.

EFFECTIVE DATE: January 26, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Molly Pauker, Broadcast Bureau, (202) 632-6302; or Gary Stanford, Broadcast Bureau, (202) 632-9660.

SUPPLEMENTARY INFORMATION:

In the matter of Clear Channel Broadcasting in the Standard Broadcast Band, Docket No. 20642.

Memorandum Opinion and Order

Adopted: December 4, 1980.

Released: December 22, 1980.

By the Commission: Commissioner Quello concurring in the result.

1. Before the Commission are several petitions for reconsideration of the *Report and Order* in Docket No. 20642, Clear Channel Broadcasting in the AM Band, 45 FR 43172, published June 26, 1980. Petitioners are Great Southern Broadcasting Company, Inc., licensee of Station WAMB, Donalson, Tennessee ("WAMB"); KBMR Radio, Inc., licensee of Station KERR, Polson, Montana ("KERR"); Piedmont Broadcasting Company, Inc., licensee of Station WSPF, Hickory, North Carolina ("WSPF"); National Black Media Coalition ("NBMC"), American Broadcasting Companies, Inc. ("ABC"); Clear Channel Broadcasting Service ("CCBS"); Midwest Television, Inc., licensee of Station KFMB, San Diego, California ("KFMB"); and Midwest Radio-Television, Inc., licensee of Station WCCO, Minneapolis, Minnesota ("WCCO").[1]

2. The City of New York Municipal Broadcasting System, licensee of Station WNYC ("WNYC"), filed comments addressing issues raised in WCCO's Petition II. WCCO filed a reply to WNYC's comments. These are discussed

[1] WCCO filed a petition to stay acceptance of applications on 820 kHz, as well as three petitions for reconsideration. All are addressed *infra*, and are referred to as "WCCO Petition I, II or III."

in paragraphs 29 and 31, *infra*. Association for Broadcast Engineering Standards, Inc. ("ABES"), filed a statement in reponse to the petitions for reconsideration of WSPF, WAMB, KBMR, CCBS, ABC and NBMC. ABES' views are noted, *infra*, in connection with consideration of each of the subject petitions. Southern California Broadcasting Company, licensee of Station KIEV, Glendale, California ("KIEV"), filed a comment opposing CCBS's petition (see paragraphs 21 through 23, *infra*) and also urging denial of the other petitions for reconsideration.

I. Petitions of WAMB, KBMR, WSPF

3. Petitioners seek reconsideration of paragraphs 69 and 70 of the *Report and Order*, relating to the daytime (ground wave) interference protection required to be afforded to Class I–A stations. Petitioners note that at paragraph 32 of the *Further Notice of Proposed Rule Making* in this proceeding, 44 FR 4502, 70 F.C.C. 2d 1077 (1978), the Commission proposed to reduce the daytime interference protection afforded to Class I–A stations from the 0.1 mV/m contour to the 0.5 mV/m contour. In the *Report and Order*, however, the Commission chose not to do so, in reliance upon three assumptions: (1) Generally, the controlling factor in the placement of any new unlimited-time Class II stations on the Class I–A channels would be the need to protect the dominant station's 0.5 mV/m 50% skywave contour, rather than the Class I station's daytime contour; (2) the proposed reduction in daytime interference protection would affect the placement of daytime-only stations on Class I channels, but action on applications for those stations have been deferred for the present; and (3) the question of daytime-only stations concerns Class I–B stations as well as the Class I–As, but limits on Class I–B service areas are beyond the scope of this proceeding, and the issue of reduction of daytime interference protection for Class I stations would be more appropriately addressed in a separate proceeding focused specifically on that question. See *Report and Order*, paragraphs 69 and 70, 45 FR at 43181.

4. Petitioners claim that the degree of daytime protection afforded the Class I station by unlimited time co-channel Class II stations has significant effects on the operation of the Class II station. Pursuant to § 73.187 of the Commission's rules, a Class II station has the obligation of protecting the co-channel Class I station's 0.1 mV/m ground wave contour during critical hours, that is, two hours after local sunrise or two hours before local sunset. Under these provisions, a Class II station can operate in three different modes during different times of the day: a high power (as much as 50 kW) during daytime hours; a low power operation to protect the requisite skywave contours at night; and an intermediate power to protect the dominant station's ground wave contour during critical hours. Petitioners argue that decreasing the ground wave protection afforded Class I stations would permit Class II stations to operate at a higher power during critical hours, perhaps in the same mode as its daytime operation. Thus, the operation of a Class II station would be simplified.

5. ABES supports the present 0.1 mV/m protection level, contending that maintenance of 0.1 mV/m groundwave protection will not inhibit additional unlimited-time Class II stations. In addition, ABES argues that the benefits from daytime Class I–A service between the 0.5 mV/m and 0.1 mV/m contours, to rural residents and highway travelers, in particular, outweigh whatever benefits woud be derived from reducing daytime protection of Class I stations to the 0.5 mV/m contour.

6. It appears that petitioners have raised adequate grounds for reconsideration of our determination not to reduce the level of ground wave protection afforded Class I stations. In fact, a reduction in the Class I daytime contour protection level would increase the primary service areas of some Class II stations during critical hours, but that increase in the Class II station's service area would come at the cost of a decrease in the Class I station's service area. However, upon reconsideration, we remain of the opinion that it would be inappropriate to resolve this conflict within the confines of this proceeding. As previously noted, this proceeding involves Class I–A stations only, but the daytime interference standards affect Class I–B stations as well. We could not summarily amend the rules with regard to Class I–B stations without benefit of notice and comment, and we do not believe that it would be appropriate to add to the already complicated AM protection rules with different daytime standards for Class I–A and Class I–B stations. Rather, the better course would be institution of a new rule making proceeding looking to the modification of those rules for all Class I stations.

7. Accordingly, upon reconsideration, the conclusions of our *Report and Order* in Docket No. 20642 regarding daytime interference protection afforded Class I–A stations are affirmed. However, the petitions for reconsideration filed by WAMB, KBMR and WSPF will be treated as petitions for rule making; and we shall proceed as expeditiously as possible to develop a Notice of Proposed Rule Making on the subject of daytime interference protection required to be afforded to all Class I stations.

II. Petition of NBMC

8. NBMC asks the Commission to reconsider its intent to consider well-founded requests for waivers of the requirements of § 73.37(e)(2) of the Rules. See *Report and Order*, paragraph 72, 45 FR, at 43181, published June 26, 1980. NBMC urges that the Commission not accept requests for waivers of this section, arguing that this would substantially dilute the effect of the preference afforded to minority-owned and noncommercial applicants by the *Report and Order*. Additionally, NBMC asks that the Commission grant a strong preference to minority applicants in comparative hearings against other applicants for the new Class II stations on Class I–A channels. In support, NBMC alleges that such a preference could enhance the availability of funds for minority applicants and might discourage non-minority applications, thus obviating the need for comparative hearings altogether, in some instances. NBMC cites the recent decision of the Supreme Court in *Fullilove* v. *Klutznick*, U.S. 78–1007, decided July 2, 1980 (48 U.S.L.W. 4979), as an intervening development which broadens the Commission's discretion in the area of minority ownership policies.

9. NBMC correctly states that the criteria in § 73.37(e)(2) were designed to facilitate our primary objectives in this proceeding: provision of additional AM spectrum for minority-owned and noncommercial applicants, as well as applicants who would provide first or second local primary nighttime service. However, NBMC is incorrect in its further assumption that because no other equally meritorious service objective has been suggested to date, no other will ever be. Purely as a matter of logic, it must be acknowledged that there could arise a desirable use of this additional spectrum space not heretofore considered. We are not prepared now to close the door to every other possible applicant, however worthy, by refusing even to consider applications for waiver of the § 73.37(e)(2) criteria.

10. Moreover, we would be legally constrained to consider the merits of waiver requests for other possible uses. *Storer* v. *United States*, 351 U.S. 192, 100 L. Ed. 1081, 76 S. Ct. 763 (1956), holds that the Communications Act requires the Commission to afford a hearing to an applicant with a well-founded request for a waiver of the rules. That principle, announced in the context of

the prohibition against multiple ownership, applies here, as well. The Court has told us that we must be willing to consider waiving our rules for nonconforming proposals which nevertheless may be found to serve the public interest. See *WAIT Radio* v. *F.C.C.*, 418 F. 2d 1153 (D.C. Cir. 1969).

11. NBMC next argues that the assignment of a strong preference to minority applications on the Class I–A channels would stimulate minority applications and funding therefor, as well as possible discourage nonminority applications and thereby reduce the necessity for comparative hearings in some instances. In opposition, ABES argues that NBMC's proposal goes beyond the scope of the instant proceeding, and raises constitutional issues which require most serious consideration.

12. We believe that it would not be appropriate for us to take up issues which relate to the conduct of comparative hearings in the instant proceeding. We have taken note of the *Fullilove* opinion, and, while we find its teachings valuable, we do not think it mandates any change in the approach taken here. It would appear to be more useful for NBMC's suggestion to be taken up in connection with a proceeding specifically designed to address our comparative criteria, in which the comments of all interested parties could be elicited and due note taken of the *Fullilove* case, as well as *TV–9 Inc.* v. *F.C.C.*, 495 F. 2d 929 (D.C. Cir. 1973) and *Garrett* v. *F.C.C.*, 513 F. 2d 1063 (D.C. Cir. 1975), in which the court has instructed the Commission regarding its minority ownership policies.

III. Petition of ABC

13. ABC urges the Commission to reconsider paragraph 84 of the *Report and Order* and decline to grant interim authorizations for limited-time stations to operate at night until such time as it has balanced the desirability of increased operations by limited-time stations against the possible reduction in new unlimited-time stations this could cause. Second, ABC suggests that the Commission limit the minority ownership criterion in § 73.37(e)(2)(iv) to minority-owned applicants explicitly seeking to operate in communities with high minority populations and to provide programming specifically to serve those populations. Articulation of the policy objectives underlying the minority ownership provision would, according to ABC, strengthen the rule against possible constitutional challenge. Finally, ABC advocates that the Commission adopt streamlined comparative hearing procedures, to reduce the administrative burden of competing applications for the newly-available frequencies.

14. We have considered ABC's first argument that since disruption to existing service is a strong factor militating against rescission of any temporary operating authority, we should not grant interim authorizations to limited-time stations. ABES' support of this position has also been noted. However, we believe that at an appropriate future time, the Commission will be able to adequately weigh the continued efficiency of the small number of interim authorizations which might be granted pursuant to paragraph 84 of the *Report and Order*, in connection with rule making undertaken pursuant to paragraph 85 of the *Report and Order*, or otherwise. In the interim, it appears that the public would benefit now from additional nighttime service on those limited-time stations which seek to provide it. Therefore, this portion of ABC's request for reconsideration will be denied, and we intend to accept requests for interim nighttime authorizations.[2]

15. We believe that ABC is quite correct in suggesting that the primary objective of our minority ownership policy is to foster diversity in the source and content of programming. The courts have approved the awarding of merit to minority applications in service to this end. See, *e.g.*, *TV–9, Inc.* v. *F.C.C.*, 495 F. 2d 929, 938 (D.C. Cir. 1973). However, we have been directed by the court that once minority ownership has been established, we may not ask for further evidence relating to program content, but must presume a relationship between ownership by minorities and programming for minorities. "The entire thrust of *TV–9* is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the Black citizenry [footnote omitted], and that that 'reasonable expectation' without 'advance demonstration' gives them relevance." (footnote omitted) *Garrett* v. *F.C.C.*, 513 F. 2d 1063 (D.C. Cir. 1975). Furthermore, because we believe that minority-controlled stations can have the additional function of educating nonminorities about minority viewpoints, we would be hesitant to restrict the threshhold criterion of this rule on the basis of the racial composition of the community of application. See *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979, 981 (1978).

16. Moreover, as ABES points out, 73.37(e)(2)(iv) merely sets out a threshhold standard which applications must meet in order to be acceptable for further processing. It would be neither feasible nor desirable to introduce program content criteria into the initial screening process.

17. We also note ABC's suggestions regarding the streamlining of comparative hearings for new stations on the Class I–A channels. Its suggestions may prove useful; however, as we have said, issues relating to the conduct of comparative hearings do not properly belong in this proceeding. See paragraph 12, *supra*.

IV. Petition of CCBS

18. CCBS asks that the Commission authorize a maximum daytime power of 100 kilowatts for Class I–A stations, to conform to the standards adopted in the Buenos Aires Region 2 Report, and adds that all but one of its members would apply to increase power of this level. Also, CCBS seeks deferment of authorization of new stations on Class I–A channels, until other proceedings which contemplate provision of spectrum space for additional radio stations have been completed. CCBS asserts that coordination of proceedings involving 9 kHz spacing, expansion of the AM band and expanded use of FM frequencies would facilitate more orderly provision of aditional aural services. CCBS' third request is for clarification of the *Report and Order*, specifically as to whether the amended § 73.37(e)(2) would apply to applications for modification of facilities by stations currently operating on or seeking to operate on Class I–A channels.

19. The Commission has considered a lengthy record of proposals for power above the present 50 kW maximum, and has concluded that a 50 kW day and nighttime power limit for Class I–A stations best serves the public interest. CCBS offers no additional evidence in its petition for reconsideration which persuades us to the contrary. We noted

[2] We note that on September 10, 1980, the Commission adopted an *Order* delegating to the Broadcast Bureau the authority to grant applications for interim authorizations. ABC opposed the issuance of interim grants pending reconsideration, via letters of September 8 and 15, 1980. We have considered ABC's position. However, since the provisional nature of the grants creates no equities on the part of the licensees thus treated, no further demand for new full-time stations on the Class I–A channels will be prejudiced thereby. In these circumstances, in conformance with the policy on interim grants set out in paragraphs 83 and 84 of the *Report and Order*, three grants of special temporary authority have been issued to limited-time stations. File Nos. BP–800804AQ, BP–800513AC and BP–800814AD. Should applications by these limited-time licensees for regular nighttime operation conflict with future applications for new stations on the Class I–A channels, we shall consider the relative merits of the service each could provide.

the Region 2 resolution providing for 100 kW daytime in the *Report and Order*. That this power level may, under some circumstances, be authorized internationally is not, however, sufficient reason for its domestic adoption, especially in light of countervailing factors. ABES concurs with this view, adding that it might be premature to evaluate maximum AM power limits, prior to the second session of the Region 2 Conference.

20. Preliminary analysis indicates that CCBS' proposed power increase would have a substantial preclusionary impact on the first adjacent channels to the Class I–A channels, particularly where these adjacencies are also Class I–A channels. This result would run directly counter to the Commission's objectives in the instant rule making. Mindful of the social value placed by all on a diversity of voices in the media, we reaffirm our conviction that the public will benefit more from the present scheme than from an increase in daytime power on Class I–A stations. Our reasons for rejecting power increases for Class I–A stations were stated at some length in the *Further Notice* and were reannounced in the *Report and Order*, which incorporated the supporting analyses and evaluations of the *Further Notice*. Accordingly, we are denying this part of CCBS' petition.

21. CCBS' request for deferment of the *Report and Order* until such time as the various proceedings looking toward provision of additional spectrum space may be resolved is opposed by ABES and KIEV, a daytime-only station which contends it is qualified to extend its hours of operation under § 73.37(e)(2)(ii). We also find CCBS' proposal impracticable. As we noted both in the *Further Notice* and the *Report and Order*, our action here takes advantage of the first possible opportunity to respond to a growing demand for additional spectrum space. In light of the immediacy of this demand, we believe it would disserve the public to postpone effectuation of the *Report and Order*.

22. The progressive diminution of need for nighttime exclusivity on the Class I–A channels has long been acknowledged. Indeed, the possibility of further duplication of these channels was foreseen in 1961, on the resolution of the predecessor proceeding to this one. See 31 F.C.C. 565 (1961). We have not acted in haste, but have based our decision on a lengthy and thorough evaluation of relevant factors. Furthermore, there is ample evidence that the approximately 125 stations which could be created as a result of this proceeding will not even approach fulfillment of the demand for more stations. Thus, the spectrum-related rule makings are not interdependent. That is, the facilitation of an increased number of stations accomplished in this proceeding will not obviate the need for additional rule making to the same end.

23. Moreover, the Region 2 MF Broadcasting Conference has called for prompt submission of data concerning proposed stations meeting the needs of each country in the Western Hemisphere. On the other hand, developments which could result in the expansion of the AM band at the upper end of the spectrum will likely not be implemented until the latter part of this decade. It would then be some time until most radio receivers are capable of receiving the additional channels. Resolution of both domestic and international matters relating to 9 kHz spacing between AM channels will require additional time, also. We do note, however, that these matters are being explored in the recently reorganized Advisory Committee on Radio Broadcasting (see *Requests for Formation of New Government-Industry Advisory Committee on AM and FM Radio Broadcasting, and for Institution of Consolidated Inquiry Proceeding on AM and FM Radio*, adopted September 10, 1980, released September 22, 1980, FCC No. 80–537, published ————). We, nevertheless, see no point in delaying for at least a decade utilization of the first additional spectrum space we have been able to make available, pending availability of the last. Whatever benefits might be gained from coordination of these rule makings would be far outweighted by the delay in getting additional stations on the air.

24. As the third part of its tripartite request, CCBS asks that we explain whether and how § 73.37(e)(2) would apply to an existing fulltime AM station seeking to change frequency to one of the 25 Class I channels, or to change facilities on a Class I channel on which it is currently operating. CCBS points out that the *Report and Order* in Docket No. 20265, 54 F.C.C. 2d 1 (1975), amended the rules so that existing AM stations applying to change frequency would not have to meet any of the (then) three alternative criteria set out in § 73.37(e)(2)(i)–(iii), but would merely be required to demonstrate compliance with the "go-no-go" rules and the interference prohibitions of § 73.182(o), the same standards applied to stations desiring to increase power. See 54 F.C.C. 2d, at 20. At that time, however, existing AM stations were precluded from applying to operate fulltime on the 25 Class I–A channels by §§ 73.22, 73.25(a) and 73.182(i).

25. The *Report and Order* in Docket No. 20642 amended §§ 73.21, 73.25(a) and 73.182, to make available the 25 Class I channels for applications for fulltime AM operation from qualified applicants. Under § 73.37(e)(2), applications for new unlimited time stations and nighttime operation by existing daytime stations must meet one of the (now) five criteria outlined therein. The *Report and Order* evinces, as CCBS acknowledges, the Commission's intent that, unless waived in individual cases, these five criteria apply to all applications regarding AM operation on the 25 Class I channels, including those for modification of facilities by existing AM stations, as well as new AM operations and daytime stations applying to operate at night. However, CCBS avers that the language of § 73.37(e)(2), as amended, does not encompass existing fulltime AM stations seeking modification to one of the 25 Class I frequencies, or stations already operating on a Class I channel which seek to increase power while remaining on the same channel. Thus, under the amended rules, as CCBS asserts they might be interpreted, such a station could apply to change to a Class I frequency, or to increase power on the frequency, without fulfilling any of the criteria of § 73.37(e)(2), only by meeting the interference protection requirements of § 73.182 and the "go-no-go" rules.

26. We recognize that there is so little opportunity for frequency changes in any given community that only in rare cases will the aural service maximums be exceeded by relaxing the frequency change requirements. Yet, the instant proceeding is intended to increase optimally the opportunity for additional stations on the Class I–A channels. It would be inconsistent not to require frequency change applications onto the Class I–A channels to serve those objectives, also. In order to eliminate the possibility of any party misconstruing the intent of the amended rules, to permit existing AM stations to apply to change frequency to one of the Class I–A channels, or to change facilities on one of the Class I–A channels, without first meeting one of the criteria of § 73.37(e)(2), we are acceding to the request for clarification in CCBS' petition and amending that rule to provide expressly that existing fulltime AM stations seeking to change frequency onto a Class I–A channel or to modify their facilities or mode of operation on a Class I–A channel must meet the requirements of § 73.37(e)(2).

V. Petition of KFMB

27. KFMB asks the Commission to amend the *Report and Order* to delete the footnote to § 73.21(a)(2)(ii), which restricts Station KFMB to 5 kW, arguing that a 50 kW power limit for KFMB would provide additional primary service in southern California and would not unduly interfere with the operation of any other station, in particular, the Class I–A station operating at 760 kHz, WJR, Detroit, Michigan. KFMB states that when it was required to change frequency from 540 to 760 kHz in 1961, as a result of U.S.-Mexican negotiations, this footnote was added to limit its power as described.

28. Initially, we note that the footnote in question has been deleted. See Attachment III to the *Report and Order*. KFMB's power level is now governed by § 73.21(a)(2)(ii)(B), which limits its power to that authorized as of June 1, 1980, or such other power level as the Commission may subsequently authorize. This technically disposes of KFMB's request. As we stated in the *Further Notice* and in the *Report and Order*, this proceeding is designed solely to revise the rules governing clear channel usage nationwide. KFMB must therefore seek any power increase by an application for a construction permit which will be governed by the provisions of §§ 73.21(a)(2)(ii)(B) and 73.37(e)(2) of the rules.

VI. Petition of WCCO

29. In Petition I WCCO asks that the *Report and Order* be amended to reflect the precise relationship between Stations WCCO and WNYC, both of which currently operate on 830 kHz. Petition II asks that the Commission issue a Show Cause Order requiring Station WNYC to modify its operation to 820 kHz, which could, WCCO asserts, resolve the lengthy dispute between it and WNYC over WNYC's nighttime operation. WNYC's comment, while not opposing a switch to 820 kHz, avers that additional data, particularly engineering analysis, is necessary to evaluate WCCO's proposal, and emphasizes its desire for prompt resolution of the controversy along the lines of the Supplemental Initial Decision (FCC 78–D–36), currently pending before the Commission on exceptions. WCCO's reply to WNYC's comment argues that the benefits to the public from switching WNYC to 820 kHz outweigh those which would derive from retention of WNYC on 830 kHz. WCCO has also petitioned the Commission to stay acceptance of applications on 820 kHz, pending resolution of its request that Station WNYC be shifted to that channel, in order that competing equities not be permitted to develop which could reduce the desirability of this solution. Finally, WCCO asks in Petition III that the Commission require directionalization of the limited-time stations, to prevent interference to the new unlimited-time Class II stations between local sunset at the limited-time stations and local sunset at the co-channel Class I–A station to the west.

30. The omission, in the general list in Attachment I to the *Report and Order*, of express reference to the explicit conditions under which WNYC currently operates on 830 kHz in no way alters the terms of the SSA which governs WNYC's nighttime operations. Nor does it in any way affect the resolution of the issues under the consolidated proceeding—Dockets No. 11227 and 17588—in which, as expressly observed in Note 1 to § 75.25(a)(2)(ii), questions relating to the future use of 830 kHz for a Class II station at New York City, will be decided. No amendment is needed in this respect.

31. We do not believe WCCO's Petition II warrants action in this proceeding. It was the Commission's intent, in the Clear Channel proceeding, to make 820 kHz, as well as the other 24 Class I–A channels, available for use by additional unlimited-time AM stations. The manner in which those frequencies are used is a matter which must be addressed in connection with application processing, not rule making. Indeed, the primary request of WCCO is the issuance of an Order to Show Cause why Station WNYC should not be required to modify its operation to 820 kHz.[3] The decision whether to issue such an order is properly made in the context of licensing, not rule making. In addition, as we stated in paragraph 75 of the *Report and Order* and paragraph 28, *supra*, we do not intend to consider individual cases in this docket. Although WCCO's proposal is put forward as a possible means of resolving a dispute which has been in hearing for many years, the proposal nevertheless does not call for resolution through action in a generalized rule making proceeding. Intimating no evaluation of the merits of WCCO's proposal, we refer petitioner to the license application process in which to seek the relief it desires. We likewise take no position herein on the issues raised in WNYC's comments and WCCO's reply to them.

32. WCCO's pleading styled "Petition for Stay" asks the Commission not to accept applications on 820 kHz, nor take any other action which would permit "equities" to develop which might later prejudice its case regarding the shift of Station WNYC to 820 kHz. Public Notice has been given of the pendency of WCCO's Petition II. Thus, to the extent that expenditure on preparation of an application itself can be claimed to give rise to "equities," this will not occur by virtue of the absence of such notice. It would be inappropriate for the Commission to take further action with respect to petitioner's request, in the context of the instant proceeding, however, especially in view of the absence of sufficient data on which to base an estimate of WCCO's prevailing on the merits. Whether a stay should be issued will be determined when petitioner has submitted information adequate to establish the desirability and feasibility, or lack thereof, of its proposal.[4] We decline to prejudge these issues at this preliminary stage.

33. Without evaluating the merits of WCCO's Petition III, we refer petitioner to paragraph 85 of the *Report and Order*, where we indicated that we have under consideration the possible inauguration of separate rule making to address the potential interference problems between the present limited-time and new unlimited-time stations. We continue to believe that these matters should be considered separately. Therefore, we are not evaluating petitioner's request on its merits herein, but will consider its views in connection with whatever separate proceeding may be initiated regarding the limited-time stations.

VII Conclusion

34. In conclusion, we have reviewed the several petitions for reconsideration in Docket No. 20642. As indicated above, we have not been persuaded that new evidence has been adduced which warrants modification of the conclusions in the *Report and Order*. We find merit, however, in the request for clarification contained in the third part of CCBS' petition, and, accordingly, amend § 73.37(e)(2) of the rules, as set out in Appendix I below. Where a proposal would be more suitably considered in another rule making proceeding or pursuant to a procedure other than rule making, we have so indicated in the discussion above.

35. Accordingly, pursuant to authority continued in Sections 1, 4(i), 303 (a) and (r), 307(b) and 403 of the Communications Act of 1934, as

[3] Midwest Radio's other request, that the Commission grant Station WNYC 820 kHz facilities in Docket No. 17588, likewise warrants no action in Docket No. 20642.

[4] It may well be determined that petitioner's proposal would be better judged against other proposed uses of 820 kHz which would be precluded thereby, and a stay might be denied on that basis alone.

amended, it is ordered, that the petition for reconsideration of Clear Channel Broadcasting Service is granted to the extent stated in paragraph 34, *supra;* and otherwise denied; and

36. It is further ordered, That the other subject petitions for reconsideration of the *Report and Order* in Docket No. 20642 are denied; and

37. It is further ordered, That effective January 26, 1981, the rule amendment set out in Appendix I attached below is adopted; and

38. It is further ordered, That this proceeding is terminated.

39. For further information concerning this proceeding contact Molly Pauker, Broadcast Bureau, (202) 632–6302, or Gary L. Stanford, Broadcast Bureau, (202) 632–9660.

(Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; (47 U.S.C. 154, 303, 307))

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix I

Section 73.37(e)(2) of the Commission's Rules is amended to read as follows:

§ 73.37 Applications for broadcast facilities, showings required.

* * * * *

(e) * * *

(1) * * *

(2) Application for a new unlimited-time station or for nighttime facilities by an authorized daytime station or for a major change in facilities resulting in operation on one of the 25 Class I channels listed in § 73.25(a) by any authorized station:

* * * * *

[FR Doc. 81–1617 Filed 1–15–81; 8:45 am]

BILLING CODE 6712–01–M

Proposed Rules

Federal Register
Vol. 46, No. 11
Friday, January 16, 1981

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 359

Removal, Reinstatement, and Guaranteed Placement in the Senior Executive Service

AGENCY: Office of Personnel Management.

ACTION: Status Update on Proposed Regulations.

SUMMARY: On August 1, 1980, the Office of Personnel Management (OPM) published proposed regulations on reduction in force in the Senior Executive Service (45 FR 51214). Reaction to the proposal was sharply divided, and the formal comments were sufficiently diverse to cause OPM to decide not to publish final regulations at this time. Rather, OPM is proceeding to form an interagency task group to advise on what should be issued. In the absence of final regulations agencies have been told that they should consult with the Executive Personnel and Management Development Group in OPM if they are facing reduction-in-force situations prior to initiating any formal action.

FOR FURTHER INFORMATION CONTACT: Neal Harwood, (202) 632-7676.

Office of Personnel Management.
Beverly M. Jones,
Issuance System Manager.

[FR Doc. 81-1752 Filed 1-15-81; 8:45 am]
BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

National School Lunch Program; Nutritional Requirements

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposal would amend 210.10 of the National School Lunch Program regulations. The Department proposes to restrict the service of foods of minimal nutritional value during the lunch period in senior high, junior high and middle schools participating in the "offer versus serve" method of school lunch service. The reasons for the restrictions are (1) these foods have very little nutritional value, (2) the "offer versus serve" option is being used in a manner which encourages students to consume foods with little nutritional value and (3) because USDA reimburses the States for food service, it has in some cases paid for food lacking in nutritional value.

DATES: To be assured of consideration, comments must be received no later than March 17, 1981.

ADDRESS: Comments may be mailed to: Samuel P. Bauer, Director, School Programs Division, USDA, Food and Nutrition Service, 201 14th Street, S.W., Auditor's Building, Room 4122, Washington, D.C. 20250, or delivered to Room 4300B at the above address between 8:30 a.m. and 5:00 p.m., Monday through Friday. Comments received may be inspected at room 4300B Auditor's Building, Policy and Programs Development Branch, School Programs Division, 201 14th Street S.W., Washington, D.C. 20250, during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Stanley C. Garnett, Policy and Program Development Branch, School Programs Division, USDA, FNS, Washington, D.C. 20250, Telephone: (202) 447-9065.

SUPPLEMENTARY INFORMATION: This proposed action has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified not significant.

This proposal has been reviewed with regard to the requirements of Public Law 96-354. Robert Greenstein, Administrator of the Food and Nutrition Service, has certified that this proposal does not have a significant economic impact on a substantial number of small entities. The Department is not aware of any small school districts that are not already in compliance with this, and therefore is unaware of any economic impact on any small school district. The Department is aware of only one large school district that would be affected, and the effect on that one school district would not impact on a substantial number of small businesses.

Background

Meal Pattern

Section 9 of the National School Lunch Act requires the Secretary to establish minimum nutritional standards for lunches reimbursed under the Act. Pursuant to that authority, the Department has developed a meal pattern for lunch. The components of the lunch pattern are milk, meat or meat alternate, fruits or vegetables or both, and bread or bread alternate. The required quantities of these food items are specified in the Program regulations at 7 CFR 210.10. Besides the food items making up the components of the meals, schools frequently serve other foods as condiments and seasonings, to round out the meal, to improve acceptability and to satisfy student appetites. The cost of other foods when served as part of the reimbursable meal is an allowable cost, but the presence or absence of these foods does not determine whether the meal is reimbursable.

The Department has always allowed schools to serve other foods and has not restricted the other foods that can be served. These foods supply calories which help to meet the energy needs of growing children. The Department recognizes that the required minimum amounts of foods in the lunch do not always meet the caloric needs of all children. In addition, other foods also contribute varying amounts of protein, vitamins, and minerals essential to good nutrition. However, some of these foods may be of minimal nutritional value. School food service personnel should carefully plan the kinds, amounts, and frequency of the other foods that they serve.

Offer versus Serve

Section 9(a) of the National School Lunch Act further provides the Secretary with authority to establish procedures which are designed to diminish waste of foods "without endangering the nutritional integrity of lunches . . ."

Until 1975, children were required to take all of the required food items prescribed by the Food and Nutrition Service (FNS). If a student did not receive all of the food items, the meal was not reimbursable by FNS.

To curtail plate waste in the National School Lunch Program and to comply with the Congressional mandate of Public Law 94–105, that students "shall not be required to accept offered foods which they do not intend to consume", the Department implemented the "offer versus serve" provision for high school students in 1976 (210.10(a)(5)). Under this provision, schools must offer students the five required items of the lunch, but students need only choose three items.

The "offer vs. serve" option was an attempt to insure that children choose only those foods they intend to eat. The amendments made by Pub. L. 94–105 limited this provision to high school students who might be expected to have more strongly formed food preferences. At the same time, the Department continued to encourage schools to offer choices and to encourage student involvement in the hope that more older students would take and consume all five food items. In 1978, Public Law 95–166, amended the National School Lunch Act to authorize extension of the "offer versus serve" option to junior high and middle schools. The "offer versus serve" option does not apply to the School Breakfast Program.

Competitive Foods Rule

On January 29, 1980 (45 FR 6758), the Department published the competitive foods regulations. These regulations implement Section 10 of the Child Nutrition Act of 1966 as amended by Section 17 of Public Law 95–166 concerning the sale of foods in competition with meals served under the National School Lunch and the School Breakfast Programs. The competitive foods regulations were finalized after a lengthy analysis period. During this analysis, numerous types of data were examined which concerned the nutritional status of the school age population in the United States, food consumption/health problem correlations and methods of comparing the nutritional quality of various foods. These data and the Department's decision making process are described in the preambles to the proposed and final rules (43 FR 17476 and 45 FR 6758, respectively) and the reader is referred to those documents, which are hereby incorporated by reference.

7 CFR § 210.2(h–1) defines foods of minimal nutritional value that may not be sold from the beginning of the school day to the end of the last lunch period. Categories of foods of minimal nutritional value are listed in Appendix B of Part 210. They are: soda water (carbonated beverages), water ices, chewing gum and certain candies (hard candies, jellies and gums, marshmallow candies, fondants, licorice, spun candy, and candy coated popcorn). These categories of foods provide less than five percent of the United States Recommended Dietary Allowance (USRDA) for each of eight specified nutrients per 100 calories and less than five percent of the USRDA for each of the eight specified nutrients per serving.

7 CFR 210.2(c–3) defines competitive foods and 7 CFR 210.15b prohibits the sale of foods of minimal nutritional value from the beginning of the school day until the end of the last lunch period.

It has come to the Department's attention that foods of minimal nutritional value are being offered to students in schools which utilize the "offer versus serve" method of lunch service. Thus, foods of minimal nutritional value are being offered in direct competition to the five required meal components. Because of a recent U.S. District Court decision in *Pulaski County School District vs. Bergland*, (C.A. No. 80–399) questions have arisen as to the applicability of the restriction on the sale of foods of minimal nutritional value when offered as a food alternate in the "offer versus serve" setting. In order to eliminate any ambiguity in the regulations on this part, it is proposed that the regulations governing the requirements for lunches described in 210.10 be amended to prohibit the inclusion of foods of minimal nutritional value as an additional food item in the "offer versus serve" lunch service.

The rationale for this action is threefold. Foods of minimal nutritional value as defined by 210.2(h–1) were found to contain fewer nutrients than other foods. This fact underpinned the decision to restrict the sale of these foods during the time the school meal programs were in effect. Providing foods of minimal nutritional value to students on an "offer versus serve" lunch line allows a student to choose a food of minimal nutritional value in lieu of one or more of the prescribed five meal components. The competition for the student's appetite is perhaps more apparent in this situation than when a student must purchase foods of minimal nutritional value separately from the school lunch. The accessibility of these foods endangers the nutritional integrity of the school lunch.

Second, the Department never intended the "offer versus serve" option to be used in a manner which encourages students to forego the five required meal components for comparatively less nutritious food items. The "offer versus serve" provision was developed to encourage student participation and reduce waste. Inclusion of foods of minimal nutritional value as an alternate to required lunch components, if it contributes to either of these goals, does so at the expense of allowing substitution of less nutritious foods for the required lunch components. The Department was sufficiently concerned about the availability of these foods to children to restrict the sale of foods of minimal nutritional value. Therefore, providing the foods as an alternate on the "offer versus serve" lunch line directly conflicts with the prohibition on the sale of competitive foods.

Third, because the Department reimburses States for meals on a cost basis, the Department is, in some cases, reimbursing schools for service of foods of minimal nutritional value. Such a result is totally inconsistent with the Department's action concerning competitive foods and places the Department in a contradictory position of restricting the sale of these foods on the one hand while financing their availability on the other.

For these reasons, the Department is proposing the following rule. This rule will restrict the service of foods of minimal nutritional value listed in Appendix B of Part 210 National School Lunch Program regulations during the lunch period(s) in schools which participate in the "offer versus serve" option.

In § 210.10 it is proposed that paragraph (a)(6) be redesignated as 210.10(a)(7) and a new paragraph (a)(6) be added to read as follows:

§210.10 Requirements for lunches.

(a)* * *

(6) Foods of minimal nutritional value as defined in Appendix B of this Part shall not be offered during the lunch period in schools which participate in the offer versus serve option described in paragraph (5) above.

* * * * *

(Catalogue of Federal Domestic Assistance No. 10.555)

(Sec. 9, Pub. L. 79–396, 60 Stat. 233 (42 U.S.C. 1758(a)); sec. 6, Pub. L. 94–105, 89 Stat. 512 (42 U.S.C. 1758); sec. 8, Pub. L. 95–166, 91 Stat. 1335 (42 U.S.C. 1758); sec. 17, Pub. L. 95–166, 91 Stat. 1345 (42 U.S.C. 1779))

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81–1283 Filed 1–15–81; 8:45 a.m.]

BILLING CODE 3410–30–M

7 CFR Parts 210 and 220

National School Lunch Program and School Breakfast Program; Competitive Foods

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed Rule.

SUMMARY: This proposed rule would amend the current National School Lunch and School Breakfast Program regulations to exempt the living quarters of residential educational units, which includes boarding schools, from the restrictions of the so-called competitive foods rule, (concerns the sale of food in competition with the meals served under the National School Lunch and the School Breakfast Programs). (45 FR 6758). This proposal would also reword the definition of "school" to clarify the distinction between residential and nonresidential schools.

DATE: Comments should be received on or before March 17, 1981.

ADDRESSES: Comment should be submitted to: Samuel P. Bauer, Director, School Program Division, FNS, USDA, Washington, D.C. 20250.

Comments will be available for review during regular business hours (8:30 a.m. to 5:00 p.m.), Monday through Friday in Room 4300B Auditors Building at the address listed above.

FOR FURTHER INFORMATION CONTACT: Stanley C. Garnett, Branch Chief, Policy and Program Development Branch, School Programs Division, FNS, USDA, Washington, D.C. 20250, (202) 447-9069.

SUPPLEMENTARY INFORMATION:

Administrative Procedures

This proposed rulemaking has been reviewed under USDA procedures established in the Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified as not significant.

This proposal has been reviewed with regard to the requirements of Public Law 96-354. Robert Greenstein, Administrator of the Food and Nutrition Service, has certified that the proposal does not have a significant economic impact on a substantial number of small entities. The proposal would have a limited impact on a number of boarding schools by removing any Federal restrictions on foods that can be made available to children through vending machines or other means in residential parts of boarding schools during school hours. A limited number of boarding schools will be affected, and in few, if any, cases would there be a significant economic impact. There may be a slight increase in the sale of certain products in those boarding schools, but it would not be enough to have a significant economic impact on any substantial number of small businesses.

Background

7 CFR 210.15b and 220.12 prohibit the sale of foods of minimal nutritional value on school premises from the beginning of the school day until after the last lunch period. These restrictions apply to all schools which participate in the National School Lunch and School Breakfast Programs. Foods of minimal nutritional value identified are soda water (carbonated beverages), frozen ices, chewing gum and certain candies.

Because boarding schools, residential child care institutions, and nonresidential schools also participate in the lunch and breakfast programs, the restrictions apply equally in those institutions.

The Department has received questions concerning the effect of the competitive foods regulations in residential schools. Because the restrictions on sale of certain foods extends throughout the school premises, both the living areas and educational areas of residential schools are affected. Such coverage may be overly broad. The living quarters of residential schools are, in effect, students' homes.

The competitive foods rule was promulgated at Congress' direction to regulate the sale of competitive foods in schools. By definition, "school" under most circumstances includes the entire school premises. However, we think it unlikely that Congress considered the situation of residential institutions or intended the Department to regulate the sale of foods in student living quarters. The Department is proposing to exempt from coverage only the living quarters of residential schools. Those areas of the schools which constitute the educational facilities, as well as the food service areas, will be covered by the competitive foods regulations. Thus, the intent of Congress that students have limited access to certain foods on school premises would be satisfied.

It is also proposed that the term "school" defined in 7 CFR 210.2(o) would be redefined to clarify the distinction between residential educational units and nonresidential educational units. This revision would be made in all existing school nutrition program regulations. The Department is seeking public comment on these proposed provisions as they relate to the School Breakfast Program as well.

1. Accordingly, Part 210, National School Lunch Program, is amended in § 210.2(o) by revising the definition of "school" as follows:

§ 210.2 Definitions.

* * * * *

(o) "School" means (1) a nonresidential educational unit of high school grade or under, operating under public or nonprofit private ownership in a single building or complex of buildings. The term "high school grade or under" includes classes of preprimary grade when they are conducted in a school having classes of primary or higher grade, or when they are recognized as a part of the educational system in the State, regardless of whether such preprimary grade classes are conducted in a school having classes of primary or higher grade. (2) A residential educational unit of high school grade or under, operating under public or nonprofit private ownership in a single building or complex of buildings. The term "high school grade or under" as defined in (o)(1) nonresidential educational unit, is applicable to (o) (2) residential educational units, (3) with the exception of residential summer camps which participate in the Summer Food Service Program for Children and private foster homes, any distinct part of public or nonprofit private institution or any public or nonprofit child care institution, which (i) maintains children in residence, (ii) operates principally for the care of children, and (iii) if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government. The term "child care institution" includes, but is not limited to: homes for the mentally retarded, the emotionally disturbed, the physically handicapped, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children and juvenile detention centers. (4) With respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

* * * * *

2. Part 210.15b, paragraph (a) is amended by adding to the end of the first sentence of that paragraph the following sentence:

§ 210.15b Competitive Food Services.

(a) * * * Except that, such regulations need not apply to the service of competitive foods in the living quarters of a residential school as defined in Section 210.2(o) (2) and (3). * * *

* * * * *

Note.—The above definition of "school" would be used to amend all existing school nutrition program regulations.

(Section 17, Public Law 95–166, 91 Stat. 1345 (42 U.S.C. 1779))

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81–1295 Filed 1–15–81; 8:45 am]

BILLING CODE 3410–30–M

Rural Electrification Administration

7 CFR Part 1701

Public Information; Appendix A—REA Bulletins—Bulletin 345–10, REA Standard PC–6, Acceptance Testing; Procedures for Cable Television Systems

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed Rule.

SUMMARY: REA proposes to amend Appendix A—REA Bulletins to issue a new Bulletin 345–10, REA Standard PC–6, Acceptance Testing Procedures for Cable Television Systems, to establish testing procedures and minimum acceptable performance criteria for REA financed CATV systems.

DATE: Public comments must be received by REA no later than March 17, 1981.

ADDRESS: Submit written comments to Joseph M. Flanigan, Director, Telecommunications Engineering and Standards Division, Rural Electrification Administration, Room 1355, South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: Claude F. Buster, Jr., Chief, Transmission Branch, Telecommunications engineering and Standards Division, Rural Electrification Administration, Room 1367, south Building, U.S. Department of Agriculture, Washington, D.C. 20250, telephone (202) 447–3917. The Draft Impact Analysis Statement describing the options considered in developing this proposed rule 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 proposes to issue Bulletin 345–10, Acceptance Testing Procedures for Cable Television Systems. This action has been reviewed under USDA procedures established in Secretary's Memorandum No. 1955 to implement Executive Order No. 12044 and has been classified not significant.

This program is listed in the Catalog of Federal Domestic Assistance as 10.853, Community Antenna Television Loans and Loan Guarantees. REA, in its effort to assure the best, most cost-effective telecommunications for rural America, and to assure loan security, proposes to issue a new Bulletin 345–10. This action will provide REA borrowers, contractors, engineers, and other interested parties with information on acceptance test procedures and minimum acceptable performance criteria for REA-financed CATV systems. All written submissions made pursuant to this action will be made available for public inspection during regular business hours, above address.

Dated: January 8, 1981.

John H. Arnesen,

Assistant Administrator—Telephone.

[FR Doc. 81–1688 Filed 1–15–81; 8:45 am]

BILLING CODE 3410–15–M

7 CFR Part 1701

REA Bulletin 20–2, "Electric Loan Policies and Application Procedures—Supplemental Resource Financing"; Supplement to Existing Bulletin

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed rule.

SUMMARY: REA proposes to issue a supplement to Bulletin 20–2, "Electric Loan Policies and Application Procedures," concerning the making of front-end and construction financing loans and loan guarantees to borrowers for projects utilizing supplemental energy resources.

In accordance with national energy goals, REA encourages its borrowers to utilize supplemental energy resources to the greatest extent practicable to meet power and energy requirements of beneficiaries under the Rural Electrification Act of 1936, as amended. Such supplemental energy resources include, but are not limited to hydroelectric, geothermal, storage, solar, fuel cell, biomass, gas recovery from coal mines and landfills and co-generation.

Under REA's existing loan policies, borrowers interested in developing supplemental resources projects for electric generation have had insufficient incentive for doing so. Early costs involved in studying technical, economic and environmental aspects of such projects have had to be borne by the borrower from revenues, or borrowed at high interest rates as short- or intermediate-term loans from private sources. If a borrower had committed funds to feasibility studies or other early costs of a project later found infeasible, the cost would have to be absorbed by consumers over a short time period. If found feasible, the most likely source of construction funds would be from REA under a loan guarantee.

REA proposes to modify existing loan policies to:

1. Provide fast-track front-end financing at attractive interest rates for early costs of assessing and developing generating projects utilizing supplemental resources;

2. Provide construction financing for such projects with loan guarantees or, where deemed appropriate by the Administrator to provide additional incentive, with insured loan funds or a blend of insured loans and loan guarantees; and

3. Allow for other considerations (national energy goals) to take priority over REA's usual criteria where the project involves initial and supplemental generation utilizing supplemental energy resources.

DATE: Public comments must be received by REA no later than March 17, 1981.

ADDRESS: Submit written comments to the Director, Energy Management and Utilization Division, Rural Electrification Administration, Room 5908 South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas B. Heath, Director, Energy Management and Utilization Division, at the above address. Telephone number (202) 447–6065. The Draft Impact analysis describing the options considered in developing and implementing the proposal is available on request from the above office.

SUPPLEMENTARY INFORMATION: Pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*), REA proposes to issue a supplement to be applicable to REA Bulletin 20–2 as described above. The proposed action has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to Implement Executive Order 12044 and has been classified "not significant." the text of the proposed rule follows:

Subject: Supplement to REA Bulletin 20–2, "Policies and Applications Procedures for Financing Supplemental Energy Projects"

I. Purpose:

To set forth Rural Electrification Administration policies and requirements concerning financing of electric generating facilities utilizing supplemental energy resources.

II. Policy:

A. It is the policy of REA to encourage its borrowers to utilize supplemental energy resources for power and energy requirements.

B. REA will consider making insured loans and/or loan guarantees to finance the costs of developing and constrtucting new generating projects or modifications to existing facilities which will utilize supplemental energy resources. Such loans and guarantees will be made in conformity with the provisions of all applicable REA bulletins, except that Bulletin 20–6, "Guarantee of Loans for Bulk Power Supply Facilities," and Section VII.B of Bulletin 20–2, "Electric Loan Policy and Application Procedures," shall not be applicable to such financing.

III. Eligible Projects:

A. The following are among the supplemental energy resource technologies for which REA will consider providing financing, when utilized for electric generation:

Solar—Storage

Thermal, Mechanical (includes compressed gas); Wind, Electrochemical.

Hydro—Fuel Cells

Conventional and Pumped Storage—No Fuel Cells.

Geothermal; Direct Combustion or Co-Combustion of:

Peat, Biomass (includes wood), Refuse or Refuse Derived Fuel.

Production and Utilization of Fuels From:

Gasification or Liquefaction of Coal, Peat, Biomass, or Refuse by Thermal, Chemical, or Biological Processes.
Fuel Gas Recovered from Mines or Landfills.

B. REA will consider providing financing for co-generation facilities to the extent that such facilities are a necessary and integral part of a borrower's electric system. For the purposes of this section co-generation shall mean the combined generation by any facility of electrical energy and energy of any other form not used within the borrower's system.

IV. Front-End Financing:

A. REA financing for early costs associated with supplemental resource utilization projects will be available as follows:

1. *Insured loans* may be approved for the following items: pre-construction activities including resource investigations, plant site options or acquisition, technical feasibility studies, cost evaluations and comparison of alternatives, environmental analyses, and costs associated with pre-construction permits and licenses other than detailed design engineering costs. Insured loans will not be available for design engineering except when necessary to develop specifications and conduct permits and licenses which are vital to keeping the proposed project on a schedule necessary to meet power or energy supply needs.

The amount of insured funds made available for front-end financing of a particular project will be at the discretion of the Administrator.

2. *Loan guarantees* may be approved for the following items: the procurement of land for resources (such as peat lands, biomass production land or land for project storage capacity), transmission rights-of-way, design engineering other than that provided under IV.A.I, cancellation charges on contracts for long lead time equipment, and for all items specified in IV.A.I, should insured loan funds be limited or unavailable.

B. Front-end financing for a proposed supplemental resource project may be requested by submitting the following items to the Director, Energy Management and Utilization Division, Washington, D.C. 20250:

1. A brief discussion of the need for the project and how it will be utilized to meet members' power and energy needs, and the estimated amount and source (supplier) of any power and energy which might be displaced by the proposed project;

2. An estimated schedule of major project milestones, including financial obligations and cash flow requirements;

3. An estimate of the impact upon the retail consumer's cost of power in the event that all front-end financing is expended but the proposed project is never constructed;

4. Two certified copies of the board resolution authorizing the requested financing; and

5. Two signed copies of REA Form 740c, "Cost Estimates and Loan Budget for Electric Borrowers." An itemized attachment to REA Form 740c should be prepared, showing the amount and purpose for each item for which financing is requested.

V. Construction Financing:

A. Normally, loan guarantees will be available for financing the cost of construction of supplemental energy resource projects. However, the Administrator may approve a blend of guaranteed funds and insured funds to provide an interest rate conducive to development of a project.

B. Construction financing for a proposed supplemental energy resource project may be requested by submitting the following items to the Director, Energy Management and Utilization Division:

1. Two certified copies of the board's resolution to construct the project and request financing from REA, specifying the amount requested;

2. Two signed copies of REA Form 740c, "Cost Estimates and Loan Budget for Electric Borrowers," with an attachment showing the detailed total construction cost estimate, including interest during construction, and any transmission or distribution facilities required, and deductions for previously provided REA front-end financing;

3. Five copies of technical and feasibility analyses. Assumptions used in the analyses must be specified, and it is recommended that they be discussed with REA prior to performance of analyses;

4. A board approved financial forecast, prepared in accordance with REA Bulletin 105–5 (distribution borrowers) or Bulletin 105–7 (power supply borrowers), for a period extending at least 10 years beyond commercial operation of the proposed project. Ths forecast must include a forecast of annual accrual and cash costs of wholesale power under the plan of power supply utilizing the proposed project vs. the plan which would be pursued if the supplemental resource project were not available;

5. Most recent REA Form 7, "Financial and Statistical Report," and REA Form 740a, "Review of General Funds" for the same period as Form 7. These must not be older than 60 days;

6. A detailed project construction schedule;

7. A report on integration of the proposed project into the existing power supply plan including such items as arrangements, for project interconnection, sale of power from the project, back-up and reserve power for the project and transmission of project power; and

8. Environmental information in accordance with REA Bulletin 20–21. REA should be consulted well in advance of a financing request to determine the exact information required for a particular project.

Copies of the draft bulletin and the Draft Impact Analysis are available upon request from the address indicated above. All written submissions made pursuant to this action will be made available for public inspection during

regular business hours at the above address.

This program is listed in the Catalog of Federal Domestic Assistance as 10.850 Rural Electrification Loans and Loan Guarantees.

Dated: January 19, 1981.

Robert W. Feragen,

Administrator.

[FR Doc. 81-1761 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-15-M

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7 CFR Part 1701

REA Bulletin 20-14 With Respect to Loan Terms and Conditions and Supplemental Financing Policies; Supplement to Existing Bulletin

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed Rule.

SUMMARY: REA proposes to issue a supplement to Bulletin 20-14, Supplemental Financing for Loans Considered Under Section 4 of the Rural Electrification Act. Under the existing policy, in order to meet program needs more effectively and conserve available loan funds, REA requires qualified borrowers to obtain a portion of their long-term loan funds from a supplemental lender, on terms and conditions approved by REA, as a prerequisite for obtaining REA loan funds. Heretofore, REA has generally been making loans with terms of 35 years, which is the maximum permitted by the REA Act of 1936, as amended. No requirement as to the duration of a supplemental loan has been in effect. The intent of the proposed action is to require that supplemental lenders which make loans to borrowers concurrently with REA provide loans having a minimum term of 25 years.

DATE: Public comments must be received by REA no later than March 17, 1981.

ADDRESS: Submit written comments to the Director, Electric Loans and Management Division, Rural Electrification Administration, Room 3342, South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: Mr. Charles R. Weaver, Director, Electric Loans and Management Division, at the above address, telephone number (202) 447-5900. The Draft Impact Analysis describing the options considered in developing and implementing the proposal 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 proposes to issue a supplement to be applicable to REA Bulletin 20-14 as described above. This proposed action has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified "significant."

General Summary of Changes

As the spread between cost of supplemental loans and the REA standard interest rate has increased, some borrowers have indicated an interest in shortening the term of future supplemental loans as a means of reducing the overall cost of financing. In order to fairly allocate the limited availability of REA's Revolving Fund, REA will generally require that supplemental loans have a minimum term of 25 years. This will serve to reduce a potential added future requirement for REA insured loan funds while continuing to provide reasonable flexibility in the source, terms and conditions of the required concurrent supplemental financing. REA will continue to offer loans with a term of up to 35 years with principal deferments not to exceed three years.

This requirement of a minimum of a 25-year term for supplemental loans may be modified in special cases where statutory requirements, existing financial arrangements or other valid reasons could preclude certain borrowers from obtaining necessary capital with otherwise acceptable financing if the requirement were strictly applied. Each such situation will be considered on its individual merits.

Copies of the draft bulletin and the Draft Impact Analysis are available upon request from the address indicated above. All written submissions made pursuant to this action will be made available for public inspection during regular business hours at the above address.

(This program is listed in the Catalog of Federal Domestic Assistance as 10.850, Rural Electrification Loans and Loan Guarantees)

Dated: January 13, 1981.

Robert W. Feragen,

Administrator.

[FR Doc. 81-1750 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-15-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 31, and 32

Static Elimination Devices and Ion Generating Tubes

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Nuclear Regulatory Commission is withdrawing a notice of proposed rulemaking published in the **Federal Register** on April 1, 1971, (sic) in which the Atomic Energy Commission (the predecessor of the NRC) solicited comments on proposed amendments of its regulations which would establish a class exemption from licensing requirements for the possession and use of tritium, krypton-85, or polonium-210 in static elimination devices and ion generating tubes. In consideration of the length of time since public comments were requested on the proposed rule and since it will be another year or more before a Commission value impact assessment will recommend the course of action that should be taken on static elimination devices and ion generating tubes, the Commission concludes that it should withdraw the proposed rule published April 1, 1971. The withdrawal of the proposed rule will not affect any person because it is not an action that adds, amends, or rescinds any NRC regulation.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. J. J. Henry, Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, (301) 443-5946.

SUPPLEMENTARY INFORMATION: On April 1, 1971, the Atomic Energy Commission (the predecessor of the Nuclear Regulatory Commission) published in the **Federal Register** (36 FR 6015) proposed amendments to 10 CFR Parts 30, 31, and 32 of its regulations which would (a) in proposed new § 30.21(a) establish a class exemption from licensing requirements for the possession and use of tritium, krypton-85, or polonium-210 in static elimination devices and ion generating tubes manufactured, processed, produced, imported, or transferred in accordance with a specific license issued by the AEC authorizing transfer for use under the exemption, (b) in proposed new §§ 32.30, 32.31, 32.32, and 32.33 establish requirements for the issuance of specific licenses authorizing the distribution of the static elimination devices and ion generating tubes to persons for use under the class exemption, (c) in proposed new §§ 30.21 (b) and (c) exempt those static elimination devices and ion generating tubes distributed for use under general license in § 31.3 prior to a specified date, and (d) revoke § 31.3 as of that same specified date.

A number of comments were received in response to the notice of proposed rulemaking, some of which suggested

that proposed new § 32.30 may have been too restrictive in requiring a specific license for the incorporation of static elimination devices or ion generating tubes into products for commercial distribution.

Neither the Atomic Energy Commission nor the Nuclear Regulatory Commission (established by the Energy Reorganization Act of 1974 on January 19, 1975) took any further action on this rulemaking proceeding. Over the intervening years, the staff began studies (including a generic environmental impact statement on consumer products) that eventually should result in Commission decisions on criteria for approval of consumer products and policy on the use of general licenses that might have a bearing on the regulatory control of static elimination devices and ion generating tubes containing byproduct materials.

The Commission believes that it would be premature to exempt at this time additional products containing radioactive material for consumer use in view of the above studies. In consideration of the length of time since public comments were requested on the proposed rule and since it will be another year or more before a Commission value impact assessment will recommend the course of action that should be taken on static elimination devices and ion generating tubes, the Commission concludes that it should withdraw the proposed rule published April 1, 1971.

In view of these considerations, the proposed rule is hereby withdrawn. The withdrawal of this proposed rule, however, does not preclude the Commission from issuing similar notices in the future or commit the Commission to any course of action with regard to static elimination and ion generating devices.

(5 U.S.C. 552(a))

Dated at Washington, D.C., this 12th day of January, 1981.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 81-1415 Filed 1-15-81; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 545

[No. 81-5]

Washington, D.C.-Maryland-Virginia SMSA Branching

Dated: January 8, 1981.

AGENCY: Federal Home Loan Bank Board.

ACTION: Establishing comment period on proposed regulation.

SUMMARY: The Federal Home Loan Bank Board will accept public comments until February 13, 1981, on its pending proposal to allow branching of Federal savings and loan associations throughout the Washington Standard Metropolitan Statistical Area.

DATE: Comments will be accepted until February 13, 1981.

ADDRESS: Comments should be addressed to Secretary, Federal Home Loan Bank Board, 1700 G Street NW., Washington, D.C. 20552

FOR FURTHER INFORMATION CONTACT: Nancy Feldman, Associate General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, D.C. 20552; (202) 377-6440.

SUPPLEMENTARY INFORMATION: On June 14, 1979, the Federal Home Loan Bank Board, by Resolution No. 79-340 (44 FR 36057; published June 20, 1979), proposed to amend its regulations to permit Federal associations with offices within the Washington, D.C.-Md.-Va. Standard Metropolitan Statistical Area ("SMSA") to branch throughout the SMSA.

When the Board proposed this regulation, it was aware that Congress had requested the President of the United States to conduct a study of the McFadden Act, which imposes restrictions on the branching of banks. While the McFadden Act does not impose restrictions on the branching of savings and loan institutions, the McFadden Study addresses competitive issues that parallel savings and loan branching issues. To give the Board and the public an adequate opportunity to assess the application of material contained in the McFadden Study to the Washington SMSA branching proposal, the Board announced on October 4, 1979, by Resolution No. 79-498 (44 FR 58744; published October 11, 1979), that it was extending the October 15, 1979, comment period deadline until at least 30 days after release of the Study. Accordingly, the Study ("Geographic Restrictions on Commercial Banking in the United States") having been submitted to Congress on January 6, 1981, the Board will accept comments regarding its proposed Washington SMSA regulation until February 13, 1981.

(Sec. 17, 47 Stat. 736, as amended; 12 U.S.C. 1437, Reorg. Plan No. 3 of 1947, 3 CFR, 1943-48 Comp., p. 1071)

By the Federal Home Loan Bank Board.

Robert D. Linder,

Acting Secretary.

[FR Doc. 81-1733 Filed 1-15-81; 8:45 am]

BILLING CODE 6720-01-M

DEPARTMENT OF ENGERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM80-36]

Rate of Return on Equity for Electric Utilities; Informal Conference

Issued January 12, 1981.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of informal conference.

SUMMARY: The staff of the Federal Energy Regulatory Commission (Commission) will hold an informal public conference to hear and discuss views from interested persons on proposals made in a Study group discussion paper on rate of return for electric utilities. The discussion paper is entitled, "Establishing the Rate of Return on Equity for Wholesale Electric Sales: Potential Regulatory Reforms."

DATES: Requests to participate in the public conference due January 27, 1981; public conference will be held on Friday, January 30, 1981, at 9:00 a.m.

ADDRESSES: Request to participate to:

The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (202) 357-8400;

Public conference: Hearing Room A, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426;

Requests for copies of discussion paper: Office of Congressional and Public Affairs, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Room 1000, Washington, D.C. 20426 (202) 357-8055.

FOR FURTHER INFORMATION CONTACT: Ms. Angela Lancaster, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (202) 357-8377.

SUPPLEMENTARY INFORMATION: On December 15, 1980, the Commission directed its staff to make public a Study Group discussion paper on rate of return for electric utilities entitled, "Establishing the Rate of Return on Equity for Wholesale Electric Sales: Potential Regulatory Reforms." In addition, the Commission authorized the staff to hold informal public conferences

to solicit views from interested persons on the proposals made by the Study Group as described in the paper. The Study Group proposed that the Commission institute one of three alternative generic procedures for setting equity rates of return for jurisdictional electric utilities, rather than continue the current, case-by-case procedures for setting rates of return. The alternatives and the basis of the Study Group's recommendation are described in the Study Group's discussion paper.

The public conference will be held on Friday, January 30, 1981. The conference will be conducted as a roundtable discussion, with members of the staff Study Group participating along with other interested persons. Persons wishing to participate in the meeting should contact the Secretary by January 27, 1981, and should give some indication of the particular issues they would most like to discuss. A record will be kept of the discussion.

There are several specific questions on which views are solicited. First, has the Study Group adequately identified the problems and advantages of the Commission's current procedures for setting electric rate of return on equity? If not, what alternative considerations should be brought to the Commission's attention?

Second, has the Study Group correctly identified the options available to the Commission for improving the Commission's regulation of the rate of return on equity allowed jurisdictional electric utilities? If not, what other options should be considered by the Commission?

Finally, which option is preferred?

Kenneth F. Plumb,

Secretary.

[FR Doc. 81-1721 Filed 1-15-81; 8:45 am]

BILLING CODE 6450-85-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

Labor Certification Process for the Permanent Employment of Aliens in the United States; Certification of Canadian Railway Workers

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Employment and Training Administration of the Department of Labor proposes to amend its regulations relating to certification of immigrant aliens for permanent employment in the United States. The amendment would add to the *Schedule A* precertification list certain Canadian railway workers who have qualified for employment through seniority rights under a collective bargaining agreement.

DATE: Interested persons are invited to submit written comments on this proposed rulemaking on or before March 17, 1981.

ADDRESS: Send written comments to: Mr. David O. Williams, Administrator, United States Employment Service, Employment and Training Administration, United States Department of Labor, Suite 8000—Patrick Henry Building, 601 "D" Street N.W., Washington, D.C. 20213.

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Bodin, Chief, Division of Labor Certifications, Telephone: 202-376-6295.

SUPPLEMENTARY INFORMATION: The Employment and Training Administration (ETA) of the Department of Labor (DOL) is proposing to amend its regulations at 20 CFR Part 656, to add to the *Schedule A* precertification list certain Canadian railway workers who will be employed with the same international railway corporation or organization with which they were employed in the United States or Canada for one continuous year.

Permanent Alien Employment Certification Process

Pursuant to the Immigration and Nationality Act (Act), before the Department of State and the Immigration and Naturalization Service (INS) may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor must first certify to the Secretary of State and to the Attorney General that:

(a) There are not sufficient United States workers, who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. 8 U.S.C. 1182(a)(14).

Department of Labor Regulations

DOL has promulgated regulations at 20 CFR Part 656 governing the labor certification process described above for the permanent employment of immigrant aliens in the United States. 45 FR 83926 (December 19, 1980). Part 656 was promulgated pursuant to and implements section 212(a)(14) of the Act (8 U.S.C. 1182(a)(14)).

The regulations at 20 CFR Part 656 set forth the factfinding process designed to develop information sufficient to support the granting or denial of a permanent labor certification. Part 656 also sets forth the responsibilities of employers who desire to permanently employ immigrant aliens in the United States, and the responsibilities of the alien beneficiaries of permanent alien labor certifications.

Schedule A Precertification List

ETA has published, at 2 CFR 656.10, a list of occupations *(Schedule A)* for which the Administrator, U.S. Employment Service, has determined that there are not sufficient United States workers who are able, willing, qualified, and available, and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens. 45 FR 83934 (December 19, 1980). DOL has delegated to the Department of State and the INS the authority to determine if an alien falls within one of the occupational categories on *Schedule A*, and, if so, to issue a permanent alien labor certification for the alien. 20 CFR 656.22; 45 FR 83941 (December 19, 1980). The *Schedule A* determination of the INS or Deparment of State is conclusive and final, and is not appealable within DOL.

Canadian Railway Workers

Various international railway companies operate tracks which cross the United States-Canadian border, or facilities which are in both the United States and Canada. Pursuant to collective bargaining agreements between these railway employers and international railway unions, the employers' employees may exercise seniority rights and bid for jobs on both sides of the border. United States workers seek and obtain employment in Canada under such agreements, as do Canadian workers in the United States.

Canadian immigration authorities may issue an employment authorization (similar to a labor certification) to a non-Canadian if the employment of that person would result in reciprocal treatment of Canadian citizens in other countries. Thus, the issuance of *Schedule A* United States permanent alien labor certifications to Canadian workers in such an occupational category would result in reciprocal employment opportunities for similarly situated U.S. workers in Canada.

During the recent rulemaking process revising 20 CFR Part 656 (see 44 FR 83926 (December 19, 1980)), DOL

received a request from inernational railway unions that consideration be given to Canadian railway workers exercising their collective bargaining agreement seniority rights across the border, so that reciprocity might be extended to United States workers in Canada. These unions represent members on both sides of the border, under collective bargaining agreements with international railway employers. Although the unions' request was outside the scope of the rulemaking concluded on December 19, 1980, ETA has determined that the request has merit and is issuing this Notice of Proposed Rulemaking. Because of the unique nature of railway employment, with tracks crossing and facilities located on both sides of the border, and the unique nature of the employment, resulting in expanded job opportunities for U.S. workers in Canada, certain Canadian railway workers will be added to *Schedule A*.

The Canadians must qualify for such employment on the basis of seniority rights under a collective bargaining agreement between an international railway corporation or organization and an international labor union. Two groups of workers would be included:

(1) Canadian citizens who have been admitted to the United States in order to work in, and who are currently working in, railway employment with the same international railway corporations or organization with which they were continuously employed in railway employment in Canada for one year before they were admitted to the United States; and

(2) Canadian citizens in Canada who will be engaged in the United States in railway employment with the same international railway corporations or organizations with which they have been continuously employed in railway employment in Canada for the immediately prior year.

Precertification of the above two groups would be permitted only where the Canadian immigration authorities reciprocate in permitting similar employment of United States railway workers in Canada.

Development of Final Rule

The final rule was prepared under the direction and control of Mr. David O. Williams, Administrator, United States Employment Service, Employment and Training Administration, United States Department of Labor, Washington, D.C.

Regulatory Impact

The rule would have less impact than specified in DOL's criteria, so that the effect of the proposed regulation is not so major as to require the preparation of a regulatory analysis. See 44 FR 5576 (January 26, 1979). This shall also certify that the rule, if promulgated, will not have a significant economic impact on a substantial number of small business entities, since it applies only to large multinational employers. 5 U.S.C. 605(b).

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17.203, "Certification for Immigrant Workers".

Proposed Rule

Accordingly, it is proposed to amend Part 656 of Chapter V of Title 20, Code of Federal Regulations, as follows:

1. Section 656.10 is amended by designating paragraph (d)(3) on *Schedule A* as paragraph (d)(4) and by adding a new paragraph (d)(3) to read as follows:

§ 656.10 Schedule A.

* * * * *

(d) Group IV: * * *

(3)(i)(A) Canadian citizens who have been admitted to the United States in order to work in, and who are currently working in, railway employment with the same international railway corporations or organization with which they were continuously employed in railway employment in Canada for one year before they were admitted to the United States, and who have qualified for such employment in the United States on the basis of seniority rights under a collective bargaining agreement between the employer and an international labor union.

(B) Canadian citizens in Canada who will be engaged in the United States in railway employment with the same international railway corporations or organizations with which they have been continuously employed in railway employment in Canada for the immediately prior year, and who have qualified for such employment in the United States on the basis of seniority rights under a collective bargaining agreement between the employer and an international labor union.

(ii) A Canadian citizen shall qualify under paragraph (d)(3)(i) of this section only if the employment of the alien would result in the reciprocal employment of United States railway workers in Canada.

* * * * *

2. Section 656.22 is amended as follows:

a. Paragraph (f)(2)(iii) is amended by deleting the word "and" at the end thereof;

b. Paragraphs (f)(1) and (f)(2)(iv) are revised, and a new paragraph (f)(2)(v) is added, to read as follows:

§ 656.22 Applications for labor certifications for Schedule A occupations.

* * * * *

(f)(1) Aliens seeking labor certifications under Group IV(1) or IV(2) of *Schedule A* shall meet, at the time of filing the application, the eligibility requirements of the Immigration and Nationality Act for an L–1 nonimmigrant visa classification as a manager or executive. See 8 U.S.C. 1101(a)(15)(L); and 8 CFR 214.2(1). However, persons who are eligible for an L–1 visa on the basis of specialized knowledge, but not managerial or executive experience, do not meet the requirements for Group IV(1) of IV(2) of *Schedule A*. The actual filing of an L–1 visa petition is not required.

* * * * *

(2) * * *

(iv) The dates the international corporation or organization was established and has been doing business in the United States prior to the submission of the application (The term "doing business" is defined in *Schedule A* at § 656.10(d)(4) of this Part); and

(v) If the alien is seeking certification of employment as a railway worker, as described in Group IV(3) of *Schedule A*, the alien shall attach:

(A) Proof of the alien's Canadian citizenship; and

(B) A document signed by an authorized officer of the international railway corporation or organization which will employ the alien in the United States and by an authorized officer of the international labor union under whose collective bargaining agreement the alien is seeking railway employment in the United States, stating that the alien has qualified for the employment on the basis of seniority rights under a collective bargaining agreement between the employer and the union. Notwithstanding such documentation, such aliens do not qualify for the purposes of *Schedule A*, Group IV(3) (see § 656.10(d)(3) of this Part), unless the alien's employment would result in the reciprocal employment of United States railway workers in Canada.

* * * * *

(Sec. 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1101 et seq.; Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq.; 5 U.S.C. 301)

Signed in Washington, D.C., this 12th day of January 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-1624 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

Income Tax; Dollar-Value LIFO Inventory

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations relating to the valuation of dollar-value last-in, first-out (LIFO) inventories. The proposed amendments would provide the public with guidance regarding a method of valuing dollar-value LIFO inventories and would affect taxpayers required to maintain inventories.

DATES: Written comments and requests for a public hearing must be mailed or delivered by April 16, 1981. The amendments are proposed to be effective for taxable years beginning after the proposed amendments are adopted by a Treasury decision.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR-267-79), Washington, D.C. 20224.

CONTACT FOR FURTHER INFORMATION: Philip Bosco of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T, 202-566-3238, not a toll-free call.

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 472 of the Internal Revenue Code of 1954. The proposed amendments are to be issued under the authority contained in sections 472 and 7805 of the Internal Revenue Code of 1954 (68A Stat. 159, 917; 26 U.S.C. 472, 7805).

Explanation of Proposed Amendments

Under regulations § 1.472-8, taxpayers are permitted to use the dollar-value LIFO method of accounting for inventories, which accounts for inventories in terms of dollars of cost rather than specific goods. In order to compare the costs in an inventory pool at the close of a year with the costs in an inventory pool at the beginning of the year, it is necessary to convert costs into dollars with a constant value, which are referred to as "base-year" dollars.

Current rules provide that taxpayers generally are not permitted to use an inventory price index to determine the base-year dollars in an inventory pool unless the index is based on the price change experience for the particular inventory pool. An exception to this rule is the *Department Store Inventory Price Indexes*, prepared by the United States Bureau of Labor Statistics for the purpose of valuing inventories found in the departments of department stores. Taxpayers generally cannot use price indexes such as the consumer and producer price indexes prepared by the Bureau of Labor Statistics because they cannot show that the use of such indexes is accurate, reliable, and suitable for their particular inventory pools.

Many taxpayers, especially small businesses, do not currently use the LIFO method because the use of the current dollar-value LIFO rules are perceived to be complex and burdensome. Amendments to the regulations are being proposed to simplify the use of the dollar-value LIFO method so that the LIFO method could be used by more taxpayers and would be easier to use by taxpayers currently using the method. However, before the proposed amendments can be adopted as final regulations, in addition to the issues addressed by the proposed amendments, several issues not addressed by the proposed amendments also must be resolved. A notice of proposed rulemaking might be published in the future addressing these issues, but written comments at this time would be helpful. The remainder of this preamble, which discusses the draft proposed amendments, also identifies some of the issues that remain to be resolved.

The proposed amendments to the regulations would simplify the use of the dollar-value LIFO method by providing that for taxable years beginning after the proposed amendments are adopted as final regulations, taxpayers may establish inventory pools under special rules and may compute an inventory price index for valuing a pool by referring to 80 percent of the percent change in selected consumer or producer price indexes prepared by the Bureau of Labor Statistics and published in the *CPI Detailed Report* or *Producer Prices and Price Indexes*, which are monthly reports on consumer price movements and producer price movements.

In developing the proposed amendments, it was determined that the consumer and producer price indexes prepared by the Bureau of Labor Statistics would overstate the movement of inventory prices experienced by some taxpayers and would understate the movement of inventory prices experienced by other taxpayers. Taxpayers experiencing a rate of inventory price inflation lower than the published rate would tend to choose the use of the published consumer and producer price indexes. Taxpayers experiencing a rate of inventory price inflation higher than the published rate would tend to choose to use a price index based on their own inventory price inflation experience. It was decided that the use of the consumer and producer price indexes prepared by the Bureau of Labor Statistics should not depend on whether a taxpayer's actual rate of inventory price inflation was relatively high or low. However, it was also decided that the use of overstated inflation rates to value LIFO inventory pools should be reduced to the extent possible consistent with the purposes of simplifying the use of the dollar-value LIFO method. The 80 percent limitation is intended to be an alternative to computing an inventory price index based on the taxpayer's own inflation rate and is intended to be an appropriately conservative estimate that the taxpayer can use without regard to the inflation rate actually experienced by the taxpayer.

An unresolved issue is how to apply the 80 percent limitation to the inflation rate for a period of more than one taxable year. For example, if a selected consumer or producer price index for a specific category of goods increased 10 percent per year for two years, the cumulative published inflation rate for the two-year period is 21 percent. If the 80 percent limitation were applied to the 21 percent cumulative published inflation rate, the inventory price index would reflect an increase of 16.8 percent (80 percent of 21 percent). However, if the 80 percent limitation were applied to the annual published inflation rate, the inventory price index would reflect an increase of 8 percent (80 percent of 10 percent) for each year and a cumulative increase of 16.64 percent.

The *CPI Detailed Report* and *Producer Prices and Price Indexes* can each be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The *CPI Detailed Report* has a single copy price

of $2.25 and a one-year subscription price of $15.00. The *Producer Prices and Price Indexes* has a single copy price of $2.75 and a one-year subscription price of $17.00.

An excerpt from the *CPI Detailed Report* for December 1979 is reproduced here.

Excerpt from Table 5.—*CPI for All Urban Consumers: Nonfood Expenditure Categories, U.S. City Average*

	Index base	Unadjusted index Dec. 1979	Unadjusted percent change to Dec. 1979 from Dec. 1978
Household furnishings and operation	1967	195.8	6.4
Housefurnishings:	1967	166.9	5.2
Textile household furnishings	1967	178.6	6.1
Household linens	1977	108.3	4.3
Curtains, drapes, slipcovers, and sewing materials	1977	114.6	7.9
Furniture and Bedding	1967	182.8	6.3
Bedroom furniture	1977	118.3	6.7
Sofas	1977	108.2	4.5
Livingroom chairs and tables	1977	108.1	4.5
Other furniture	1977	117.1	6.3
Appliances including TV and sound equipment	1977	137.5	3.3
Television and sound equipment	1977	105.3	2.0
Television	1967	103.6	.9
Sound equipment	1977	107.8	2.9
Household appliances	1967	157.9	4.5
Refrigerators and home freezers	1967	156.7	4.5
Laundry equipment	1977	113.6	6.9
Other household appliances	1977	109.9	3.4
Stoves, dishwashers, vacuums, and sewing machines	1977	108.6	.5
Office machines, small electric appliances and air conditioners	1977	111.4	7.0
Other household equipment	1977	113.0	6.5
Floor and window coverings, infants', laundry, cleaning, and outdoor equipment	1977	111.7	5.7
Clocks, lamps, and decor items	1977	110.1	6.9
Tableware, serving pieces, and nonelectric kitchenware	1977	117.2	8.0
Lawn equipment, power tools, and other hardware	1977	110.3	4.8

The proposed amendments would provide that the index or indexes selected for an inventory pool must be the most detailed index or indexes for the category or categories of goods that most closely resemble the type of goods in the inventory pool. Written comments are requested suggesting additional criteria to be used to determine the appropriate index or indexes for an inventory pool. Suggestions with respect to specific types of businesses would be helpful.

The proposed amendments would also provide that if it is necessary to select more than one consumer or producer price index for an inventory pool, the inventory price index used to determine the LIFO value of the pool is computed by referring to 80 percent of a weighted average of the percent changes in the selected consumer or producer price indexes for the pool. The weighted average is computed with reference to the relative amounts of costs of goods in each consumer or producer price index category of goods in the inventory pool. An issue not resolved is whether the weighting of the indexes should be based on the relative current-year costs in ending inventory, the relative base-year costs in ending inventory, or the relative costs in ending inventory of a representative year which would be revised at reasonable intervals such as every five years. Written comments addressing these issues or suggesting alternate ways of applying multiple indexes to a single pool are requested.

The proposed amendments would also provide special rules for establishing the inventory pools of retailers, wholesalers, jobbers and distributors to be valued with the inventory price indexes computed under the new rules. The proposed amendments would provide that retailers, wholesalers, jobbers, and distributors using the new rules to compute an inventory price index may establish inventory pools for any group of goods included within one of eleven general categories of consumer goods described in the *CPI Detailed Report*. These categories are food and beverages, housing maintenance and repair commodities, fuels (other than gasoline), house furnishings and housekeeping supplies, apparel commodities, private transportation (including gasoline), medical care commodities, entertainment commodities, tobacco products, toilet goods and personal care appliances, and school books and supplies. Written comments suggesting other pooling methods to be used with the new inventory price index rules are welcome.

The proposed amendments would provide that the use of an inventory price index based on selected consumer or producer price indexes is a method of accounting. The proposed amendments would provide that taxpayers must request the Commissioner's consent to a change to such method of accounting, but also would provide that for the first or second taxable year beginning after the proposed amendments are adopted as final regulations, taxpayers may change to this method of computing inventory price indexes without requesting the consent of the Commissioner. This change would be made by filing a Form 970 with the taxpayer's income tax return for the year of change.

Initial Regulatory Flexibility Analysis

Amendments to the regulations are being proposed because the existing rules relating to the computation of inventory price indexes used in connection with the dollar-value LIFO method of inventory valuation are perceived by many taxpayers, especially many small businesses, as being too complex and therefore the LIFO method is not used by such taxpayers.

The objective of these proposed amendments is to provide taxpayers with an alternate, simplified, method of computing an inventory price index that will make the use of the dollar-value LIFO method easier and therefore more accessible, especially to small businesses. The proposed amendments, if adopted, would therefore permit taxpayers to use price indexes prepared by the United States Bureau of Labor Statistics in lieu of computing an inventory price index based on their own inflation experience. A necessary part of the objective to simplify the use of the dollar-value LIFO method is to maintain the integrity of the method as a method that results in the clear reflection of income. Therefore, in order to mitigate any inaccuracy inherent in the use of averages and to reduce the possibility of adverse selection against the Government, the proposed amendments would permit taxpayers to use only 80 percent of the percent change in the selected consumer or producer price indexes. The amendments are proposed under the authority of sections 472 and 7805 of the Internal Revenue Code of 1954.

The proposed amendments, if adopted, will affect any small business that is required under section 471 of the Internal Revenue Code to maintain inventories, elects to use the LIFO method in valuing such inventories, and wishes to use the rules provided by the proposed amendments. No taxpayer will

be required to use the method provided by the proposed amendments.

If the proposed amendments are adopted, any small business wishing to use the rules provided by the proposed amendments will be required to report for the first year that the method is used the inventory pools used, the type of goods included in each pool, and the consumer or producer price index or indexes selected for each pool. In addition, for each year in which the inventory price index computation method is used, the taxpayer will be required to maintain adequate books and records showing how inventory pools were established, how the consumer and producer price indexes were selected, and how the inventory price indexes and the change in such indexes were computed. Professional accounting skills may be desirable in the initial year of using the method provided by the proposed rules, although information disseminated by various industry groups may provide small businesses with adequate assistance. Otherwise, the rules prescribed in the proposed amendments do not require any professional skills in addition to those already needed to keep inventory accounting records for a small business.

The proposed amendments do not overlap with, conflict with, or duplicate any existing federal regulation.

The amendments are being proposed to reduce the economic impact on small businesses of the rules relating to the use of the LIFO method by simplifying the computations required under such method, thereby enabling more small entities to avail themselves of the tax reduction benefits of the use of the LIFO method and reducing the computational and recordkeeping costs of taxpayers using the LIFO method. The only significant alternative that was considered, other than not proposing any amendments, was to limit the availability of the new method to small businesses and allow the use of 100 percent of the change in the selected consumer and producer price indexes. This alternative was rejected because there is no authority under sections 472 and 7805 of the Internal Revenue Code to differentiate between large and small businesses in providing rules that would affect tax liability. In addition, allowing the use of 100 percent of the change in the selected indexes would result in an increase in the number of taxpayers using an overstated inflation rate to value inventory pools and would increase the extent to which such rates are overstated. The 80 percent limitation provided in the proposed amendments is intended to be an alternative to computing an inventory price index based on the taxpayer's own inflation experience and therefore a conservative estimate that taxpayers can use without regard to the inflation rate actually experienced by the taxpayer.

Comments and Requests for a Public Hearing

Before adopting these proposed amendments, consideration will be given to any written comments (preferably six copies) that are submitted to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is to be held, notice of the time and place will be published in the **Federal Register.**

Drafting Information

The principal author of these proposed amendments is Geoffrey B. Lanning of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the proposed amendments, both on matters of substance and style.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

Paragraph (e) of § 1.472–8 is amended by adding new paragraph (e)(3) to read as set forth below:

§ 1.472–8 Dollar-value method of pricing LIFO inventories.

* * * * *

(e) *Methods of computation of the LIFO value of a dollar-value pool.* * * *

(3) *Use of inventory price index computed with reference to consumer or producer price indexes*—(i) *In general.* For purposes of paragraph (e)(1) of this section, for taxable years beginning after [insert date these proposed amendments are adopted by a Treasury decision], an inventory price index computed in the manner provided by paragraph (e)(3) will be accepted by the Commissioner as an appropriate method of computing an index, and the use of such inventory price index to compute the LIFO value of a dollar-value inventory pool will be accepted as accurate, reliable, and suitable. A taxpayer using the inventory price index computation method provided by paragraph (e)(3) must use such method in determining the value of all goods for which the taxpayer has elected to use the LIFO method. However, the inventory price index computation method provided by paragraph (e)(3) may not be used by a taxpayer eligible to use inventory price indexes prepared by the United States Bureau of Labor Statistics for the purpose of valuing the LIFO inventories of a specific industry. Thus, a taxpayer eligible to use the retail price indexes prepared by the Bureau of Labor Statistics and published in *Department Store Inventory Price Indexes* may not use the inventory price index computation method provided by paragraph (e)(3). An inventory price index computed as provided by paragraph (e)(3) is computed in the manner provided by paragraph (e)(3)(ii) with reference to consumer or producer price indexes selected in the manner provided by paragraph (e)(3)(iii). Special rules for establishing inventory pools to be valued by an inventory price index computed in the manner provided by paragraph (e)(3) are in paragraph (e)(3)(iv). Rules relating to the adoption of, or change to, the method of computing an inventory price index in the manner provided by paragraph (e)(3) are in paragraph (e)(3) (v) and (vi).

(ii) *Computation of index.* An inventory price index computed in the manner provided by this subdivision (ii) shall reflect 80 percent of the percent change in the selected consumer or producer price index or indexes for a specific category or categories of goods. See paragraph (e)(3)(iii) of this section for rules relating to the selection of appropriate consumer or produce price indexes. Thus, if the selected consumer or producer price index for a specific category of goods increased 10 percent for the period December 1981 to December 1982, an inventory price index computed in the manner provided by this subdivision (ii) with reference to such consumer or producer price index will reflect an increase of 8 percent (80 percent of 10 percent) for the period December 1981 to December 1982. If under paragraph (e)(3)(ii) it is necessary to select more than one consumer or producer price index for an inventory pool, 80 percent of the percent change in such indexes is 80 percent of the weighted average percent change for such indexes. Such weighted average is computed with reference to the relative amounts of costs in the inventory pool for each index category of goods.

(iii) *Selection of consumer or producer price indexes*—(A) *In general.* An inventory price index computed as provided by paragraph (e)(3) of this section is computed with reference to

the most detailed consumer or producer price indexes for specific categories of goods in the *CPI Detailed Report* or *Producer Prices and Price Indexes* published by the United States Bureau of Labor Statistics.

(B) *Selection of category of goods.* The index or indexes selected must be the most detailed index or indexes for the specific category or categories of goods that most closely resemble the type of goods in the inventory pool to be valued. Whether the selection of the consumer or producer price indexes to be used to compute an inventory price index is appopriate, and the propriety of all computations incidental to the use of such consumer or producer price indexes, will be determined in connection with the examination of the taxpayer's income tax return. The selection of a consumer or producer price index for a specific category of goods to compute an inventory price index under paragraph (e) (3) is a method of accounting. A taxpayer desiring to change the selection of the consumder or producer price indexes must secure the consent of the Commissioner as provided in § 1.446–1 (e). In the case of such a change, any layers of inventory increments previously determined and the LIFO value of such increments shall be retained. Instead of using the earliest taxable year for which the taxpayer adopted the LIFO method for any items in the inventory pool, the year of such change shall be used as the base year in determining the LIFO value of the inventory pool for the year of change and later taxable years. The base year costs of layers of increments in the pool at the beginning of the year of change shall be restated in terms of new base year costs using the year of change as the new base year.

(C) *Other selection requirements.* Manufactuers, processors, wholesalers, jobbers, and distributors may select indexes from only *Producer Prices and Price Indexes*. Retailers may select indexes from either the *CPI Detailed Report* or *Producer Prices and Price Indexes*, but if equally appropriate indexes could be selected from either publication, a retailer using the retail inventory method must select the index from the *CPI Detailed Report* and a retailer not using the retail inventory method must select the index from *Producer Prices and Price Indexes*. If a retailer using the retail inventory method selects a price index from *Producer Prices and Price Indexes*, the selected index must be converted into a retail price index. If a retailer not using the retail inventory method selects an index from the *CPI Detailed Report*, the selected index must be converted into a cost price index. Manufacturers, processors, wholesalers, jobbers, and distributors, must convert selected indexes into cost prices indexes. Seasonally adjusted indexes may not be selected. Indexes for specific cities, class of cities, or regions may not be selected. In the case of indexes published in the *CPI Detailed Report*, indexes may be selected only from indexes for all urban consumers. In the case of a taxpayer using the retail inventory method, the selected index must be the index as of the last month of the taxpayer's taxable year. Taxpayers that do not use the retail inventory method must select indexes as of the month or months most appropriate to the taxpayer's method of determining the current-year cost of the inventory pool under paragraph (e)(2)(ii) of this section. For example, assume that a calendar year taxpayer does not use the retail method and determines the current year cost of inventory pools underparagraph (e)(2)(ii)(*a*) by reference to the actual cost of the goods most recently purchased or produced. If all the goods most recently purchased or produced in 1982 were purchased or produced in November, the selected index or indexes must be indexes as of November 1982.

(iv) *Special rules for pools.* A retailer, wholesaler, jobber, or distributor computing an inventory price index in the manner provided by paragraph (e)(3) of this section may establish an inventory pool for any group of goods included within one of eleven general categories of consumer goods described in the *CPI Detailed Report*. The eleven categories are food and beverages, housing maintenance and repair commodities, fuels (other than gasoline), house furnishings and housekeeping supplies, apparel commodities, private transportation (including gasoline), medical care commodities, entertainment commodities, tobacco products, toilet goods and personal care appliances, and school books and supplies. See paragraphs (b), (c) and (d) of this section for additional rules relating to the establishment of pools. Exccpt as provided in paragraph (e)(3)(v) of this section, relating to the adoption or change of method of computing an inventory price index, the rules of paragraph (g) (1) and (2) of this section apply to a change in method of pooling.

(v) *Adoption or change of method.* The use of an inventory price index computed in the manner provided by paragraph (e) (3) of this section is considered a method of accounting. A taxpayer permitted to adopt or change to the dollar-value LIFO inventory method without first securing the consent of the Commissioner may adopt the inventory price index computation method prescribed by paragraph (e) (3) incident to such adopotion or change without first securing the consent of the Commissioner. In all other cases, a taxpayer may adopt or change to the inventory price index computation method prescribed by paragraph (e) (3) only after first securing the consent of the Commissioner as provided in § 1.446–1 (e). However, in the case of a taxpayer not using the inventory price index computation method prescribed by paragraph (e) (3), the taxpayer may adopt or change to such method for the taxpayer's first or second taxable year beginning after [insert date Treasury decision adopting these amendments is published by the **Federal Register**] without requesting the Commissioner's consent to such adoption or change. In addition, in such a case the taxpayer is not required to request the Commissioner's consent to a change in method of pooling incident to such adoption or change if the taxpayer is changing to a method of pooling authorized by paragraph (e) (3) (iv). The inventory price index computation method provided by paragraph (e) (3) may be adopted and used only if the taxpayer indicates on a Form 970 a listing of each inventory pool, the type of goods included in each pool, and the consumer or producer price index or indexes selected for each inventory pool. In the case of a taxpayer permitted to adopt or change to the inventory price index computation method without requesting the Commissioner's consent, the Form 970 shall be attached to the taxpayer's income tax return for the taxable year of such adoption or change. In other cases, the Form 970 shall be attached to a Form 3115 filed in accordance with § 1.446–1 (e). Taxpayers must maintain adequate books and records of the use and computation of the inventory price index method in order to satisfy the requirements of § 1.472–2 (h). Notwithstanding the rules in paragraph (e) (1) of this section, a taxpayer adopting or changing to the use of an inventory price index computed in the manner provided by paragraph (e) (3) is not required to demonstrate that the use of the double-extension method is impractical.

(vi) *Requirement incident to change.* In the case of a taxpayer using a method other than an inventory price index computed as prescribed by paragraph

(e) (3) of this section to determine the LIFO value of a dollar-value inventory pool, any layers of inventory increments previously determined by such method and the LIFO value of such layers shall be retained if the taxpayer changes to the use of a price index computed as prescribed by paragraph (e) (3). Instead of using the earliest taxable year for which the taxpayer adopted the LIFO method for any items in the pool, the year of such change shall be used as the base year in determining the LIFO value of the inventory pool for the year of change and later taxable years. The base year costs of layers of increments in the pool at the beginning of the year of change shall be restated in terms of new base year costs, using the year of change as the new base year. See paragraph (f) (2) of this section for rules relating to a change to the dollar-value method from another method of pricing LIFO inventories.

* * * * *

William E. Williams,

Acting Commissioner of Internal Revenue.

[FR Doc. 81-1726 Filed 1-13-81; 4:40 p.m.]

BILLING CODE 4830-01-M

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 530

Employment of Homeworkers in Certain Industries

AGENCY: Wage and Hour Division, Labor.

ACTION: Hearing for the purpose of obtaining information concerning employment of homeworkers: extension of period for submitting written comments.

SUMMARY: This document extends the period for filing written comments regarding Regulations 29 CFR Part 530. This action is taken to permit addtitional comment from interested persons.

DATE: Comments must be received on or before February 17, 1981.

ADDRESS: Comments should be sent to the Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-3508, Washington, D.C. 20210, (202) 523-7043.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 5, 1980 (45 FR 80555) the Wage and Hour Division published a notice of a hearing to obtain information concerning the employment of homeworkers. Interested parties desiring to comment in writing were to submit comments on or before January 13, 1981.

Because of the interest in this matter, the Wage and Hour Division believes that it is desirable to grant an extension of the comment period for interested parties. Therefore, the comment period for submitting information concerning the employment of homeworkers under the Fair Labor Standards Act is extended to February 17, 1981.

Signed at Washington, D.C., this 9th day of January 1981.

Henry T. White, Jr.,

Deputy Administrator, Wage and Hour Division.

[FR Doc. 81-1692 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-27-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

29 CFR Part 1603

41 CFR Part 60-20

Interpretive Guidelines on Employment Discrimination and Reproductive Hazards; Withdrawal of Proposed Guidelines

AGENCY: Equal Employment Opportunity Commission and Department of Labor.

ACTION: Withdrawal of Proposed Interpretive Guidelines.

SUMMARY: On February 1, 1980, (45 FR 7514) the Equal Employment Opportunity Commission and the Department of Labor published proposed interpretive guidelines on employment discrimination and reproductive hazards for public comment. Extensive comments were received. Upon reviewing the comments, the agencies have concluded that the most appropriate method of eliminating employment discrimination in the work place where there is potential exposure to reproductive hazards is through investigation and enforcement of the law on a case by case basis, rather than by the issuance of interpretive guidelines. Therefore, the agencies hereby withdraw the proposed interpretive guidelines. The agencies, however, will apply general principles of Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended, to their continued vigorous investigation and resolution of sex discrimination issues involving employer/contractor policies and practices based on occupational exposure to potential reproductive hazards.

FOR FURTHER INFORMATION CONTACT: Karen Danart, Acting Director, or Raj K. Gupta, Supervisory Attorney, Office of Policy Implementation, Equal Employment Opportunity Commission, Room 4002, 2401 E Street, NW, Washington, D.C. 20506, (202) 634-7060, or the Acting Director, Division of Program Policy, Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, D.C. 20210, (202) 523-9426.

Authority: E. O. 11246, as amended, and Title VII of the Civil Rights Act of 1964, as amended.

Signed at Washington, D.C., this 13th day of January, 1981.

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

Ray Marshall,

Secretary of Labor.

Donald Elisburg,

Assistant Secretary, Employment Standards Administration, Department of Labor.

Weldon J. Rougeau

Director, Office of Federal Contract Compliance Programs, Department of Labor.

[FR Doc. 81-1647 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-27-M
BILLING CODE 6570-06-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S-201]

Conveyor Standard; Extension of Written Comment Period; Notice of Informal Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Extension of Time for Submission of Comments; Notice of Public Hearing.

SUMMARY: This notice extends the time for written comments concerning the rulemaking proceeding for conveyors (29 CFR 1910.186). A notice reopening the record and providing opportunity for submission of written comments was published on November 14, 1980, at 45 FR 75258. The notice requested submission of written comments by December 29, 1980. Many interested parties requested extensions of time to submit their comments. OSHA finds validity in these requests and has

decided to grant an extension of time, until March 17, 1981, to submit written comments.

This notice also schedules an informal public hearing concerning conveyors. The purpose of this hearing is to receive testimony on certain issues concerning economic feasibility and alternative provisions.

DATES: Written comments must be received by March 17, 1981. The informal public hearing will begin on May 5, 1981, at 9:30 a.m.

All notices of intention to appear at the public hearing must be submitted by April 7, 1981. All testimony and evidence which will be introduced into the hearing record must be received by April 21, 1981.

ADDRESSES: The informal hearing will begin at 9:30 a.m. on May 5, 6, and 7, 1981, in the Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210; at 9:00 a.m. on May 12, 13, and 14, 1981, in the Lakeside Room, Best Western/Lakeshore Hotel, 600 North Lakeshore Drive, Chicago, Illinois 60611; and at 9:00 a.m. on May 19, 20, and 21, 1981, in the Century Room, Quality Inn-Airport, 5249 West Century Blvd., Los Angeles, California 90071.

Comments should be sent to: Docket Officer, Docket No. S–201, Room S–6212, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: (202) 523–7894.

Notices of intention to appear and written testimony should be sent to: Tom Hall, Division of Consumer Affairs, Room N–3635, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: (202) 523–8024.

FOR FURTHER INFORMATION CONTACT: Carrol E. Burtner, Director, Office of Mechanical Engineering Safety Standards, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3506, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: (202) 523–7202.

SUPPLEMENTARY INFORMATION: The Occupational Safety and Health Administration (OSHA) published a Notice of Proposed Rulemaking for a permanent occupational safety standard on conveyors used in general industry (29 CFR 1910.186) on June 3, 1974, in the Federal Register (39 FR 19507). Interested persons were given until August 2, 1974 to submit comments with respect to the proposal and to file objections and require a hearing thereon. The period for submission of written comments was extended until October 9, 1974, pursuant to a notice in the Federal Register on September 9, 1974 (39 CFR 32562), which also announced scheduling of an informal rulemaking hearing in Washington, D.C., on October 15, 1974. Approximately 130 comments were received in response to the proposal, and 14 parties testified at the public hearing. The record was kept open until November 15, 1974, for the submission of posthearing comments and documents. The record of the public hearing was closed on December 1, 1974, and was certified by the Administrative Law Judge to the Assistant Secretary for Occupational Safety and Health on December 2, 1974. All the documents relating to this hearing are available for inspection and copying at the OSHA Docket Office, Room S–6212, Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

A notice to reopen the record was published on November 14, 1980, at 45 FR 75238 to permit additional accident and economic data and analyses to be entered into the record and to allow public comment thereon. The notice allowed interested persons until December 29, 1980, to submit written comments concerning the new information placed in the record. Many commenters requested additional time to review the record and submit written data, views and arguments and also requested an opportunity for a public hearing. OSHA has decided, based on these requests, to extend the comment period 60 days from the date of publication of this document, until March 17, 1981, and to schedule a public hearing.

Hearing Issues

In addition to the general extension of the written comment period on all the issues raised in the notice of November 14, 1980, OSHA invites hearing testimony on the following issues. Any other issues raised in the written comments that are determined to be appropriate for discussion at the hearing will be published in a supplementary hearing notice.

Issue 1

The purpose of the November 14 notice was to allow the public an opportunity to comment on the economic material and injury data entered into the record. Several commenters requested additional time to comment on this new information, and OSHA believes that this extension of time and informal public hearing will provide interested persons with such an opportunity. Therefore, the economic impact of a conveyor standard and the injury data will be a subject to be addressed at the hearing.

In addition, although this rulemaking predates the Regulatory Flexibility Act (Pub. L. 96–353, 94 Stat. 1164 (5 U.S.C. 601 *et seq.*)) OSHA is requesting information about the economic impact of the proposed conveyor standard on small business.

Issue 2

In response to requests from interested persons, OSHA is publishing the text of four alternative provisions that have been developed, based on evidence in the rulemaking record, from four provisions proposed in 1974. The four alternatives, and the proposed requirements on which they are based, are set forth below.

a. *Proposed provision (c)(2):* Before operating the conveyor each day, a visual inspection of the entire conveyor and immediate area shall be made by the operator of the conveyor to determine that actuation will cause no hazard to employees; the inspection shall include an examination of at least the following: (i) Feed points; (ii) Discharge points; (iii) Brakes; (iv) Cables and sheaves; (v) Tracks and rails, wheels, rollers; (vi) Limit switches and slack cable switches; (vii) The presence of all guards and switches; and (viii) Any parts of the conveyor exposed to employees.

Alternative to proposed provision (c)(2): The employer shall inspect the safety devices, guards, and danger zones on conveyors before each day's use.

b. *Proposed provision (c)(3):* If observation of the entire conveyor is not possible from the operator's station, audible or visual warning signals or both, detectable at all employee stations, shall be used to warn of the conveyor's actuation.

Proposed provision (c)(4): If a conveyor is not operated continuously, an audible or visual alarm shall be used to warn employees that the conveyor is being started.

Alternative to proposed provisions (c)(3) and (c)(4): Warning. Before a conveyor is started, except as specified below, the employer shall provide a visible or audible warning that is:

(i) Seen or heard by all employees at or adjacent to the conveyor;

(ii) Of sufficient duration to allow employees to get clear of the conveyor before it is started; and

(iii) Activated by the conveyor's mechanism if the conveyor is automatically or remotely controlled.

Exception. No warning is required before activation of an assembly conveyor when employees working at or

near the conveyor are familiar with the conveyor's indexing cycle, or a completely enclosed conveyor, or a conveyor at which no employees are working.

c. *Proposed provision (c)(14):* Only trained operators shall be permitted to operate conveyors. Training shall include instruction in operation under normal conditions and emergency action under unusual conditions.

Alternative to proposed provision (c)(14): Training. (1) The employer shall ensure that conveyors are only operated by designated employees trained in standard operating and emergency procedures.

(2) Employers shall instruct employees whose work stations are at or adjacent to conveyors in the operation of emergency stop devices and the locations and hazards of any danger zones in the vicinity of their work stations.

d. *Proposed provision (f)(2)(i):* Before repairs, tests or services are begun, the following precautions shall be taken: (i) The conveyor shall be placed in a location where it will cause the least possible interference with employees not involved in the conveyor operation. Where the regular work of employees requires them to frequently pass close to the conveyor, the area shall be roped off or barricaded and caution signs shall be posted in the area in accordance with the caution sign requirements of § 1910.145.

Alternative to proposed provision (f)(2)(i): During conveyor modification, repair, testing, or servicing, the employer shall rope off, barricade, or post any unguarded danger zones.

OSHA particularly welcomes testimony and data on the economic and technological feasibility of these alternative provisions. OSHA has estimated the costs of compliance for the four proposed provisions and the alternatives, and has included these estimates in a document, "Compliance Cost Estimation and Economic Impact Assessment for the Proposed Federal Standard Regulating Conveyors."

Issue 3

In the 1974 conveyor proposal, OSHA included one "lockout" requirement, (f)(2), which stated that:

(f)(2) Before repairs, tests or services are begun, the following precautions shall be taken: * * *

(ii) All power controls shall be locked out. When operation of the conveyor is necessary during repairs or testing, the power shall be left on only to perform those tests and repairs. Affected employees shall be warned that the power is on for this purpose;

Although OSHA intends to include a similar provision in any final standard for conveyors, an analysis of conveyor accident and injury data suggests that additional lockout emphasis is necessary to protect conveyor workers from the risk of serious injury. For example, employees who attempt to free a conveyor which has been stopped by a conveyor jam are exposed to several serious hazards. First, the sudden release of the energy stored up while the power remains on and the conveyor is jammed might cause an employee to fall and be pulled into the conveyor. Second, an employee continuing to hold a tool used to free a jam might be pulled into the reactivated conveyor. Finally, any tool, such as a probe, used to release a jammed and stopped conveyor might itself be turned into a lethal projectile.

An analysis of the data from a study by Coleman et al. (Exh. 24) shows that a lockout provision for jammed and stopped conveyors might have prevented between 11 and 16% of the conveyor-related accidents studied, although it is not possible to determine with certainty how many of the accidents studied were caused specifically by efforts to unjam, rather than maintain, the conveyor. Review of data from a Safety Sciences study (Exh. 22) suggests that approximately 6% of the accidents investigated might have been prevented by lockout of the power supply. In addition, analysis of a series of 39 conveyor fatality reports from several states (Exh. 89) reveals that several of these fatalities would probably have been prevented if the conveyor involved had been locked out while the employee attempted to unjam it, and a review of an OSHA report on fixed machine fatalities (Exh. 93) shows that two of the fatalities reported were caused by failure to observe the same precaution.

OSHA invites comment and testimony on the feasibility and appropriateness of providing conveyor workers with such additional lockout protection. In particular, OSHA welcomes any injury data related to the failure to lock out powered conveyors in these operation situations.

Public Participation in Hearing

Under section 6(b)(3) of the Act and 29 CFR Part 1911, an opportunity to submit oral testimony concerning the hearing issues will be provided at an informal public hearing scheduled to begin at 9:30 a.m. on May 5, 1981, in the Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue, NW., Washington, D.C. 20210. The hearing will continue at regional locations as follows: 9 a.m. on May 12, 1981, in the Best Western/Lakeshore Hotel, Chicago, Illinois 60611; and 9:00 a.m. on May 19, 1981, in the Quality Inn-Airport, Los Angeles, California 90045.

Notice of Intention to Appear

Persons desiring to participate at the hearing, including those who previously requested that a public hearing be held, must file a notice of intention to appear, which must be received by April 7, 1981, with Tom Hall, OSHA Division of Consumer Affairs, Room N3635, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Telephone: (202) 523–8024. Persons who do not intend to appear at the hearing may submit written comments on the hearing issues, by March 17, 1981, to the Docket Office, Docket S–201, U.S. Department of Labor, Washington, D.C. 20210. Telephone: (202) 523–7894.

The notices of intention to appear, which will be available for inspection and copying at the OSHA Division of Consumer Affairs, must contain the following information:

1. The name, address, and telephone number of each person to appear;
2. The capacity in which the person will appear;
3. The city where the person intends to appear;
4. The approximate amount of time required for the presentation;
5. The specific issues that will be addressed;
6. A detailed statement of the position that will be taken with respect to each issue addressed; and
7. Whether the party intends to submit documentary evidence, and if so, a detailed summary of the evidence.

Filing of Testimony and Evidence Before Hearing

Any party requesting more than 15 minutes for presentation at the hearing or who will submit documentary evidence, must provide in quadruplicate the complete text of its testimony, including all documentary evidence to be presented at the hearing, to the OSHA Division of Consumer Affairs, where they will be available for inspection and copying. This material must be received by April 21, 1981. Each submission will be reviewed in light of the amount of time requested in the notice of intention to appear. In instances where the information contained in the submission does not justify the amount of time requested, a more appropriate amount of time will be allocated and the participant will be notified of that fact.

Any party who has not substantially complied with the above requirement

may be limited to a 15 minute presentation, and may be requested to return for questioning at a later time. Any party who has not filed a notice of intention to appear may be allowed to testify, as time permits, at the discretion of the Administrative Law Judge.

Conduct of the Hearings

The hearing will commence at 9:30 a.m. on May 5, 1981, with the resolution of any procedural matters relating to the proceeding. The hearing will be presided over by an Administrative Law Judge who will have all the powers necessary or appropriate to conduct a full and fair informal hearing as provided in 29 CFR Part 1911, including the powers:

1. To regulate the course of the proceedings;

2. To dispose of procedural requests, objections, and comparable matters;

3. To confine the presentation to the matters pertinent to the issues raised;

4. To regulate the conduct of those present at the hearing by appropriate means;

5. In the Judge's discretion, to question and permit questioning of any witness; and

6. In the Judge's discretion, to keep the record open for a reasonable stated time to receive written information and additional data, views, and arguments from any person who has participated in oral proceeding.

Following the close of the hearing, the presiding Administrative Law Judge will certify the record of the hearing to the Assistant Secretary of Labor for Occupational Safety and Health. Proposed § 1910.186 of Part 1910 will be reviewed in light of all testimony and written submissions received as part of the record, and a standard will be issued or a determination will be made not to issue a rule, based on the entire record of this proceeding, as well as all previously submitted evidence from the earlier written comments and public hearing.

This hearing notice for proposed § 1910.186 was prepared under the diretion of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

(Sec. 6, Pub. L. 91-596, 84 Stat. 1593 (29 U.S.C. 655), 29 CFR Part 1911; Secretary of Labor's Order No. 8-76 (41 FR 25059))

Signed at Washington, D.C., this 9th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-1242 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

29 CFR Parts 1952 and 1955

Proposed Withdrawal of the Indiana State Plan

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Notice of Initiation of Withdrawal Action.

SUMMARY: This notice publishes the Assistant Secretary's decision to initiate a proceeding under Section 18(f) of the Occupational Safety and Health Act, 29 U.S.C. 667(f), and the regulations promulgated thereunder at Part 1955 of this chapter, to withdraw the approval of the Indiana State plan for Occupational Safety and Health. Indiana has 30 days in which to submit a response to the statement of issues in the notice. Interested persons have 30 days in which to submit a petition requesting party status. At any time during the proceeding, any person who is not a party may submit a written statement of position.

DATES: Requests for party status should be submitted by February 17, 1981. Comments may be submitted at any time during the proceeding.

ADDRESSES: Requests for party status should be submitted to: Chief Administrative Law Judge, U.S. Department of Labor, Room 700, Vanguard Building, 1111 20th Street, NW., Washington, D.C. 20036. Written comments to the State should be submitted to: Bill Ray, Acting Commissioner, Indiana Division of Labor, 1013 State Office Building, Indianapolis, Indiana 46204.

Written comments to the Department of Labor and Information requests should be submitted to: Barbara Bryant, Chief, Eastern Division, Office of State Programs, Occupational Safety and Health Administration, Room N-3613, 200 Constitution Ave., NW., Washington, D.C. 20210, (202) 523-8045.

SUPPLEMENTARY INFORMATION: Pursuant to Section 18(f) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667(f)) and Part 1955 of this Chapter, notice is hereby given that the following complaint, having been served on the Commissioner of the Indiana Division of Labor, has been placed on public record. This complaint initiates an administrative action by the Assistant Secretary for withdrawal of the Indiana plan for occupational safety and health. Absent summary decision or settlement, this action will lead to a formal, fact-finding hearing before a departmental administrative law judge, during which the State will have an opportunity to present witnesses, obtain evidence through discovery, and fully brief and argue all issues of fact and law. The Department of Labor has the burden of proof in the proceeding. Any other interested persons wishing to participate in the proceeding as a party, should submit a petition to the administrative law judge within 30 days hereafter, in accordance with the requirements set out at 29 CFR 1955.17. Pursuant to the provisions set out at 29 CFR 1955.18, any person who is not a party may submit a written statement of position with 4 copies to either the Assistant Secretary or the State. Mere statements of approval or opposition to the plan without any documentary support shall not be considered as falling within this provision.

On the basis of the hearing record, the administrative law judge will decide whether approval of the Indiana plan should be withdrawn. The decision of the administrative law judge can be appealed by any party to the Secretary; if the Secretary upholds the decision, the State may obtain judicial review of the determination in the court of appeals for the circuit in which the State is located. Throughout the courts of the withdrawal proceedings, until a final decision by the Secretary the plan will continue to be in effect.

(Sec. 18, Pub. L. 91-596 84 Stat. 1608 (29 U.S.C. 667))

Signed at Washington, D.C. this 12th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

Complaint

Complainant, Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, brings this action to enforce the provisions of the Occupational Safety and Health Act of 1970, (hereinafter referred to as the "Act") 84 Stat. 1590, 29 U.S.C. 651 et seq., seeking to withdraw approval of the Indiana State plan.

I

This proceeding arises under Section 18(f) (29 U.S.C. 667(f)), of the Act and the regulations promulgated thereunder at 29 CFR Part 1955.

II

Jurisdiction of this action is conferred upon the Office of Administrative Law Judges, U.S. Department of Labor, pursuant to Section 18(f) of the Act and the regulations promulgated at 29 CFR 1955.11 and 1955.12.

III

Respondent, the State of Indiana, has been administering its own plan for occupational safety and health through the Indiana Occupational Safety and Health Administration (hereinafter referred to as IOSHA) since February 25, 1974, pursuant to Section 18(b) (29 U.S.C. 667(b)) of the Act.

IV

Respondent as a result of the aforesaid activities, is subject to the requirements of Section 18(c) (29 U.S.C. 667(c)) of the Act and the regulations at 29 CFR Part 1955 promulgated thereunder.

V

Complainant is bringing this action under a delegation of authority from the Secretary of Labor, who is mandated by law (29 U.S.C. 657(f)), to make a continuing evaluation of the manner in which each State having an approved plan is carrying out such plan.

VI

Comprehensive monitoring by complainant during the past six years of the Indiana State plan has revealed a consistent pattern of poor performance in critical program areas.

VII

In June, 1977, both the State and the National AFL-CIO submitted to the complainant a petition requesting the complainant to withdraw approval of the respondent's State plan. The United Steelworkers of American subsequently joined the AFL-CIO in its petition.

VIII

Based upon the evaluation of special studies undertaken in response to this petition, complainant preliminarily determined that the respondent's State plan failed to provide an effective program for the protection of the safety and health of employees in the State of Indiana and failed to comply with assurances contained in the State plan that IOSHA would provide enforcement of safety and health standards at least as effective as Federal enforcement of Federal standards, and failed to comply with assurances in the State plan that IOSHA would have qualified personnel necessary for the effective enforcement of its standards. Thereafter, in accordance with the requirements of Section 18(f) of the Act and 29 CFR 1955.10(a), the complainant notified the respondent on April 2, 1980, of its intent to institute a proceeding to withdraw the approval of the respondent's plan.

IX

On May 15, 1980, the respondent filed a response to the complainant's notice in which it denied the allegations in the notice and preserved its right to an administrative hearing on the issue of whether the State plan should be withdrawn.

X

First Ground for Withdrawal. Respondent has substantially failed to comply with the provisions of the State plan by not hiring and retaining a sufficient number of experienced, qualified industrial hygienists. As a result, the State has been unable to establish an adequate health enforcement program.

XI

Second Ground for Withdrawal. Respondent has substantially failed to comply with the provisions of the State plan by failing to provide effective enforcement of standards. Respondent's compliance officers have failed to recognize a substantial number of serious hazards present in inspected workplaces, and have failed to issue citations for such hazards. Therefore, employees in Indiana have been exposed to serious hazards which were not cited, and hence not abated.

XII

Third Ground for Withdrawal. Respondent has substantially failed to comply with the provisions of the State plan by improperly proposing penalties for violations of respondent's standards. Penalties proposed by IOSHA are substantially lower than those proposed by complainant OSHA for similar violations in similar workplaces. Enforcement of IOSHA standards therefore is less effective than federal enforcement of federal standards.

XIII

Fourth Ground for Withdrawal. Respondent has substantially failed to comply with the provisions of the State plan by circumscribing the rights of employees so as to diminish the effectiveness of the program, and by failing to maintain its program in accordance with the appropriate changes in the Federal program regarding employee rights.

Wherefore, complainant prays that the judge affirm complainant's decision to withdraw approval of the Indiana State Plan.

Respectfully submitted,

Carin Ann Clauss,
Solicitor of Labor.
Benjamin W. Mintz,
Associate Solicitor for Occupational Safety and Health.
Harold J. Engel,
Counsel for Regional Trial Litigation.
Patrick R. Tyson,
Assistant Counsel for State Plans.
Arthur J. Amchan,
Attorney.
Olympia Pachares,
Attorney.

[FR Doc. 81-1723 Filed 1-15-81; 8:45 am]
BILLING CODE 4510-26-M

Office of the Secretary

34 CFR Subtitle A

Definitions of Small Organization and Small Governmental Jurisdiction

AGENCY: Department of Education.

ACTION: Notice of Definitions under the Regulatory Flexibility Act.

SUMMARY: The Secretary proposes definitions of "small organization" and "small governmental jurisdiction" to be used to implement the Regulatory Flexibility Act.

This Act allows the Secretary to apply to these terms definitions that are appropriate to the Department's activities. The definitions will govern the procedures of the Department in proposing regulations that affect institutions of higher education and local educational agencies (LEAs) in carrying out Federally funded programs.

DATE: Comments must be received on or before February 17, 1981.

ADDRESS: Comments should be addressed to A. Neal Shedd, Director, Division of Regulations Management, Office of the General Counsel, U.S. Department of Education (Room 2129, FOB-6) 400 Maryland Avenue, S.W., Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: A. Neal Shedd. Telephone (202) 245-7091.

SUPPLEMENTARY INFORMATION:

Summary of the Regulatory Flexibility Act

The Regulatory Flexibility Act, (Pub. L. 96-354, enacted September 19, 1980), provides procedures that Federal agencies must follow in promulgating regulations that have a significant economic impact on a substantial number of small entities. "Small entities" are defined in the Act to mean small businesses, small organizations, and small governmental jurisdictions.

The Act seeks to alleviate the disparate burden that regulations may place on small entities but, at the same time, to ensure that statutory purposes are fulfilled. The Act requires Federal agencies to consider for their regulations alternative provisions that will minimize any significant economic impact on small entities.

Requirements of the Regulatory Flexibility Act

The Regulatory Flexibility Act applies to all regulations for which a notice of proposed rulemaking (NPRM) is issued on or after January 1, 1981 and which will have a significant economic impact on a substantial number of small entities. If regulations do have that impact, the agency promulgating the regulations must publish an initial regulatory flexibility analysis or a summary in the **Federal Register** with the proposed regulations. The agency must also prepare and make available to the public a final regulatory flexibility analysis.

The initial regulatory flexibility analysis must include the following:

(a) The reasons for and objectives of the regulations.

(b) The legal basis for the regulations.

(c) A description—and, if possible, an estimate of the number—of small entities to which the proposed regulations will apply.

(d) A description of the proposed paperwork associated with the regulations.

(e) An identification, if possible, of all relevant Federal regulations which may

duplicate, overlap or conflict with the proposed regulations.

(f) A discussion of alternatives that could minimize the significant economic impact of the regulations on small entities.

The final regulatory flexibility analysis must include the following:

(a) Reasons for and objectives of the regulations.

(b) A summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis.

(c) A summary of the agency's assessment of these issues.

(d) A summary of any changes made in the proposed regulations as a result of the comments.

(e) A description of each significant alternative designed to minimize any significant economic impact of the regulations on small entities considered by the Department and the reasons why it was rejected.

The analyses are not required if the Secretary certifies that the regulations will not impose a significant economic impact on a substantial number of small entities.

The Act also requires an agency to—

(a) Take action so as to ensure that small entities are given an opportunity to participate in rulemaking for regulations that have significant economic impact on a substantial number of small entities;

(b) Publish a semi-annual agenda of planned or proposed regulations that will have a significant economic impact on a substantial number of small entities;

(c) Review and, if necessary, amend existing regulations that have a significant economic impact on a substantial number of small entities.

Definitions Under the Regulatory Flexibility Act

The Act allows each agency to define "small business", "small organization" and "small governmental jurisdiction" in terms appropriate to that agency's activities where the agency finds the definitions in the Act to be inappropriate. The Secretary has found that the Act's definitions of "small organization" and "small governmental jurisdiction" are unsuited to two kinds of organizations with which the Department is primarily concerned—local educational agencies (LEAs) and institutions of higher education. It is therefore proposed to define "small LEA" and "small institution of higher education" to better carry out the intent of the Act.

The definitions published in this notice will be the Department's working standards under the Act while public comments are being considered.

The definitions of "small LEA" and "small institution of higher education" that the Secretary is proposing for use under the Regulatory Flexibility Act are explained in the following sections of this document.

Small LEA

"Small governmental jurisdiction" is defined by the Act as "governments of cities, counties, towns, townships, villages, school districts or special districts with a population of less than 50,000."

Under most of the Department's programs, an LEA is defined by statute as—

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in—

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school. (See 34 CFR 77.1 (c), formerly 45 CFR 100c.1(c)).

The definition of "small governmental jurisdiction" is not appropriate for LEAs, since LEAs frequently serve areas with smaller populations than areas served by other governmental bodies. Moreover, an LEA's size is measured more easily and more accurately by focusing on enrollment rather than population.

For these reasons, the Secretary proposes to define a small LEA as one with a student enrollment of fewer than 1500 students. Based on available data, this definition would include 65 percent of all LEAs in the United States and 11 percent of the total student population in the United States.

For the convenience of those who may wish to comment on this definition the following table shows the number of LEAs and the number of students that would be affected if the Secretary were to use different figures to define small LEA. The first column, "Size of Enrollments," shows LEAs by various total enrollments ranging from those with no students to those with more than 25,000 students. The second column, "Number of LEAs," shows the number of LEAs corresponding to each enrollment category in the first column. The third column, "Percent of Total LEAs" shows the percentage of LEAs corresponding to each enrollment category in the first column. The fourth column, "Enrollments," shows the number of students enrolled in LEAs corresponding to each enrollment category in the first column. The fifth column, "Percent of Total Enrollments," shows the percentage of students enrolled in LEAs corresponding to each category in the first column.

LEA's by Enrollment Size: 1979–80

Size of enrollments	Number of LEA's	Percent of total LEA's	Enrollments	Percent of total enrollments
No students	639	3.819	0	0.000
Under 300	4,394	26.259	525,525	1.198
300 to 499	1,705	10.189	671,153	1.530
500 to 999	2,576	15.395	1,862,305	4.246
1,000 to 1,499	1,516	9.060	1,872,069	4.268
1,500 to 1,999	1,203	7.189	2,083,083	4.749
2,000 to 2,499	812	4.853	1,817,160	4.143
2,500 to 2,999	662	3.956	1,817,633	4.144
3,000 to 3,499	496	2.964	1,599,661	3.647
3,500 to 3,999	389	2.325	1,448,453	3.303
4,000 to 4,999	532	3.179	2,365,216	5.393
5,000 to 9,999	1,112	6.646	7,748,133	17.666
10,000 to 24,999	512	3.060	7,448,661	16.983
25,000 and over	185	1.106	12,600,125	28.729
All LEA's	16,733	100.0	43,859,177	100.0

SOURCE: Elementary and Secondary Education General Information Survey—Public School Districts 1979–80. National Center for Educational Statistics, U.S. Department of Education, (1001 Presidential Building), 400 Maryland Avenue, S.W., Washington, D.C. 20202.

Small Institution of Higher Education

"Small organization" is defined under the Act as "any not-for-profit enterprise which is independently owned and

operated and is not dominant in its field." The Secretary has decided to refine this definition as it applies to institutions of higher education.

For purposes of the Act the Secretary proposes to define a "small institution of higher education" as an institution of higher education (as that term is defined in the individual authorizing statute or implementing regulations for the program) that has a fulltime equivalent (FTE) student enrollment of fewer than 500 or—if the FTE figure is not readily available—a total student population of fewer than 550. Based on available data, for programs this definition would include 20–25 percent of all institutions of higher education and 1.5–2.4 percent of FTE students attending those institutions.

For the convenience of those who may wish to comment on the proposed definition, the following table shows the number of colleges and universities and the number of FTE students that would be affected if the Secretary were to use different figures to define "small institutions of higher education." The data on which the proposed definition is based in the best available data. It includes both non-profit and for-profit postsecondary institutions.

Colleges and universities have been included in the following table if:

(a) They are legally authorized to offer and are offering at least a one-year program of college-level studies leading toward a degree ("college-level" means a postsecondary associate, baccalaureate, post-baccalaureate, or rabbinical education program);

(b) They submitted the information requested by NCES; and

(c) They meet one of the following criteria:

(1) The institution is accredited at the college level by an agency that has been listed as nationally recognized by the Secretary of Education;

(2) The institution holds preaccredited status at the college level with a designated nationally recognized accrediting agency; or

(3) If the institution is public or nonprofit, it has qualified under the "three-institutional-certification method" established by Section 1201 (a)(5)(B) of the Higher Education Act of 1965. That is, the Secretary of Education verifies that not fewer than three accredited college level institutions have accepted and do accept an unaccredited institution's credits, on transfer, as though the credits came from an institution accredited by a nationally recognized accrediting agency.

The first column, "Size of FTE Student Enrollments," lists categories of FTE enrollments ranging from fewer than 114 to fewer than 628. The second column, "Number of Colleges and Universities Included," shows the number of these institutions corresponding to each FTE enrollment category in the first column. The third column, "Percent of Total Colleges and Universities," shows the percentage of these institutions corresponding to each FTE enrollment category in the first column. The fourth column, "FTE Student Enrollments," shows the total FTE student enrollment for colleges and universities corresponding to each FTE enrollment in the first column. The fifth column, "Percent of total FTE Student Enrollments," shows the percentage of total FTE Student enrollment for colleges and universities corresponding to each FTE enrollment category in the first column.

FTE [1] Student Enrollments for Colleges and Universities, Fall 1979

[All figures are cumulative]

Size of FTE student enrollments	Number of colleges and universities included	Percent of total colleges and universities	FTE student enrollments	Percent of total FTE student enrollments
Under 114	160	5	11,618	0.1
Under 198	319	10	36,255	0.4
Under 301	478	15	76,264	0.8
Under 429	638	20	134,073	1.5
Under 534	797	25	210,568	2.4
Under 628	958	30	304,715	3.5
Total number of colleges and universities			3,188	
Total FTE student enrollment			8,605,506	

[1] NCES generated full-time equivalent.

SOURCE: Higher Education General Information Survey (HEGIS), 1979. National Center for Educational Statistics, U.S. Department of Education, (1001 Presidential Building), 400 Maryland Avenue, S.W., Washington, D.C. 20202.

Invitation to comment: Interested persons are invited to submit comments and recommendations regarding the proposed definitions. The public is also invited to comment on—

(a) Whether the Department's activities require additional definitions under the Regulatory Flexibility Act (e.g., "small proprietary institutions") should be defined;

(b) What should constitute a "significant economic impact" and a "substantial number of small entities" under the Act; and

(c) Whether the Department should establish a definition for small private elementary and secondary schools and, if so, what that definition should be.

In addition, the Secretary is considering ways to reduce regulatory burdens on small entities by such methods as simplifying or consolidating requirements for small entities; applying less stringent requirements on small entities; or exempting small entities from the requirements. As another possible approach to reducing regulatory burden, it may be useful to apply the definitions of small LEA and small institution of higher education in current or future program regulations. The Secretary invites comments on this concept. Comments are also sought on what regulations should be changed and how they should be changed to minimize burdens on small institutions of higher education and small LEAs.

Written comments and recommendations may be sent to the address given at the beginning of this preamble. All comments received on or before February 17, 1981 will be considered in the development of the final definitions.

All comments submitted in response to these proposed definitions will be available for public inspection, during and after the comment period, in Room 2129, FOB–6, 400 Maryland Avenue, S.W., Washington, D.C. between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Shirley M. Hufstedler,

Secretary of Education.

January 12, 1981.

[FR Doc. 81-1615 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION

34 CFR Part 682

Guaranteed Student Loan Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking; Cross-reference.

SUMMARY: In this issue of the **Federal Register** the Secretary of Education has promulgated final regulations for the Guaranteed Student Loan Program deferment provisions. The Secretary has, however, requested comments on all the new provisions of those regulations. In addition, the Secretary requests comments concerning whether the definition of "estimated financial assistance" in § 682.200 of the GSLP regulations should be revised to include Veterans benefits, student benefits under Social Security, and other social service payments such as aid to Families with Dependent Children. This revision would avoid duplication of GSLs with other Federal assistance.

The texts of the regulations on which the Secretary invites comments are published in the Rules and Regulations section of this issue of the **Federal Register.** They have been adopted as final regulations and will govern these

programs until the Secretary issues new regulations based on public comment.

DATES: All comments, suggestions, or objections must be reviewed on or before March 17, 1981.

ADDRESSES: Comment should be addressed to: Jane A. Bryson, Office of Student Financial Assistance, U.S. Department of Education, (Room 4310, ROB-3) 400 Maryland Avenue, S.W., Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Jane A. Byrson or Cheryl Leibovitz, Telephone: (202)245-2475.

INVITATION TO COMMENT: For additional details on how to comment, see the Preamble of the final regulations for this program published in this issue of the Federal Register.

(Catalog of Federal Domestic Assistance Number 84.032, Guaranteed Student Loan Program)

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

[FR Doc. 81-1562 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-1-FRL 1628-5]

Approval and Promulgation of Implementation Plans—Connecticut; Notice of Proposed Rulemaking: State of Connecticut Ambient Monitoring Network

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Revisions to the State Implementation Plan (SIP) for the State of Connecticut were submitted to EPA on June 9, 1980 and November 17, 1980 by the Commissioner of the Department of Environmental Protection. On May 10, 1979, EPA promulgated Ambient Air Quality Monitoring, Data Reporting, and Surveillance Provisions. That action revoked the requirements for air quality monitoring in Part 51 of Title 40 of the Code of Federal Regulations and established a new Part 58 entitled Ambient Air Quality Surveillance. Those regulations satisfy the requirements of Section 110(a)(2)(C) of the Clean Air Act (the Act) by requiring ambient air quality monitoring and data reporting for purposes of SIPs. Additionally, requirements of Sections 319, 313, and 127 of the Act are statisfied.

The intended effect of Connecticut's SIP revision is to meet the requirements of this new Part 58.

This Notice discusses the Connecticut submittal and EPA's proposed action. EPA is proposing to approve the comprehensive air quality monitoring network.

DATES: Comments must be received on or before February 17, 1981.

ADDRESSES: Copies of the Connecticut submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, Region I, Room 1903, JFK Federal Building, Boston, Massachusetts 02203; Public Information Reference Unit, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; the Department of Environmental Protection, Air Compliance Unit Library, Room 144, State Office Building, 165 Capitol Avenue, Hartford, Connecticut 06115

Copies of EPA guidance pertaining to the requirements of the SIP revision are available for inspection in Room 1903, JFK Federal Building, Boston, Massachusetts; the Public Information Reference Unit, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; and at the Department of Environmental Protection, State Office Building, Hartford, Connecticut 06115.

Comments should be submitted to the Regional Administrator, Region I, Environmental Protection Agency, Room 2203, JFK Federal Building, Boston, Massachusetts 02203.

FOR FURTHER INFORMATION CONTACT: Donald P. Porteous, Air Section, EPA Region I, 60 Westview Street, Lexington, Massachusetts 02173, (617) 861-6700.

SUPPLEMENTARY INFORMATION: On May 10, 1979 (44 FR 27558) pursuant to the requirements of Sections 110(a)(2)(C), 319, 313 and 127 of the Act, EPA promulgated Ambient Air Quality Monitoring, Data Reporting, and Surveillance Provisions, revoking Part 51 and establishing a new Part 58 entitled Ambient Air Quality Surveillance.

As required by Subpart C, 58-20, "the State shall adopt and submit to the Administrator a revision to the plan which will:

(a) Provide for the establishment of an air quality surveillance system that consists of a network of monitoring stations designated as State and Local Air Monitoring Stations (SLAMS) which measure ambient concentrations of those pollutants for which standards have been established in Part 50 of this chapter.

(b) Provide for meeting the requirements of Appendices A, C, D, and E to this part.

(c) Provide for the operation of at least one SLAMS per pollutant during any stage of an air pollution episode as defined in the contingency plan.

(d) Provide for the review of the air quality surveillance system on an annual basis to determine if the system meets the monitoring objectives defined in Appendix D to this part. Such review must identify needed modifications to the network such as termination or relocation of unnecessary stations or establishment of new stations which are necessary.

(e) Provide for having a SLAMS network description available for public inspection and submission to the Administrator upon request. The network description must be available at the time of plan revision submittal and must contain the following information for each SLAMS:

(1) The Storage and Retrieval of Aerometric Data (SAROAD), site identification form for existing stations.

(2) The proposed location for scheduled stations.

(3) The sampling and analysis method.

(4) The operating schedule.

(5) The monitoring objective and spatial scale of representativeness as defined in Appendix D to this part.

(6) A schedule for:

(i) locating, placing into operation, and making available the SAROAD site identification form for each SLAMS which is not located and operating at the time of plan revision submittal,

(ii) implementing quality assurance procedures of Appendix A to this part for each SLAMS for which such procedures are not implemented at the time of plan revision submittal, and

(iii) resiting each SLAMS which does not meet the requirements of Appendix E to this part at the time of plan revision submittal.

Connecticut's SIP submittal to EPA on November 17, 1980 included a comprehensive air quality monitoring plan designed to meet anticipated Federal regulations. Connecticut has worked closely with EPA, Region I to design a comprehensive monitoring system. The number and locations of SLAMS were jointly determined by Connecticut and the Regional Office. Stations are located in all areas where Connecticut and EPA decided they are necessary to determine: (1) highest concentrations expected to occur in the area covered by the network; (2) representative concentrations in areas of high population density; (3) the impact of significant sources or source categories on ambient pollution levels;

and (4) general background concentrations. Connecticut will operate the SLAMS network in accordance with the Quality Assurance Procedures described in Appendix A to 40 CFR Part 58 and will submit a written Quality Assurance Program to the Regional Office by December 31, 1980. Some SLAMS will be designated as episode monitoring sites for declaring and monitoring episodes for CO, SO_2 NO_2 O_3 and particulate matter.

Connecticut also provides for a special purpose monitoring system which is comprised of several studies designed to aid in determining air quality levels and the effects of air pollution sources on air quality in Connecticut, measure effects of control strategies on air quality, and provide a better understanding of air pollution in Connecticut and the effects of air pollution on the public's health.

The site-specific SLAMS monitoring network description is not included in the SIP revision to allow for annual review and revision of the network without repeating the full SIP revision procedure.

Connecticut's submittal establishes an ambient air montoring network for "Criteria Pollutants" (SLAMS) meeting Appendices A, C, D, and E, establishes episode monitoring stations, and provides for a network description and an annual SLAMS review.

EPA finds the Connecticut submittal meets the applicable regulations and is proposing approval of the comprehensive air quality monitoring network.

The Administrator's decision to approve or disapprove the plan revision will be based on whether it meets the requirements of Section 110(a)(2)(C), 319, 313, and 127 of the Clean Air Act, as amended, and EPA regulations in 40 CFR Part 58. This revision is being proposed pursuant to Sections 110(a) and 301 of the Clean Air Act, as amended (42 U.S.C. 7401 et seq. and 7601).

Under Executive Order 12044, EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA refers to these other regulations as "specialized". I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

Pursuant to the provisions of 5 U.S.C. 605(b) I hereby certify that this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The reason for this finding is that the proposal relates only to air quality surveillance to be carried out by four states and will not cause any significant economic impacts.

Dated: December 31, 1980.

William R. Adams, Jr.,

Regional Administrator, Region I.

[FR Doc. 81-1736 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-38-M

40 CFR Part 52

[A-2-FRL 1626-7]

Interstate Air Pollution Abatement: Notice of Proceedings Under Section 126 of the Clean Air Act

AGENCY: Environmental Protection Agency.

ACTION: General notice to extend the date for closure of a public hearing record of proceedings under Section 126 of the Clean Air Act (Interstate Pollution Abatement).

SUMMARY: This notice extends the date for closure of the public hearing record concerning petitions filed pursuant to Section 126 of the Clean Air Act by Connecticut and New Jersey. These petitions, discussed in a November 3, 1980 **Federal Register** notice (45 FR 72702), concern interstate air pollution impacts of particulate matter and sulfur dioxide within the New Jersey-New York-Connecticut metropolitan area. A public hearing was held in response to these petitions on December 3 and 4, 1980. On December 24, 1980 EPA received a request from the New York State Department of Environmental Conservation to maintain the public hearing record for an additional 30 days, and is honoring that request through today's action.

DATE: The date for closure of the public hearing record is extended until February 5, 1981.

ADDRESS: Written material should be submitted to: Robert A. Predale, Environmental Protection Agency, Air Programs Branch, Room 1005, 26 Federal Plaza, New York, New York 10278, (212) 264-9800.

All material submitted should include a reference to "Docket No. 2A-80-1."

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

Dated: January 9, 1981.

(Sections 110 and 301 of the Clean Air Act, amended (42 U.S.C. 7410 and 7601))

Charles S. Warren,

Regional Administrator, Environmental Protection Agency.

[FR Doc. 81-1735 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-38-M

40 CFR Part 123

[SW-4-FRL 1628-6]

Tennessee's Application for Interim Authorization, Phase I

AGENCY: EPA, Region IV.

ACTION: Reopening of comment period on Tennessee's Application for Interim Authorization

SUMMARY: By notice dated November 28, 1980 (45 FR 79118), EPA announced review of the Tennessee Application for Interim Authorization to administer a Hazardous Waste Management Program under the Resouce Conservation and Recovery Act (RCRA). On December 29, 1980, a public hearing was held concerning Tennessee's application. Since the public hearing, EPA has received several requests for an extension of time for submittal of comments on Tennessee's Application for Interim Authorization. Today EPA is announcing that the comment period on Tennessee's Application is being reopened and the final date for receipt of written comments is January 30, 1981. This comment period is being reopened as a result of the several requests from various organizations and individuals. The State submission has not been materially changed, which would require that the formal review process start over.

DATE: Comments on Tennessee's Application for Interim Authorization must be received by January 30, 1981.

ADDRESSES: Copies of Tennessee's Application for Interim Authorization and the transcript of the public hearing are available at the following addresses for inspection and copying by the public:

(1) Division of Solid Waste Management, Tennessee Department of Public Health, 320 Capitol Hill Building, Nashville, Tennessee 37219, Telephone: 615/741-3424.

(2) Environmental Protection Agency, Regional Office Library, Room 121, 345 Courtland Street, NE, Atlanta, Georgia 30365, Telephone: 404/881-4216.

(3) EPA Headquarters Library, Room 2404, 401 M Street, SW, Washington, D.C. 20460.

Written comments should be addressed to: Patricia S. Zweig, Environmental Protection Agency,

Residuals Management Branch, 345 Courtland Street, NE, Atlanta, Georgia 30365, Telephone: 404/881-3966.

Dated: January 9, 1981

John A. Little,

Acting Regional Administrator.

[FR Doc. 81-1734 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-30-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Ch. I

Improving Government Regulations; Semiannual Agenda of Significant Proceedings

AGENCY: Federal Communications Commission.

ACTION: Publication of semiannual agenda of significant proceedings.

SUMMARY: On March 23, 1978, President Carter signed Executive Order 12044 directing Federal agencies to make improvements in the regulatory process. As part of these improvements, the Order stated that agencies shall publish at least semiannually an agenda of significant proceedings to provide the public with adequate notice of these matters. In compliance with the Order, the FCC has prepared an agenda of important proceedings under development or review.

EFFECTIVE DATE: November 24, 1980.

ADDRESS: Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Anne Riffey, Office of the Executive Director, (202) 632-7513.

SUPPLEMENTARY INFORMATION: .

Semiannual Agenda of Significant Proceedings

The Commission wants to encourage greater public participation in the FCC rule making process. To help keep the public informed of significant rule making proceedings, the Commission has prepared an agenda of important proceedings now in progress. The Commission expects to publish an agenda of significant proceedings in the **Federal Register** every six months.

The following terms may be helpful in understanding the status of the proceedings included in this report:

1. A Notice of Inquiry (NOI) is issued by the Commission when it is seeking information on a broad subject or trying to generate ideas on a given topic. A comment period is specified during which all interested parties may submit comments.

2. A Notice of Proposed Rule Making (NPRM) is issued by the Commission when it is proposing a specific change to the FCC Rules and Regulations. Before any changes are actually made, interested parties may submit written comments on the proposals.

3. A Memorandum Opinion and Order (MO&O) is issued by the Commission to deny a petition for rule making, conclude an inquiry, modify a decision, or deny a petition for reconsideration of a decision.

4. A Report and Order is issued by the Commission to state a new or amended rule or state that the FCC Rules will not be changed.

5. A Report Making (RM) Number is assigned to a proceeding after the appropriate Bureau/Office has reviewed a petition for rule making, but before the Commission has taken action on the petition.

6. A Docket Number is assigned to a proceeding if the Commission has issued either a Notice of Proposed Rule Making or a Notice of Inquiry in regard to the matter under consideration. Since January 1, 1978, the Commission has used docket numbers which consist of the last two digits of the calendar year in which the docket was established plus a sequential number which begins at 1 with the first docket initiated during a calendar year (e.g. Docket 78-1 or Docket 79-1). The abbreviation for the responsible Bureau usually precedes the docket number, as in "BC Docket 79-164." When a docket number consists of only five digits (e.g. Docket 19622), this indicates that the docket was established before January 1, 1978.

Semiannual Agenda of Significant Proceedings (as of Nov. 24, 1980)

Title of proceeding	Rulemaking or docket No.	Description	Stage of development	Projected date of upcoming action
A. Broadcast Matters				
A-1—Clear Channel Proceeding. Contact Person: Louis Stephens, 632-7792; Gary Stanford, 632-9660.	20642	Consideration of a proposal to permit additional AM stations to operate on the 25 Class I-A Clear Channels.	Report and Order Adopted in May 1980. Petitions for Reconsideration scheduled for presentation to Commission.	Dec. 4, 1980, agenda.
A-2—Reduction of AM Bandwidth to 9kHz. Contact Person: Gary Stanford, 632-9660.	BC Docket 79-164	Inquiry into reduction of spacing between AM channels from 10 kHz to 9kHz.	Final resolution is awaiting results of Region 2 Conference on AM Broadcasting, to be held in November 1981. In the interim, Commission will develop further reports.	Bureau will present Commission with full report of activities prior to Jan. 19, 1981.
A-3—Deregulation of Radio. Contact Person: Roger Holberg, 632-7792.	BC Docket 79-219	Study to determine if radio broadcasting should be partially or totally deregulated.	Combined Notice of Inquiry (NOI) and NPRM issued September 1979. Comments are being analyzed and R&O is planned.	R&O is expected to be ready for Commission agenda in January 1981.
A-4—FCC Renewal Forms. Contact Person: Israel Teitelbaum, 632-7792.	BC Docket 80-253	Study to revise FCC renewal forms for Commercial and non-commercial broadcast stations.	Commission issued NPRM June 4, 1980. Reply comments due Dec. 4, 1980; final item being drafted.	Final item Expected to go to Commission in February 1981.
A-5—Inquiry into the Proper Role of Television, Translators, and Low-Power TV Broadcasting. Contact Person: Michael Couzens, 632-6302.	BC Docket 78-253	Inquiry into uses of television translators, especially in rural areas, to determine if rules concerning translators should be changed to permit their increased use.	Commission adopted a NPRM in September 1980. Further comments close on Mar. 1, 1981. Several Petitions for Reconsideration are pending which will be presented to Commission.	February 1981 for Petitions for Reconsideration.
A-6—Subscription (Pay) TV Operations. Contact Peraon: Freda Thyden, 632-7792.	21502	Inquiry to determine whether current rules governing pay TV operation are necessary or desirable and whether any new rules are needed to govern the service.	A Second Report and Order (R&O) is forthcoming, and a further NPRM which will include wuch issues as the "complement of four" requirement.	April 1981.
A-7—Equal Employment Opportunity in the Broadcast Industry. Contact Person: Steve Bookshester, 653-7586.	21474	Revision of FCC Form 395, the annual employment form filed by broadcasters, to make it more useful in monitoring the broadcaster's commitment to equal employment opportunity.	Further NPRM issued in 1980 seeking comments on a revised Model EEO program R&O is being drafted.	R&O expected to be ready for agenda in Second Quarter, 1981.

Title of proceeding	Rulemaking or docket No.	Description	Stage of development	Projected date of upcoming action
A. Broadcast Matters—Continued				
A-8—Children's Television Programming and Advertising Practices. Contact Person: Steve Bookshester, 653-7586.	19142	Evaluation of television licensees' compliance with the Commission's 1974 policy guidelines on children's television programming and advertising practices.	NPRM adopted by Commission in December 1979. The comment stage extends from January to August 1980. R&O is being drafted.	R&O ready to be scheduled for agenda in Second Quarter, 1981.
A-9—New VHF Channel Assignment. Contact Person: Martin Blumenthal, 632-7792.	20418	Study of possibility of assigning new VHF channels in the Top-100 markets, specifically at this time in Charleston, West Virginia; Johnstown or Altoona, Pennsylvania; Knoxville, Tennessee; and Salt Lake City, Utah.	Report and Order adopted in September 1980. See entries for New Jersey VHF-TV, below.	
A-10—New Jersey UHF-TV Assignments. Contact Person: Gordon Godfrey, 632-9660.	BC Docket 79-269	Study to assign 6 UHF-TV frequencies to various New Jersey communities.	NPRM adopted Oct. 18, 1979. Record closed August 1980, R&O being developed.	R&O projected for consideration on agenda in first Quarter, 1981.
A-11—New Jersey UHF-TV Financial Viability. Contact Person: Martin Blumenthal, 632-7792.	BC Docket 79-270	Study of means by which the New Jersey UHF-TV stations created in BC Docket 79-269 (above) might best become financially viable.	NPRM adopted Oct. 18, 1979, in conjunction with BC Docket 79-269; record closed August 1980.	Final action projected for the same time as BC Docket 79-269, above.
A-12—Reassignment of UHF-TV. Frequency to New Jersey. Contact Person: Mark Lipp, 632-7792.	BC Docket 80-719	Study of possibility of reassigning the Channel 9 UHF-TV frequency from New York City to a New Jersey community.	NPRM adopted Nov. 6, 1980. Matter being held in abeyance pending resolution of RKO appeal by Federal court.	
A-13—Revision of Financial Qualifications Form. Contact Person: Alan Stillwell, 632-6302.	BC Docket 80-190	Study to revise form 324, Financial Qualifications form, which broadcasters are required to file with the Commission.	NPRM adopted Apr. 24, 1980; reply comments due December.	R&O is planned for scheduling on agenda in first Quarter, 1981.
A-14—Commercial Television Network Practices. Contact Person: Israel Teitelbaum, 632-7792.	Docket 21049	Inquiry into practices and policies of the 3 major television networks regarding the acquisition and distribution of television programming.	Network Inquiry Special Staff has made final report to Commission. Report is now being analyzed by B/cast Bureau staff. Recommendations to the Commission are being formulated.	May or June 1981.
A-15—Use of FM Frequencies. Contact Person: Kathryn Hosford, 632-9660.	BC Docket 80-90	Study of means for increasing the use of FM frequencies.	NPRM issued on Feb. 28, 1980. Reply comments due on Dec. 1, 1980.	Item to the Commission in June 1981.
A-16—Processing of FM Rulemaking Petitions. Contact Person: Jonathan David, 632-7792.	BC Docket 80-130	Study of possible modifications to the procedures for processing FM petitions.	NPRM issued Mar. 27, 1980. Reply comments due Dec. 1, 1980.	Item to the Commission in June 1981.
A-17—FM Quadraphonic Broadcasting. Contact Person: Al Jarratt, 632-7275.	Docket 21310	Inquiry into whether Commission should authorize a quadraphonic FM broadcasting system.	Notice of Proposed Rule Making (NPRM) adopted July 17, 1980. Reply comments due on Feb. 9, 1981.	
A-18—AM Stereo. Contact Person: James McNally, 632-9660.	Docket 21313	The Commission must decide if, and under what circumstances, standards for the transmission of stereophonic program material by AM broadcast stations should be established.	NPRM adopted September 1978; a Memorandum Rept. and Order and Further NPRM adopted July 30, 1980, and released Sept. 11, 1980. Comment period closes in February 1981, after which the staff will probably draft an R&O.	
A-19—Teletext Inquiry. Contact Person: Jim Green, 632-6302.	Rulemaking 3727	Petition by CBS, Inc., to authorize use of teletext by TV stations.	Period for comments on the petition has closed. Staff is evaluating several alternatives with a view to taking action in the next two or three months.	First Quarter, 1981.
B. Cable Television Matters				
B-1—Cable TV Systems: Multiple Ownership and Cross-Ownership. Contact Person: William Johnson, 632-6466.	Dockets 18891 and 20423	Inquiry to determine if FCC should limit size of cable systems, multiple ownership and cross ownership.	Additional R&O's are forthcoming in these dockets. Office of Plans and Policy has a study of these issues in progress. Study includes telephone cross-ownership issues also.	
B-2—Cable TV Impact on Broadcast Service. Contact Person: William Johnson, 632-6468.	Dockets 21284 and 20988	Inquiry into the economic relationship between television broadcasting and cable television to provide the Commission with better methods of predicting changes in these industries and analyzing cases where questions of impact are raised.	R&O eliminating CATV rules has been adopted by Commission, but rule changes have been stayed in connection with an appeal of the Commission's decision. Court action is expected by the Spring of 1981.	
B-3—Cable TV Local Franchise Fees. Contact Person: Deborah Stuehrmann, 632-6468.	Docket 21002	Proposal to eliminate rule (§ 76.31) that limits the ability of local authorities to collect franchise fees in excess of 3% of a cable system's gross revenues.	Draft of final R&O is in progress. Additional analysis of economic study (NERA study) submitted in comments may be required.	
B-4—Cable TV Mandatory Local TV Signal Carriage Rules for "Saturated" Cable TV Systems. Contact Person: Stephen Bailey, 632-6468.	Docket 21472	Proposal to amend the cable TV mandatory signal carriage rules with respect to those situations where the availability of additional channels on local cable systems has been exhausted.	Draft of final R&O is in progress.	
C. Common Carrier Matters				
C-1—Cost Allocation Manual—AT&T. Contact Person: Tim Stevens, 632-9342.	CC Docket 79-245	Proceeding to develop and prescribe specific procedures to be followed by AT&T in allocating costs among its various services.	Final Commission Order tentatively scheduled for vote in December 1980. Reconsideration should follow.	December 1980.

Title of proceeding	Rulemaking or docket No.	Description	Stage of development	Projected date of upcoming action
C. Common Carrier Matters—Continued				
C-2—Cellular Mobile Communications. Contact Person: Michael Sullivan, 632-6450.	CC Docket 79-318	Inquiry into implementation of cellular mobile communications systems.	Draft of Report and Order completed and expected to be before the Commission in First Quarter, 1981.	First Quarter, 1981.
C-3—Xerox XTEN Proposal. Contact Person: Beverly Baker, 632-5930.	Gen. Docket 79-188	Xerox Corporation has proposed the allocation of microwave frequencies in the 10.55-10.68 GHz band for use in providing a new common carrier electronic message service.	Draft item revised. Awaiting final comments from Common Carrier Bureau, Office of Science and Technology, Office of Plans and Policy and General Counsel's office.	First Quarter, 1981.
C-4—Resale and Shared Use of WATS. Contact Person: Brad Allenby, 632-6917.	CC Docket 80-54 (RM 3453)	Regulatory policies concerning resale and shared use of common carrier domestic public swtiched network services. (MCI petition for rule making #3453).	On Oct. 21, 1980, the Commission concluded that the tariff restrictions were unlawful. The Commission's final order prescribing unlimited resale and shared use of public swtiched network service is expected to be released in December. AT&T will have 60 days from the release date to file tariff revisions removing all resale and sharing restrictions.	
C-5—WATS Offering. Contact Person: Kent Nakamura, 632-6917.	Bureau Project #210 (TR-13555).	AT&T tariff revisions reflect significant and complex changes in a major basic service. The filing represents substantial structural change in the WATS offering.	Numerous petitions for rejection or suspension of the proposed tariff revisions have been filed primarily by large volume WATS customers and companies that compete with AT&T. The Commission will act on the petitions before the effective date of the proposed tariff revisions.	December 1980.
C-6—Bell System Operating Companies Tariff, FCC No. 6. Contact Person: Kent Nakamura, 632-6917.	21499 Rate Case	Investigation into the lawfulness of facilities offerings by AT&T and its associated Bell companies to other common carriers; Bell System Operating Companies Tariff FCC No. 6.	The Commission is expected to adopt in December 1980 a Notice of Inquiry and Proposed Rulemaking.	December 1980.
C-7—Second Generation Satellites. Contact Person: Ron Lepkowski, 632-5930.	Bureau Project #130	The total number of applications for new domestic satellites may exceed the number that could be accommodated in the orbital arc useful for U.S. service. In order to avoid potential conflicts, a rulemaking approach is desired.	Action on applications to be completed in December 1980. Staff now working on the follow-on proceedings to develop and promulgate long term policy and procedures.	First Quarter, 1981.
C-8—AT&T Rate Structure Rulemaking. Contact Person: Pat Donovan, 632-5550.	CC Docket 79-246	Inquiry into AT&T private line tariff and rate structures and volume discount policies.	Staff is preparing a commission Memoranuum Opinion and Order and Second Notice of Inquiry. Item is scheduled to be presented to the Commission in February.	February 1981.
C-9—MTS-WATS Market Structure Inquiry. Contact Person: Carl Lawson, 632-9342.	CC Docket 78-72	Inquiry to determine whether public interest requires interstate Message Telecommunications Service (long distance telephone service) and/or Wide Area Telecommunications Service (bulk rate long distance service) or their functional equivalents, to be provided on a sole source basis.	Report and third supplemental notice, issued Aug. 19, 1980, resolved entry policy question and issues other than access charges and Alaska entry policy. Staff preparing further order as access charges. Awaiting supplemental comment regarding Alaska entry policy.	Planned for February 1981.
C-10—"Authorized User" Petitions. Contact Person: Gene Belardi, 632-7265.	CC Docket 80-170	Study of whether to authorize non-carrier entities to obtain service directly from Comsat for provision of international communications.	An NPRM was issued in May 1980. Comments and reply comments have been filed and reviewed. Staff research and economic studies completed. R&O is being drafted. See also CC Docket 80-634, below.	
C-11—International Resale and Shared Use. Contact Person: Helen Golding, 632-6917.	CC Docket 80-176	Study of the restrictions on resale and shared use of international services.	Comments were filed by twenty-three parties, seventeen of which filed reply comments in late September. The staff is in the process of drafting a recommended decision to be presented to the Commission in the Spring of 1981.	April 1981.
C-12—AT&T General Rate Increase. Contact Person: Brad Allenby, 632-6917.	Bureau Project #28	Tariff filing by AT&T that would increase its tariff charges, to become effective in part by June 1980.	Bureau's order was released on June 13, 1980, with Chief ordering an investigation of the across-the-board increases, but deferred that investigation until the hearing on AT&T's rate of return in Docket 79-63. MCI has challenged some procedural aspects of the decision and an application for review is pending.	No earlier than Second Quarter, 1981.
C-13—Uniform System of Accounts for Telephone Companies. Contact Person: David Chessler, 653-7413.	CC Docket 78-196	Study to develop a system of accounts which can readily provide cost information by both jurisdiction and individual service categories.	Review of comments received on First Supplemental NPRM is ongoing. Staff will devise specifications of the new proposed Uniform System of Accounts.	
C-14—Communications Satellite Corporation Structure. Contact Person: J. Ball, 632-7834.	CC Docket 80-634	An inquiry into changes in the corporate structure and operations of Communications Satellite Corporation.	NPRM adopted Oct. 9, 1980; released Oct. 29, 1980, to provide interested parties the opportunity to comment on the tentative proposals the Commission made in the Comsat study for changes in the Corporate structure and operations of Comsat. See also CC Docket 80-170 above.	Second Quarter, 1981.

Title of proceeding	Rulemaking or docket No.	Description	Stage of development	Projected date of upcoming action
C. Common Carrier Matters—Continued				
C-15—Overseas Communication Service. Contact Person: Stuart Chiron, 632-7265.	CC Docket 80-632	The Commission has tentatively concluded that voice/record dichotomy in international services no longer best serves the public interest. This NPRM proposes to permit the IRCs to provide international voice services and AT&T to provide international record services. NPRM revisits 1964 TAT-4 decision which helped establish voice/record dichotomy.	NPRM released Oct. 28, 1980. Comments due Dec. 12, 1980. Replies due Jan. 16, 1961.	Second Quarter, 1981.
C-16—AT&T Rate of Return. Contact Person: Kent Nilsson, 632-9342.	CC Docket 79-187	Inquiry to determine if AT&T's rate of return during 1978 exceeded the limits specified by the Commission in Docket 20376.	Comments from NOI have been reviewed. Further action pending policy guidance from the Commission.	
C-17—INMARSAT INterconnection—Implementation of Sec. 503(G) of INMARSAT Act. Contact Person: J. Ball, 632-7834.	CC Docket 79-35	Rulemaking regarding operational arrangements for maritime satellite service; interconnection with earth stations; and regulating safeguards against cross-subsidization of costs.	Further Notice of Proposed Rule Making being prepared requesting public comment on whether Comsat should be permitted to combine the expenses and assets of its INMARSAT investment with its INTELSAT revenue requirement for rate setting purposes.	
C-18—MDS Licensing. Contact Person: Cicely Holiday, 632-6415.	CC Docket 80-116	Inquiry on alternatives to trial-type proceedings for awarding MDS licenses. Possible alternatives include paper kearings, lotteries, and auctions.	NPRM issued March 1980. Staff is evaluating comments to draft an R&O.	
C-19—MDS Frequency Reallocation. Contact Person: Kevin Kelley, 632-6430.	Gen. Docket 80-112	Inquiry and rulemaking to consider reallocation of frequencies; in the 2500-2690 MHz band.	NPRM issued March 1980. Comment period extended to Sept. 26 and Oct. 27, 1980. Staff anticipates issuance of an R&O.	
D. Field Operations Bureau Matters				
D-1—Radio Operator Licensing. Contact Person: Vernon Wilson, 632-7240.	Docket 20817	Inquiry to review radio operator rules and evaluate the current need for them.	Order issued extending time to file comments to Dec. 5, 1980, and reply comments until Jan. 5, 1981.	2d Quarter, 1981 or later.
E. Office of General Counsel				
E-1—Reimbursement for Participation in Commission Proceedings. Contact Person: Randy May, 632-7020.	Gen. Docket 78-205	Inquiry as to the rules under which FCC should reimburse expenses of public participants in its rulemaking proceedings.	Comments are being evaluated by staff.	2d Quarter, 1981 or later.
F. Office of Plans and Policy				
F-1—Improvements to UHF TV Reception. Contact Person: Phil Giesler, 653-5940.	Gen. Docket 78-391	A five-person task force has been created to examine comparability for UHF and VHF television reception and to assist in determining what regulatory changes are needed to achieve comparability.	Last Report was issued November 1980. Contractor's reports pending.	
F-2—Direct Broadcast Satellite Inquiry. Contact Person: Florence Setzer, 653-5940.	Gen. Docket 80-603	Study of regulatory options concerning direct broadcast satellite (DBS).	NOI and R&O issued in October 1980. Comments due by Dec. 5, 1980, and reply comments by Dec. 22, 1980.	2d Quarter, 1981.
G. Office of Science and Technology				
G-1—Xerox XTEN Proposal. Contact Persons: Bert Withers, 653-8100; Beverly Baker, 632-5930.	Gen. Docket 79-188	Xerox Corporation has proposed the allocation of microwave frequencies in the 10.55-10.68 GHz band for use in providing a new common carrier electronic message service.	Comment dates on NPRM of August 1979, were extended to March 1980. An initial Commission decision is expected by the end of 1980.	1st Quarter, 1981.
G-2—Spread Spectrum Communications Technology. Contact Person: Michael Kennedy, 632-7073.	Not yet Assigned	Inquiry into possible civil application of spread spectrum <communications technology and possible rulemakings needed to permit its use (it is implicitly forbidden under present rules).	NOI is being written to be presented to Commission.	February 1981.
G-3—Radio Frequency Interference to Electronic Equipment. Contact Person: Al Paul, 653-8126.	Gen. Docket 78-369	Inquiry to determine extent of radio frequency interference to electronic equipment and need for government regulation to lessen such interference.	Pursuant to NOI, review of the comments received and the record has been completed. Statistical summary of comments is currently being developed, to be followed by coordination with appropriate operating bureaus/offices. An options paper is to be issued early in 1981.	1st Quarter, 1981.

Title of proceeding	Rulemaking or docket No.	Description	Stage of development	Projected date of upcoming action
G. Office of Science and Technology—Continued				
G-4—Broadcasting-Satellite Planning Conference. Contact Person: Michael Kennedy, 632-7073.	Gen. Docket 80-398	Preparation of U.S. Proposals to a 1983 ITU Region 2 Conference to plan the use to 12 GH, broadcasting satellites in the Western Hemisphere.	An initial NOI has been released and comments are being reviewed. Release of another NOI is anticipated.	1st or 2d Quarter, 1981.
G-5—Mobile Services Conferences. Contact Person: Lawrence Palmer, 653-8102.	Gen. Docket 80-184	Preparation of U.S. proposals to a 1982 World Conference on the Mobile Radio Services.	Two NOIs have been issued and comments are being reviewed. Expect another NOI in 1st Quarter 1981 and a R&O containing FCC recommended proposals in 2d Quarter 1981.	NOI—1st Quarter, 1981; R&O—2d Quarter, 1981.
G-6—Space Services Planning Conference Space WARC. Contact Person: Thomas S. Tycz, 653-8102.	Gen. Docket 80—	Preparation of U.S. proposals to a 1984/85 (2d session) ITU WARC on "Use of the Geostationary-Satellite Orbit and Planning of the Space Services Utilizing It".	Initial NOI on agenda of Nov. 25, 1980. Expect another NOI to be released 2d Quarter.	Initial NOI—November 1980; 2d NOI—2d Quarter, 1981.
G-7—Air-to-Ground Telephone Service at 900 MH, Contact Person: Mel Murray, 653-8166.	RM. 3524	This proposed system is designed to serve passengers on commercially scheduled airlines in the contiguous United States. Airfone, the petitioner, plans to use single side band modulation, proposes the use of a total of 4 MH, of spectrum to provide 310 two-way voice channels which will be interconnected to the public telephone network.	Petition is being analyzed along with the experimental-developmental applications filed by petitioners.	2d Quarter, 1981.
H. Private Radio Bureau Matters				
H-1—Telephone Interconnection in Land Mobile Radio Services. Contact Person: Lewis Goldman, 632-6498.	Docket 20846	Proceeding to develop and prescribe specific rules for interconnection of private land mobile radio systems with the public switched telephone network.	An R&O is being drafted by the staff...	April 1981.
H-2—Additional Personal Radio Service. Contact Person: John B. Johnston, 234-6884.	PR Docket 79-140	Inquiry into need for new Personal Radio Service at 900 MH, and technical and operational characteristics of such a possible service.	NOI issued previously and comment period ended in February 1980. Staff is drafting a NPRM in conjunction with the Office of Science and Technology.	April 1981.

Federal Communications Commission.
William J. Tricarico,
Secretary.

[FR Doc. 81-1550 Filed 1-15-81; 8:45 am]
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47 CFR CH. 1

[CC Docket No. 79-35; FCC 80-744]

Further Proposal Regarding Implementation of Requirements of the International Maritime Satellite Telecommunications Act

AGENCY: Federal Communications Commission.

ACTION: Further notice of proposed rulemaking (Docket No. 79-35).

SUMMARY: This Further Notice of Proposed Rulemaking provides and opportunity for interested parties to comment on whether the Communication Satellite Corporation (Comsat) should be permitted to include, for rate setting purposes, the net expenses and assets of its International Maritime Satellite System (INMARSAT) investment in the revenue requirements for its International Telecommunications Satellite (INTELSAT) operations.

This further notice is necessary because Comsat indicated in initial comments filed in this proceeding that no such cross-subsidization would be necessary, but has now changed its position in view of the significant start-up losses that it foresees as resulting from its participation in INMARSAT.

DATES: Interested parties may file comments on or before February 27, 1981 and reply comments on or before March 20, 1981.

ADDRESS: Comments and responses to this notice should be submitted to: The Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: James L. Ball/Glenn deChabert, International Facilities Planning Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C. 20554, (202) 632-3214.

In the matter of implementation of requirements of the International Maritime Satellite Telecommunications Act, CC Docket No. 79-35.

Adopted: December 16, 1980.
Released: December 29, 1980.

1. On February 26, 1979, we released a Notice of Proposed Rulemaking inviting comments on proposals to implement certain requirements imposed on the Commission by the International Maritime Satellite Telecommunications Act, 47 U.S.C. 751 (1979). *International Maritime Satellite System*, 70 F.C.C. 2d 1968 (1979). The International Maritime Satellite Telecommunications Act declares that it is the policy of the United States to provide for U.S. participation in the International Maritime Satellite Organization (INMARSAT) in order to develop a global maritime satellite system that will meet the maritime commercial and safety needs of the United States and foreign countries. INMARSAT is intended to be an independent international organization that will provide for ownership and operation of such a system. The Act amends the Communications Satellite Act of 1962, 47 U.S.C. 701 (1976), to designate the Communications Satellite Corporation (Comsat) as the U.S. operating entity in INMARSAT and place sole responsibility on Comsat for any financial obligations it incurs in that capacity.

2. Our Notice of Proposed Rulemaking inquired into (1) ownership of earth stations and operational arrangements by which Comsat and U.S. domestic or international carriers will interconnect their facilities for the purpose of extending maritime satellite services to users in the United States and beyond, and (2) operational arrangements by which Comsat will interconnect its facilities with private communications systems authorized by this Commission.[1] In addition, it sought comments from interested parties concerning regulatory safeguards to assure that Comsat's participation in INMARSAT will not adversely affect its participation in INTELSAT, and to prevent Comsat from cross-subsidizing its maritime satellite services with its other communication services. The purpose of this Further Notice of Proposed Rulemaking is to provide interested parties with an opportunity to comment on issues relating to this latter subject area that were raised by Comsat following the period for comments and replies allowed by our initial notice.

[1] We addressed issues concerning operational arrangements, interconnection between Comsat and U.S. domestic and international carriers and private communications systems on April 30, 1979. *International Maritime Satellite System*, 71 FCC 2d 1069 (1979). Issues concerning earth station ownership and operation are still outstanding.

A. Background

3. In our initial notice, we indicated that regulatory safeguards with respect to Comsat's investment in INMARSAT would be necessary for two reasons. First, we stated that Comsat's participation in INMARSAT should not be permitted to adversely affect its participation in INTELSAT or furtherance of the objectives set forth in the Communications Satellite Act. Second, we stated Comsat's provision of maritime satellite services should not be cross-subsidized with other communications services it provides. We noted that Comsat's participation in INMARSAT will necessarily involve substantial investment, and that the immediate prospects for an economically viable maritime satellite system appear uncertain.[2] In view of these factors, we indicated a concern that the costs of financial commitments undertaken by Comsat, as the U.S. operating entity in INMARSAT, not be passed on to users of communications services other than maritime satellite services.

4. We therefore posed several approaches to guard against potential cross-subsidization situations: (1) Requiring Comsat to establish a separate subsidiary for maritime satellite services; (2) changing elements of Comsat's basic structure without a separate subsidiary for maritime satellite services; (3) requiring Comsat to establish a separate system of accounts for maritime satellite services; and, (4) a combination approach. We invited comments from interested parties on these approaches and on any other regulatory measures which they believe should be taken to guard against cross-subsidization. However, we indicated that we would defer imposition of specific subsidiary arrangements, structural changes, or accounting rules until we examined Comsat's overall corporate structure and activities in the Comsat Study.[3]

[2] We noted that the Economic, Marketing and Financial Panel of the INMARSAT Preparatory Committee does not expect total cumulative INMARSAT revenues to equal total cumulative INMARSAT costs until the late 1980's at the earliest. However, we expressed concern that even this projection may be optimistic, and that initial losses may not be recouped until after that date.

[3] The Comsat Study was undertaken pursuant to Section 505 of the International Maritime Satellite Telecommunications Act which directed the Commission to determine whether any changes are required in Comsat's structure or operations to ensure that the corporation is able to fulfill effectively its obligations and carry out its functions under the Communications Satellite Act of 1962 and the Communications Act of 1934. A Final Report and Order in the Comsat Study was transmitted to Congress on May 1, 1980. *Communications Satellite Corporation*, 77 F.C.C. 2d 564 (1980).

5. In our final report in the Comsat Study, we reaffirmed the observation we made in our initial notice in this proceeding that INMARSAT will suffer losses. We observed that Comsat will be faced with a substantial negative cash flow in providing INMARSAT services, and concluded that a fundamental policy question exists with respect to how Comsat's expected INMARSAT losses should be absorbed. In so concluding, we recognized that Comsat will have the incentive and perhaps the ability to cover at least a part of its INMARSAT losses by shifting as many INMARSAT-related costs to its INTELSAT rate base, a process of cross-subsidization which would be difficult to detect as long as common facilities are involved. We further recognized that such cross-subsidization could impose excessive costs on INTELSAT ratepayers. However, we decided not to recommend at that time total separation between Comsat's INTELSAT and INMARSAT functions. Instead, we deferred imposition of any structural separation between Comsat's INTELSAT and INMARSAT roles to this proceeding, in which we would consider how Comsat may treat its INMARSAT losses from a regulatory standpoint. We also stated it would be useful for Congress to also consider this problem and provide the Commission with direction or guidance as to how it should be handled. In this respect we suggested that Congress may wish to reexamine U.S. national interest in light of expected INMARSAT losses and alternatives available to treat such losses.[4]

6. This further notice is necessitated by the fact that Comsat has recently proposed to treat its INMARSAT losses in a manner that is markedly different from the position that it took in the comments it filed in response to our initial notice in this proceeding.[5] In

[4] We noted that an alternative to permitting any form of cross-subsidization would be direct government subsidy of Comsat's INMARSAT operations. On the other hand, we indicated that a more extreme form of cross-subsidy than the cross-subsidy which may be available through common cost allocations would be to permit Comsat to add all of its INMARSAT investment and expenses to its INTELSAT revenue requirements.

[5] In our initial notice, we requested Comsat to indicate: (1) The means by which Comsat intended to fund its initial INMARSAT investment; (2) how Comsat intended to treat any losses it might sustain during initial maritime satellite operations; (3) the effect any such losses (or its initial INMARSAT investment) might have on its INTELSAT obligations and provision of INTELSAT services; (4) the level of all costs, including, but not limited to, operational, administrative, equipment and hardware costs, it expected to incur in providing maritime satellite service and in participating in INMARSAT; (5) all common, joint and overhead costs it expected to incur; and (6) how such costs

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response to our initial notice, Comsat gave the clear impression that its INMARSAT losses would have no adverse impact on its INTELSAT obligations, and that cross-subsidization of its INMARSAT services with its INTELSAT services neither would be necessary nor was contemplated. As for funding of its initial INMARSAT investment, Comsat asserted that it has the "financial capability to undertake the INMARSAT program without any adverse impact on its furnishing of INTELSAT services." Comments at 21. Comsat declared a consolidated cash position of approximately $66 million and a continuing ability to generate "substantial amounts of cash which will be adequate to finance both Comsat's INTELSAT and INMARSAT activities, as well as other activities." Comments at 21. Moreover, Comsat asserted that insofar as its capitalization consisted of $373 million of equity and $1.8 million of long term debt as of December 31, 1978, the corporation "is in an excellent position to acquire additional long-term debt, if necessary," and noted that the Commission, in fact, "explicitly acknowledged this capability when it imputed 45 percent debt to Comsat in determining an appropriate rate of return in the Comsat rate proceeding." Comments at 21.

7. As for treatment of INMARSAT losses, Comsat stated that it "fully intends to keep these two (INTELSAT and INMARSAT) activities separate from one another through appropriate organizational and accounting practices." Comments at 3–4. It indicated that to the extent it incurs losses from its INMARSAT services, it will be able to separately record and isolate such losses through a separate system of accounts for its INMARSAT activities. Comments at 24. Comsat further stated that the appropriate mechanism to record such losses would be instituted once Comsat could clearly determine the magnitude of projected losses. Comments at 24. Comsat concluded that whatever the ultimate disposition of the losses, "as long as they are segregated they can have no impact on Comsat's INTELSAT obligations or its provision of INTELSAT services." Comments at 24.[5] It assured the Commission that its planned internal corporate controls and separate accounting capability would prevent the costs of INMARSAT services from being borne by other communications services. Comments at 24.

8. On July 17, 1980, Comsat submitted a letter to the Commission in which it proposed a strikingly different approach to handling anticipated INMARSAT losses than the position it took in the comments it filed in this proceeding.[7] Essentially, Comsat proposed that it be allowed to combine for rate setting purposes, the net expenses and assets of its INMARSAT activities with its INTELSAT revenue requirements. It attached an internal memorandum to its letter which contains a hypothetical analysis concluding that such a remedy would have a minimal impact on its INTELSAT business.[8] The memorandum finds several options for absorbing initial INMARSAT losses to be either infeasible or undesirable. It maintains that existing maritime satellite rates cannot be increased because, based on the MARISAT experience,"* * *the demand characteristics in this market would cause much lower utilization of the service and would retard, if not prevent, its development." The memorandum observes that a reduction in Comsat's ownership in INMARSAT to reduce losses "* * * would produce the adverse result of U.S. and Comsat having an even lower voice in the business." And, it states that "asking for a government subsidy is possible, but our strong preference is that this business should be totally supported by the private sector. But still we cannot expect our shareholders to support this venture on a stand-alone basis."

9. The memorandum contains a worldwide maritime satellite traffic forecast based on Comsat's experience in providing maritime satellite services. According to the memorandum, the financial implications of the projections contained therein show Comsat's "* * * share of the after-tax losses accumulating to over $17 million in the period 1980–1988." The memorandum states that "* * * while the first year of profitability is estimated to be 1988, it is speculative to project when thereafter, even on a year-by-year basis, INMARSAT will provide an acceptable return." It further states that "these results will be in return a gross investment by Comsat of almost $100 million," and concludes that "clearly these are not the characteristics of a venture that prudent business people with a responsibility to shareholders can willingly pursue; further action is both required and appropriate."

10. The action recommended in the memorandum is to propose to the Commission that "* * * we be allowed to include, for rate setting purposes, the net expenses and assets of INMARSAT in the revenue requirements of our INTELSAT operations, at least during the several years of start up for the new service." The memorandum states that while Comsat would organizationally separate its INTELSAT and INMARSAT lines of business, its rate of return should reflect a single jurisdictional business and the reasonableness of Comsat's earnings from INTELSAT and INMARSAT services should be viewed on an overall basis. According to the memorandum, this approach would have a "very small impact" on Comsat's INTELSAT business. The memorandum further states:

> Our best forecasts for INTELSAT circuit costs show a steady decline averaging about 8.7% over the next ten years. The effect of combining the revenue requirements is a slight decrease of about one-half percentage point in that rate of decline. Viewed another way, INTELSAT rates would average 4–5% more over the period than they otherwise would have been. Naturally, the percentage impact on costs to the end user is an order of magnitude smaller, probably less than 1% if any at all, as our costs are a shrinking fraction of the total costs of international communications.

11. Three carriers submitted responses to the Commission concerning Comsat's July 17, 1980 letter. AT&T reiterated the comments that it made in the Comsat Study that Comsat's INMARSAT activities should not be subsidized by its INTELSAT activities, or vice versa, unless a conscious decision is made by the Commission that any subsidy is in the public interest.[9] AT&T stated that it would not, in principle oppose Comsat's proposal to combine its INMARSAT and INTELSAT expenses and assets for rate setting purposes during a transition period, so long as the Commission closely monitors such a combination

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would be allocated or accounted for between corporate organizational units and the service they provide.

[4] Comsat stated that it expects INMARSAT's capital requirements "to be relatively small in the early years, particularly in view of the expectation that the initial INMARSAT space segment will be leased from other entities and the capital investment in those facilities will be made by such other entities." Comments at 22. It also stated that it expects that all of the costs it would incur by operating earth stations and participating in INMARSAT "would be offset by revenues received for furnishing maritime services," and concluded that even if losses are experienced in the early years, "neither they nor the required capital investments are likely to be of such magnitude as to have any adverse effect on Comsat's ability to meet its INTELSAT obligations." Comments at 22.

[7] Letter to Chief, Common Carrier Bureau, from William H. Berman, Vice President and General Counsel, Communications Satellite Corporation, dated July 17, 1980. That letter has been made a part of the record in this proceeding.

[8] The internal memorandum was originally provided by Comsat to the Commission's Common Carrier Bureau in connection with the Comsat Study.

[9] Letter to Chief, Common Carrier Bureau from Robert E. Boone, Sr., General Attorney, dated August 11, 1980.

"* * * with an eye toward (a) the duration of the transition period, and (b) its effect on present and future rates charged by Comsat to service carriers for INTELSAT circuits." TRT Communications Corporation opposes any Commission grant of the relief sought by Comsat in its July 17 letter. TRT points out that if Comsat is permitted to combine its INMARSAT and INTELSAT expenses and assets, the international service carriers will subsidize Comsat's INMARSAT business.[10] TRT maintains that it in effect would be helping Comsat to compete against the public coast station services that it provides through Station WNU at Slidell, Louisiana. Western Union International opposes Comsat's proposal and requests an opportunity to more fully submit comments to the Commission.[11] WUI notes its efforts along with other carriers to become involved in INMARSAT. It emphasizes that "Comsat now seeks to burden WUI and others with the risks of the new venture by burdening its INTELSAT ratepayers with the INMARSAT start-up costs."

B. Discussion

(1) Overview

12. At the outset, we note that the concern we expressed in our initial notice in this proceeding—that the cost of INMARSAT financial commitments made by Comsat not be borne by users of its other communications services—reflects well established Commission policy declaring cross-subsidization between services as generally inimical to the pbulic interest.[12] In our initial notice, we emphasized that the cost of providing a service is at the heart of the statutory requirements of sections 201 through 205 of the Communications Act for just, reasonable and nondiscriminatory rates, and that such costs are to be directly controlling in rate setting or are to be considered as the reference or benchmark from which to measure departures from this basis.[13] In addition, we noted that these views were expressed during the early stages of INMARSAT's development. In a 1976 letter to the Secretary of State concerning the formation of an international organization to provide maritime satellite services, we recommended that the United States participate in a forthcoming confernece looking toward resolution of outstanding issues and formation of general principles upon which such an organization would be based.[14] We indicated that the Commission then had under consideration in a formal proceeding the issue regarding creation of a U.S. entity to be responsible for maritime satellite services.[15] In this respect, we stated:

It is not, however, the intention of the Commission to create a U.S. entity that would undertake a financial commitment in INMARSAT under any arrangements that would require the users of services other than maritime satellite service to bear the costs of such commitments. Any such course, we believe, would require Congressional action.

13. We recognize that our general policy against cross-subsidization cannot be applied in a vacuum without regard to other public interest considerations. It is clear that costs are not the only criterion for determining the lawfulness of rates and that other factors may be weighed.[16] However, it is unclear that the circumstances before us present other factors which outweigh our general policy. Comsat's main reason for requesting permission to cross-subsidize its INMARSAT and INTELSAT services appears to be a business judgment that INMARSAT is an even less attractive investment than Comsat originally anticipated, and that the Comsat shareholders should not be expected "to support this venture on a stand-alone basis." We do not regard the fact that losses will be sustained, in and of itself, to be sufficient justification for permitting the cross-subsidization that Comsat seeks. The drastic departure from traditional Commission policy sought by Comsat requires clear public interest justification. Comsat's July 17 letter to the Commission fails to provide such justification.

14. It appears that the only factors which may provide such justification involve the U.S. commitment to the commercial and operational success of INMARSAT and the national interest and foreign policy implications that flow from this commitment. However, as we will discuss, we question whether there is sufficient connection between Comsat's projects INMARSAT losses and U.S. foreign policy objectives to warrant cross-subsidization between Comsat's INMARSAT and INTELSAT services.

(2) The National Interest and Foreign Policy Basis for U.S. Participation in INMARSAT

15. In a joint letter to the Chief, Common Carrier Bureau, the

[10] Letter to Chief, Common Carrier Bureau, from Lloyd D. Young, Regulatory Counsel, dated July 30, 1980.

[11] Letter to Chief, Common Carrier Bureau from Robert E. Conn, Executive Vice President, Western Union International, dated July 21, 1980.

[12] AT&T Private Line Cases, 61 FCC 2d 587, 609 (1976).

[13] *See:* Private Line Rate Cases, 34 F.C.C. 244 (1961); 34 F.C.C. 217, 231 (1962); In Re WATS, 35 V.C.C. 149, 153–56 (1963); In Re WATS, 37 F.C.C. 668 (1964); In Re Part 61 of the Rules, 25 F.C.C. 2d 957, 965 (1970), 40 F.C.C. 2d 149, 154 (1973); In Re 48 kHz, 29 F.C.C. 2d 493 (1971); Hi-Lo, 55 F.C.C. 2d 224, 241 (1975), 58 F.C.C. 2d 362, 366 (1976); In Re WATS, 59 F.C.C. 2d 671, 678 (1976); 64 F.C.C. 2d 538 (1977); AT&T Private Line Rate Cases, 61 F.C.C. 2d 587, 607 (1976); 64 F.C.C. 2d 971 (1977).

[14] The conference was the second among three intergovernmental conferences convened regarding international maritime satellite communications services. In 1972, the Intergovernmental Maritime Consultative Organization (IMCO) estalished a panel of representatives from over 20 countries, including the United States, to study the feasibility of creating an international maritime satellite system. The panel included U.S. Government, common carrier, and maritime industry representatives. It completed its study in 1974 and issued a report that (1) examined operational requirements and technical parameters for a maritime satellite system; (2) provided an economic assessment for such a system; and (3) included a draft agreement that would create an international organization to operate the system. IMCO thereafter convened in Intergovernmental Conference in 1975 to consider the establishment of an international maritime satellite organization. U.S. participation in the Conference again was through U.S. Government, common carrier, and maritime industry representatives. After three sessions, the Conference adopted and opened for signature in 1976 two separate agreements providing for the establishment of INMARSAT—a Convention to be signed by governments and an Operating Agreement to be signed by either the governments or their designated operating entities. These instruments set forth the legal and financial requirements for participation in INMARSAT and the institutional basis upon which the organization operates.

[15] We released a Notice of Inquiry on December 5, 1974, seeking comments from interested parties on a number of issues relating to the establishment of an intenational maritime satellite system. *International Maritime Satellite System*, 50 F.C.C. 2d 640 (1974). We considered the comments filed in adopting recommendations to the Department of State for the first session of the Intergovernmental Conference convened in 1975 to consider an international organization to establish a martime sattlite system. We invited further comments regarding the designation of a private communications entity to be the U.S. participant and investor in any such organization. *International Maritime Satellite System*, 55 F.C.C. 2d 87 (1975). Subsequently, however, we terminated this proceeding in view of enactment of the International Maritime Satellite Telecommunications Act designating Comsat as the U.S. representative in INMARSAT, *International Martime Satellite System*, 70 F.C.C. 2d 1985 (1979).

[16] *See* Private Line Rate cases, 34 F.C.C. 2d at 217, 231 and 297; In Re WATS, 59 F.C.C. 2d at 671, 678. *See also*, AT&T Private Line Rate Cases, 61 FCC 2d 587, 589 (1976), in which we stated:

Our prior policy supports the position that actual costs of providing service underlie the statutory requirement that rates be just, reasonable, and nondiscriminatory, albeit this does not mean that costs are the *only* criterion useful in determining whether rates are lawful under the Act. Further, we conclude that the public interest is not generally served by interservice cross-subsidization, but recognize that statutory and social policies may lend sanction to some intraservice subsidies. Finally, we make findings regarding proper cost standards, measures of cross-subsidization, and acceptable departures from cost of service as a criterion of the justness and reasonableness of return levels and relationships (emphasis in original).

Department of State and the National Telecommunications and Information Administration (NTIA) emphasize the U.S. commitment to the commercial and operational success of INMARSAT, and call for expeditious Commission determination of proper treatment of Comsat's INMARSAT investment costs "* * * in view of foreign policy considerations * * *" [17] They state that:

The United States was instrumental in bringing INMARSAT into being and is now, through COMSAT, the largest investor in the Organization. United States policy, as clearly stated in the International Maritime Satellite Telecommunications Act supports participation in INMARSAT in order to serve the maritime commercial and safety needs of the United States. Any international uncertainty about our commitment to the commercial and operational success of INMARSAT could have an unfortunate impact upon our influence in the Organization. An early Commission determination as to the appropriate treatment of COMSAT's start-up costs would be helpful in dispelling such uncertainty. Additionally, our record of leadership in INTELSAT prompts us to favor a climate within INMARSAT which enables U.S. spokesmen to play a similarly constructive role in the further development of a global maritime satellite capability generally, and on behalf of U.S. interests more particularly.

The two agencies take no position on what the appropriate regulatory treatment should be concerning Comsat's anticipated INMARSAT losses. However, they note that:

* * * the Commission has several tools available which it can—and should—use to assure that the overall public interest is served. For example, if the Commission determines that COMSAT should be permitted to combine the expenses and assets of its INMARSAT revenue requirements with its INTELSAT revenue requirements, it should set firm limitations of duration, amount, etc. These limitations would not only have the effect of protecting the INTELSAT ratepayer, but would also act as an incentive for COMSAT to assure commercially sound and efficient INMARSAT operations. The Commission should also consider the extent to which such combination affects COMSAT's ability to pass on reductions in INTELSAT charges. It is particularly important that COMSTAT's charges not deter utilization of INTELSAT capacity or the introduction of new INTELSAT services.

16. We note that the views expressed above by NTIA and State are consistent with their position during Congressional hearings considering INMARSAT legislation. In those hearings the two agencies stressed the importance of national interest and foreign policy concerns in connection with U.S. participation in INMARSAT. [18] The Department of State maintained that U.S. participation in an international joint undertaking for the provision of maritime satellite communications service would be in the public interest. [19] The State Department indicated a concern that the failure of the U.S. to participate in INMARSAT could cause duplicative efforts by other countries in deploying maritme communications satellites which would result in a needlessly wasteful use of available radio spectrum and limited orbital locations. [20] It concluded that * * * a responsible approach dictates U.S. support for a joint and unified enterprise to avoid duplicative requirements and the squandering of scarce resources." [21] With respect to foreign policy concerns, the State Department concluded that:

* * * a decision not to permit participation in INMARSAT, following our failure to implement after a lengthy period of negotiation and the signature of a memorandum of understanding, the joint program of experimentation and evaluation using an aeronautical satellite Capability with European and Canada, would lend credence to the argument that the U.S. is really not interested in cooperative international efforts to exploit space for peaceful purposes. [22]

17. In supporting legislation to provide for U.S. participation in INMARSAT, NTIA indicated that the executive branch "* * * strongly believes that the INMARSAT organization should come into existence." [23] It further stated that the failure of the U.S. to participate in INMARSAT

* * * would not sit well with the international community, having urged so strongly INMARSAT on the conditions we set forth, and having gotten those conditions after a big fight, to turn around and not go forward. It would not put us in the best position in the international community.

18. National interest and foreign policy factors accordingly were considered in the U.S. decision to participate in INMARSAT. In enacting the International Maritime Satellite Telecommunications Act, Congress recognized the lengthy negotiations in which the U.S. actively participated looking toward the creation of INMARSAT.[24] The Senate Committee on Commerce, Science and Transportation stated:

Although Congress did not decide prior to the negotiations that it is in the national interest to participate in INMARSAT, as it did with the establishment of INTELSAT, it is apparent to the committee that if the United States is to have any credibility in future international telecommunications negotiations, the Congress must authorize the U.S. participation in INMARSAT and designate a representative to sign the operating agreement. S. Rep. No. 95–1036, 95th Cong., 2d Sess. 5 (1978).

The Senate Committee further cited the statement of the Assistant Secretary of Commerce that the failure of the U.S. to participate in INMARSAT "would not sit well with the international community." S. Rep. No. 95–1036 at 5.

[17] Letter to Chief, Common Carrier Bureau, from the Assistant Secretary of Commerce for Communications and Information, and the Assistant Secretary of State for Transportation and Telecommunications, dated October 16, 1980.

[18] Commission testimony did not address national interest of foreign policy considerations with respect to U.S. participation in INMARSAT. Commission testimony reviewed the involvement of Commission staff members, under the aegis of the Department of State, in international discussions and negotiations leading up to U.S. initialling of the INMARSAT Convention. In addition, it indicated that the Commission had further assisted the Department of State by outlining its views concerning institutional arrangements which might be adopted for INMARSAT. Commission testimony focused on institutional, operational and regulatory issues concerning the type of entity to be the U.S. representative should the U.S. participate in INMARSAT. In doing so, the testimony emphasized that the Commission had neither conducted a formal inquiry nor reached a formal conclusion as to whether the U.S. should participate in INMARSAT. *See* Statement of Charles D. Ferris, Chairman, Federal Communications Commission, before Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, May 8, 1978 (Serial No. 95–99), pp. 27–42; Statement of Walter R. Hinchman, Chief, Common Carrier Bureau, Federal Communications Commission, before the Subcommittee on Communications, House Interstate and Foreign Commerce Committee, April 4, 1978 (Serial No. 95–101), pp. 78–85

[19] *See* Statement of Joel W. Billar, Deputy Assistant Secretary of State for Commercial Telecommunications Affairs, before Subcommittee on Communications, House Interstate and Foreign Commerce Committee, April 4, 1978 (Serial No. 95–101), p. 19

[20] The State Department was concerned that the failure of the U.S. to participate in a joint international undertaking would pressure European interests to deploy European developed MAROTS satellites operationally. Such an effort would be duplicative of the existing U.S. MARISAT system and any follow-on MARISAT system that may be deployed by U.S. carriers.

[21] Statement of Joel W. Billar, p. 19.

[22] *Id.* p. 20. The State Department further concluded: In view of the fact that good communications are essential for the efficient operation of world shipping and for the safety and welfare of those at sea, and taking into account the difficulty in recent years of maintaining an adequate standard of ship-to-shore communications service using existing techniques, the State Department supports new legislation which would establish a legal basis for the U.S. Government to became a Party to the INMARSAT Convention, and designate, subject to appropriate Executive Branch oversight, an entity to be the United States Signatory to the INMARSAT Operating Agreement.

[23] *See* Statement of Henry Geller, Assistant Secretary-designate, Telecommunications and Information, Department of Commerce, before Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, May 8, 1978 (Serial No. 95–99) p. 67.

[24] See footnote 14, above.

The House Committee on Interstate and Foreign Commerce took a similar view:

> It is the view of this committee that a decision not to participate in INMARSAT, following the failure of the United States to arrive at a satisfactory plan with Europe and Canada for the growth of undersea cables and satellite facilities, would lend credence to the argument that the United States is not interested in cooperative international efforts to promote telecommunications technologies for peaceful purposes. H.R. Rep. No. 95–1134, Part 1, 95th Cong., 2d Sess. 9 (1978).

(3) General Considerations

19. In view of the national interest and foreign policy considerations underlying the declared policy objective of the International Maritime Satellite Telecommunications Act to provide for U.S. participation in INMARSAT, and the expressed concerns of the Department of State and NTIA that there be no international uncertainty regarding the U.S. commitment to the commercial and operational success of the organization, we will expeditiously consider Comsat's proposed treatment of its anticipated INMARSAT losses. However, at the outset, we question whether the form of cross-subsidization that Comsat seeks would be consistent with the spirit, if not the intent, of the International Maritime Satellite Telecommunications Act. The Act provides for U.S. participation in INMARSAT through a private entity that operates for profit and is not an agency of the Federal Government.[25] As the U.S. designated entity in INMARSAT, Comsat is solely responsible for meeting all financial obligations resulting from its participation in INMARSAT.[26] Section 503(d) of the Act states:

> The corporation shall be responsible for fulfilling any financial obligation placed upon the corporation as a signatory to the operating agreement or other pertinent instruments, and any other financial obligation which may be placed upon the corporation as the result of a convention or other instrument establishing INMARSAT. The corporation shall be the sole United States representative in the managing body of INMARSAT.

The legislative history of the Act clearly shows that "this section relieves the U.S. Government from any financial responsibility to Comsat for its participation in INMARSAT or in a similar system."[27] In addition, the legislative history indicates a Congressional intent that Comsat's INTELSAT obligations not be adversely affected by its participation in INMARSAT. In recommending enactment of the Act, Congressman Murphy of the House Committee on Merchant Marine and Fisheries stated:

> This bill does not require an authorization of appropriated funds. *Moreover, the policies in this bill do not impact INTELSAT or its relationship with U.S. carriers.* (emphasis added) Cong. Rec. H. 12731, October 12, 1978.

Finally, the Act's requirement that the Commission conduct the Comsat study, in part, was borne out of a general Congressional concern for Comsat's continued ability to fulfill effectively its obligations and carry out its functions under the 1962 Satellite Act and the 1934 Communications Act, in view of the additional responsibilities being placed on it as the designated U.S. operating entity in INMARSAT.[28]

20. In light of a legislative history which illustrates Congress' clear intent that Comsat be solely responsible for all financial obligations flowing from INMARSAT, we believe a serious question exists as to whether Comsat's proposal to cross-subsidize its INMARSAT services is consistent with the provisions of the International Maritime Satellite Telecommunications Act. Even assuming that Comsat's proposal is consistent with the Act, however, we believe that Comsat must clearly connect the fact that it will suffer initial start-up losses with overriding public interest factors that justify departure from our traditional policy disfavoring cross subsidies.

21. We recognize that high start-up cost and relatively low traffic volume will prohibit Comsat from initially setting INMARSAT rates based on cost. We further recognize that the U.S. policy commitment to INMARSAT's commercial and operational success as expressed in the International Maritime Satellite Telecommunications Act necessarily limits Comsat to providing maritime satellite services only through INMARSAT. Nevertheless, it is clear that Comsat accepted the risk of loss, along with the opportunity for profit when it voluntarily undertook the responsibilities and embraced the monopoly privileges associated with becoming the sole U.S. participant in INMARSAT. In this connection, Comsat actively sought to be the U.S. designated entity in INMARSAT to the exclusion of other U.S. carriers seeking the same status.[29] Comsat opposed an alternative in which it would be part of a consortium of U.S. carriers acting as the U.S. designated entity in INMARSAT, even though it recognized that initial losses would be incurred. Moreover, subsequent to being designated the U.S. operating entity in INMARSAT, Comsat attempted to increase its initial investment share in INMARSAT from the 17 percent originally provided for by the INMARSAT Operating Agreement to a 30 percent share. In seeking to increase its investment share, Comsat asserted that a 30 percent share would better approximate its initial projected use of the INMARSAT system. Comsat ultimately had to settle for a 23.5 percent share because of similar efforts by other INMARSAT Signatories.

22. Given the business decisions exercised by Comsat's management in seeking involvement in INMARSAT, we question whether we now should require Comsat's INTELSAT ratepayers to bear the initial losses associated with Comsat's INMARSAT activities. The crucial issue before us is not whether Comsat should be permitted to cross-subsidize its INMARSAT service out of its INTELSAT service revenues simply because of the start-up losses that it anticipates from participation in INMARSAT. The legislative history of the International Maritime Satellite Telecommunications Act demonstrates that the prospect of early losses was foreseen. Rather, the crucial issue is whether there are public interest factors relating to foreign policy concern which are sufficient to override this Commission's general policy that cross-subsidization between services is inimical to the public interest. In our view, resolution of that issue turns largely on whether Comsat's anticipated start-up losses will be so great as to

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[25] Section 502(b) of the Act states: It is the purpose of this title to provide that the participation of the United States in INMARSAT shall be through the Communications Satellite Corporation, which constitutes a private entity operating for profit, and which is not an agency or establishment of the Federal Government.

[26] *See* S. Rep. No. 95–1036, 95th Cong., 2d Sess. 20 (1978); H.R. Rep. No. 95–1134, Part I, 95th Cong., 2d Sess. 15 (1978); H.R. Rep. No. 95–1134, Part II, 95th Cong., 2d Sess. 12 (1978).

[27] *See* H.R. Rep. No. 95–1134, Part II, at 12. See also, the comments of Congressman Devine on H.R. 11209 which state in part:

> This legislation is necessary to enable the United States to participate in INMARSAT through the designation of Comsat as its operating entity. *While Comsat must contribute roughly $34 million, there will be no taxpayer dollars involved in the program.*
>
> Comsat was chosen as the designated entity for many reasons, including its expertise in satellite endeavors, the necessity to have a designated entity in existence as soon as possible, and the lack of an economic justification for the creation of a new corporation for this limited purpose. (emphasis added) Cong. Rec. 3896, May 15, 1978.

[28] *See* S. Rep. No. 95–1036 at 15–16. *See also Communications Satellite Corporation*, 77 FCC 2d at 575.

[29] *See* Statement of Dr. Joseph V. Charyk, President, Communications Satellite Corporation, before the Subcommittee on Communications, House Interstate and Foreign Commerce Committee, April 4, 1978 (Serial No. 95–101), pp. 58–63; *See also* Statement of Dr. Charyk before the Subcommittee on Communications, Senate Committee on Commerce, Science, and Transportation, May 8, 1978 (Serial No. 95–99), pp. 109–127.

jeopardize its ability to participate in INMARSAT and, as a result, threaten the U.S. foreign policy commitment to INMARSAT's commercial and operational success. In this connection we do not have a clear statement from Comsat that it will seek to withdraw from INMARSAT if it is denied the remedy that it seeks. Nor do we have a clear statement from the State Department and NTIA of the national interest and foreign policy implications of a denial of Comsat's proposal. Such a statement from these agencies would be helpful in our consideration of the issues that Comsat's proposal raises.

23. If Comsat's start-up losses will be of such severity as to threaten U.S. national interests and foreign policy objectives, Congressional action addressing this problem could be an alternative to permitting Comsat to pass its INMARSAT investment losses on to its INTELSAT ratepayers. As we noted in the Comsat Study, one form of Congressional action could involve reconsideration of whether U.S. participation in INMARSAT should receive direct taxpayer subsidization. *Communications Satellite Corporation*, 77 FCC 2d at 668. From the perspective of economic efficiency and of the other values found in Section 1 of the Communications Act, direct payments from general tax revenues might be preferred to an internal subsidy arrangement of the sort proposed by Comsat. However, Congressional action may take other forms. For instance, Congress could amend the Act to designate a new U.S. Signatory to INMARSAT in the form of a consortium of carriers. This option would provide a risk-sharing solution to initial start-up losses. Also, Congress could revisit the Act and conduct a broad review of continued U.S. participation in INMARSAT as we suggested in the Comsat Study, 77 FCC 2d at 66. There, we indicated that such a review could consider the requirement for an independent maritime communications system, the identification of the most efficient means of providing maritime services and the determination of the most appropriate means for subsidizing this service. Finally, Congress might also reconsider whether a maritime satellite system, which will service a somewhat specialized consumer group, can best be provided through the private marketplace.

24. From a regulatory standpoint, Comsat's proposal to include its net INMARSAT assets and expenses with its INTELSAT operations for rate setting purposes also raises a number of other issues which we believe must be considered in the context of this proceeding. Moreover, in view of the opposition to the proposal already expressed by WUI and TRT, we believe that these carriers and other interested parties should have an opportunity to comment on it and to pose any alternative approaches that would assure U.S. commitment to INMARSAT's commercial and operational success. As we have noted, Comsat's proposal may affect U.S. international service carriers and their customers because it would essentially result in passing along INMARSAT investment costs to them. Since some of these carriers are the licensees of public coast radio stations that will compete with Comsat's INMARSAT services, we believe that they and other interested parties should be given an opportunity to comment on the effect the proposal will have on the overall competitive structure for maritime communications.

25. In addition, there may be regulatory approaches to dealing with Comsat's anticipated INMARSAT start-up losses other than Comsat's proposal. One approach could take the form of intertemporal subsidization. Under this approach, Comsat would be permitted to include within its INMARSAT rate base those expenses in excess of revenues occurring in the formative years of INMARSAT operations. Comsat's shareholders would continue to bear the risk of corporate participation in INMARSAT. However, Comsat could expand its INMARSAT rate base by the amount of its unrecovered expenses during the unprofitable INMARSAT start-up period. Thus, while Comsat's INMARSAT business would not have generated sufficient revenues to attain any net return on investment during the start-up period, the rate base would reflect in its return allowance the Corporation's risk-related expenses over that period. In this manner, Comsat ultimately could recover these expenses when and if it began to realize a net return on its INMARSAT investment.[30]

[30] We emphasize these unrecovered expenses would not include "revenue deficiencies"; *i.e.*, lost profits representing the amount by which total INMARSAT revenues may fall short of total INMARSAT revenue requirements for each year in which Comsat fails to earn its allowed return on its INMARSAT investment. We specifically denied Comsat's request to include alleged "revenue deficiencies" in its INTELSAT rate base in the Comsat Rate Case, *Communications Satellite Corporation*, 56 FCC 2d 1101, at 1129–1132 (1975), *aff'd. sub.nom. Communications Satellite Corporation* v. *FCC*, 611 F. 2d 863, 892–894 (1977). Moreover, the Supreme Court has consistently denied the requests of regulated companies to include "revenue deficiencies" in their rate bases on the principal ground that to do so would unfairly privilege ratepayers of previous years at the expense of ratepayers of future years. *See FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 83 S. Ct. 211, 9L.Ed. 2d 199 (1962); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590, 62 S. Ct. 736, 745, 86 L.Ed. 1037 (1942); *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388, 395, 42 S. Ct. 351, 354, 66 L.Ed. 678 (1922).

26. Another approach would be to defer any action on the treatment of Comsat's anticipated start-up losses until some time after the INMARSAT system becomes operational. This approach would provide an incentive for Comsat, the sole U.S. representative and largest investor in INMARSAT, to exercise its influence within the organization in the pursuit of cost-effective options in the areas of INMARSAT operations, capital expenditures and the procurement of the second generation INMARSAT space segment. We note that Comsat has not indicated any change in the outlook for its consolidated cash position of approximately $66 million which is "projected to increase in the future", according to its initial comments to this proceeding. Comments at 21. Nor has Comsat indicated any change of position which would decrease its ability to acquire additional long-term debt to cover its INMARSAT start-up losses. On the basis of the information Comsat has provided to us, the adoption of this alternative for a period of limited duration would not appear to seriously undermine the financial position of the Corporation. *See* para. 6, above.

(4) Specific issues raised.

27. *Treatment of losses.* In commenting on Comsat's proposal, we urge interested parties to address four issues. The first issue involves the preferred means of handling the anticipated INMARSAT losses. This issue subsumes the basic question of who should bear the financial obligation for U.S. involvement in INMARSAT. In this connection, we must be cognizant of the fact that, in our free enterprise system, firms have the right to invest capital and to face the normal risks associated with their investment decisions. While this fact is tempered in regulated industries in which firms have common carrier obligations, such firms still assume responsibility for their investment decisions.

28. In Comsat's case, we face a potential conflict between theoretical and practical considerations. We have noted the legislative history which places responsibility on Comsat for any financial obligations that it incurs as the U.S. Signatory. We have also recounted Comsat's eagerness to be the sole U.S. participant in INMARSAT and its push to acquire a greater ownership share in this enterprise. Moreover, it is clear that

the common carrier obligations that Comsat has undertaken as the single U.S. representative in INTELSAT and INMARSAT are not without associated benefits and rewards. As the U.S. representative in INTELSAT, Comsat is sheltered from competition in the provision of INTELSAT services to and from the United States. As the U.S. representative in INMARSAT, Comsat will be similarly sheltered in the provision of INMARSAT services. It is also important to note that, like other common carriers under our jurisdiction, Comsat is allowed a rate of return which includes a risk factor. That is, Comsat's prescribed rate of return for INTELSAT services includes an explicit allowance to compensate for the risks it normally assumes in its business decisions.[31] Comsat similarly will be allowed a rate of return for its INMARSAT services that includes a risk factor. And, part of the risk that Comsat knowingly assumed in joining INMARSAT was the risk of incurring start-up losses, as projected by both its own forecasts and INMARSAT's forecasts. In view of these factors, we expect Comsat to fulfill the obligations it undertook in joining the INMARSAT system. However, we recognize that, if Comsat's current forecasts for INMARSAT losses are correct, it is likely to behave as we would expect any normal business to behave, and attempt to minimize its losses. Such behavior could take the form of unenthusiastic support for necessary capital expenditures by INMARSAT or the commitment of corporate resources to the development of the market for maritime satellite communications. We are concerned that the national interest and foreign policy considerations underlying the declared policy objective of the International Maritime Satellite Telecommunications Act may not be effectively fulfilled if Comsat behaves in this manner.

29. Therefore, we request public comment on whether action by the Commission is necessary to assure that the U.S. commitment to INMARSAT's operational and commercial success is fulfilled. We request those parties supporting some form of Commission action to comment on regulatory solutions such as those that we described in paragraphs 25 and 26 above, as well as the cross-subsidization scheme proposed by Comsat. We request all parties to comment on whether we should deny Comsat a regulatory remedy and direct it to seek Congressional relief.

30. *Effects on rates.* The second issue involves what effect combining INMARSAT expenses and assets with INTELSAT revenue requirements may have on the rates Comsat charges for its INTELSAT services. One of our major concerns in considering either Comsat's proposal or any other regulatory approach to treating anticipated INMARSAT losses will be its potential effect on users of INTELSAT services. We will carefully weigh any public interest benefits to be gained from a regulatory solution to INMARSAT losses against any adverse impact or disadvantage to consumers.

31. For purposes of our consideration of this issue, we urge interested parties to note the differences between Comsat's traffic and revenue projections and those of INMARSAT. The traffic and revenue projections made by Comsat in its July 17, 1980 letter to the Commission are based on its experience in providing four years of commercial maritime satellite services under the MARISAT developmental program.[32] The Comsat projections are significantly more conservative than the only other available comprehensive forecast of maritime satellite traffic and revenue—the July 1978 report of the INMARSAT Preparatory Committee's Economic, Financial and Marketing Panel.[33] The INMARSAT Prepcom Panel projected that cumulative INMARSAT revenues will equal total cumulative INMARSAT costs sometime in the late 1980's. As we concluded in our initial notice in this proceeding, however, INMARSAT's projection may be optimistic in view of certain assumptions made by the Panel in arriving at traffic and revenue forecasts. The revenue forecasts upon which the Panel's breakeven projection is predicated were developed from traffic forecasts based on a number of critical assumptions made because of (1) a lack of meaningful historical information on maritime satellite usage, and (2) the failure of countries representing an estimated fifty percent of the world's vessels to report any traffic estimates of future maritime satellite usage by their vessels. Although Comsat recently submitted its current traffic and revenue projections to INMARSAT and urged acceptance of these forecasts as the basis of operational and financial planning, INMARSAT apparently has decided to continue to rely on the 1978 report of the INMARSAT Prepcom Panel, with certain adjustments.[34] We note that these adjustments do not cure the basic problems that we have with the assumptions made by the Prepcom in arriving at its 1978 projections.[35]

32. In its July 17 letter to the Commission, Comsat projects higher initial market estimates than the INMARSAT Prepcom Panel due to an unexpected demand by unique customers (i.e., oil rigs and construction barges); however, it believes that the long term market for maritime satellite services is with "more traditional customers" (i.e., oil tankers, cargo ships).[36] Comsat forecasts a slower ship station terminal placement rate than the INMARSAT Prepcom Panel due to the "current and projected costs of terminals," although it envisions a higher utilization rate per ship or terminal. Comsat concludes that these factors combine to produce the summary difference between its projections and those of the INMARSAT Prepcom Panel—"a significantly slower, long term growth rate for the development of the maritime satellite communications market." We request Comsat to summarize in its comments the methodology it used to arrive at its projections. In particular, we request Comsat to identify and explain any judgments on the characteristics of the maritime satellite communications

[31] In the 1978 Settlement Agreement in the Comsat Rate Case, Comsat's overall allowed rate of return was set at 12.48%. *See Communications Satellite Corporation*, 68 FCC 2d 941, 950 (1978). Of that 12.48%, 7.48% represents the yield on long-term U.S. government bonds conditioned upon imputation of dept equal to 45% of Comsat's INTELSAT rate base for the six year period which began on January 1, 1978; 4.0% represents a "risk permium", as derived from our assessment of the evidence on Comsat's corporate risk characteristics in the Comsat to Rate Case; and 1.0% represents an incentive to Comsat improve its overall earnings through operating and internal efficiencies. *See Communications Satellite Corporation*, 56 FCC 2d 1101, 1170–1174 (1975).

[32] *See* Attachment 1 of the inter-office memorandum enclosed with Comsat's July 17, 1980 letter.

[33] *See* Report of the Fourth Session of the Economic, Marketing and Financial Panel, Prepcom/Econ/Report 4, July 7, 1978, submitted to the INMARSAT Preparatory Committee, July 13, 1978.

[34] Comsat submitted its projections in April of this year to the INMARSAT Advisory Committee on Finance and Market Planning. *See* Report of the Second Session of the Advisory Committee on Finance and Market Planning Council/4/11. ACFMP/2, April 17, 1980.

[35] For instance, in its report to the INMARSAT Council, the Advisory Committee continued reliance on the Prepcom Panel's 1978 ship terminal forecast rather than Comsat's more recent projections. The Advisory Committee noted that Comsat's forecasts and those of the Prepcom Panel are consistent for the period 1979 to mid-1983, but significantly diverge beyond that period. The Advisory Committee decided that Comsat's forecasts "* * * might not be sufficiently comprehensive and that all Signatories might jointly be in a better position to estimate, at the appropriate time, ship terminal fitting rates." However, in stating this reason for continuing reliance on the Prepcom Panel's 1978 ship terminal forecast, the Advisory Committee ignored the fact that the Prepcom Panel's forecast was partly based on critical assumptions made because of the failure of countries representing fifty percent of the world's vessels to report ship terminal or traffic estimates.

[36] *See* Attachment 1 of the inter-office memorandum enclosed with Comsat's July 17, 1980 letter.

market which provide a basis for its projections. We invite interested parties to comment on the viability of Comsat's projections and to submit any different traffic and revenue forecasts which they believe will more accurately reflect the future of the market. Comsat's projections are contained in its application (CSS–81–001–P) for authority to participate in INMARSAT's first generation satellite system, filed on November 5, 1980.

33. As for the projections Comsat makes on the effects of combining INMARSAT expenses and revenues with its INTELSAT revenue requirements, we note at the outset that Comsat's July 17 letter does not contain sufficient information to evaluate these projections. More troublesome, however, is the fact that Comsat has provided at least three different projections of the initial losses that it anticipates as a result of its involvement in INMARSAT.[37] In addition to the INMARSAT expense and revenue projections Comsat submitted to us its July 17 letter, on September 12, 1980, Comsat provided the State Department with a written analysis of the cost implications of implementing the Baseline Operational Plan for INMARSAT's first space segment facilities.[38] This analysis contains somewhat different projections of initial INMARSAT losses than those submitted on July 17. Moreover, the revenue projections for the Baseline Operational Plan, recommended to the INMARSAT Council by the Director General and ACTOM, submitted by Comsat in its November 5 application, vary from those submitted both on July 17 and September 12.

34. Whereas Comsat stated in its July 17 letter that the first year of profitability ($1 million after taxes) for its INMARSAT line of business may be 1988, it indicates in its September 12 letter to the State Department that pre-tax profits of $1.7 million may be realized in 1987. By contrast, Comsat indicated 1987 pre-tax profits of $1.1 million in its application CSS–81–001–P. In addition, whereas Comsat stated in its July 17 letter that it would incur after tax losses of $17 for the 1980–1988 period, Comsat (1) states in the body of its letter to the State Department that it will incur pre-tax losses of $33.8 million "for the first seven years of INMARSAT operations (1980–1988)" [39] and (2) indicates in its application pre-tax losses of $42.6 for the 1979–1988 period.[40] We note that Comsat's Attachment III, Table III–2 of its September 12 letter indicates that Comsat's pre-tax loss projection is for the 1979–1988 period rather than the 1982–1988 period. Table III–2 projects Comsat's pre-tax loss during the first seven years of INMARSAT operations as $29.0 million. According to the table, this translates into an after-tax loss of $14.5 million for this seven year period, a $16.7 after-tax loss for the 1980–1988 period that Comsat used in its July 17 letter to the Commission, and a $16.9 after-tax loss for the 1979–1988 period that Comsat used in the application it ultimately filed with the Commission.

35. We recognize that these discrepancies may be inconsequential for purposes of analysis. However, we believe that Comsat should state with specificity what information was considered and what assumptions it made in preparing its analysis to the State Department and its formal application that were not considered in preparing the analysis contained in its July 17 letter to the Commission. In particular, we request Comsat to explain the nature of the $4.8 million in operations losses that it attributed to the 1979–1981 timeframe in its September 12 letter.[41] We also request Comsat to amend its July 17 forecast of the impact combined INTELSAT and INMARSAT rate bases will have on Comsat's rates for INTELSAT circuits in view of the profit/loss analyses Comsat provided to the State Department and in its application.[42] In submitting this amended forecast, we expect Comsat to explain its methodology and provide all necessary background information or identify references to such information which the Commission may already have in its possession. This information will permit both the Commission and interested parties to assess Comsat's forecast with respect to the effects of its proposal to combine INMARSAT expenses and assets with INTELSAT revenue requirements.

36. *Restrictions on cross-subsidizations.* The third issue concerns what restrictions, if any, should be placed on Comsat if it is to be permitted to combine its INMARSAT expenses and assets with its INTELSAT revenue requirement. We agree with NTIA and AT&T that Comsat's INMARSAT business should ultimately stand on its own. Comsat may not have the incentive to work toward this end if it is permitted to cross-subsidize for an unlimited period. We therefore believe that, should Comsat be permitted to cross-subsidize, it should only be allowed to do so for a pre-determined transition period. Our initial determination of the duration of that transition period could be reviewed as may be necessary to reflect changing conditions. This would provide us with the opportunity to compare changing INMARSAT traffic and revenue projections to capital outlays and expenses.

37. The transition period should be of sufficient duration to provide Comsat both the incentive and a reasonable opportunity to develop the maritime satellite communications market. As it draws to a close, we would review the results of Comsat's efforts in developing this market and determine whether continued combination of INMARSAT expenses and assets with the INTELSAT revenue requirement is necessary and in the public interest. In making this determination, we would consider the effect of continued cross-subsidization on Comsat's charges for INTELSAT circuits, as well as the prospects for Comsat's INMARSAT business to exist on a stand-alone basis.

38. Two factors must be considered in determining the initial transition period. First, the period should permit development of more complete historical information on maritime satellite traffic and revenue growth than now exists. We note that the current shipboard terminal projections of INMARSAT and Comsat generally conform through 1982, but begin to significantly diverge

[37] In its application CSS–81–001–P, Comsat submits both an Income Statement for the INMARSAT "Baseline Operational Plan" and an Income Statement for a "Baseline Operational Plan with Options" (Attachment 9). The Baseline Operational Plan is that which was recommended to the INMARSAT Council by the Director General of INMARSAT and by the INMARSAT Advisory Committee on Technical and Operational Matters (ACTOM). In Comsat's view, this Plan represents "an operationally sound approach to the implementation of space segment by INMARSAT." *See* FCC File No. CSS–81–001–P at 24. The Baseline Operational Plan with Options represents Comsat's gross INMARSAT operating losses through 1988 should INMARSAT exercise options for (1) a fourth and fifth MCS, (2) a third MARISAT–A, (3) one year of MARISAT–B service, (4) extension of the basic MAREC'S service to seven years with a deferred payment option, and (5) retention of the MARECS–B (POR–IOR) flexibility option. *See* FCC File No. CSS–81–001–P at 23–24. However, for the purposes of this discussion, we shall compare only the recommended Baseline Operational Plan projections to those which Comsat submitted in its July 17 letter and its September 12, 1980 letter, *infra*, n. 40.

[38] Letter from John L. MuLucas, Executive Vice President International Communications and Technical Services, Communications Satellite Corporation, to Mr. B. Boyd Hight, Deputy Assistant Secretary for Transportation and Telecommunications, Department of State, September 12, 1981 [sic]. We will make this letter part of the record in this proceeding.

[39] *Id.*, p. 2.

[40] FCC File No. CSS–81–001–P, Attachment 8.

[41] In its application, Comsat's attributes $5.0 million in operations losses to the 1979–1981 timeframe.

[42] Neither Comsat's letter to the State Department nor its application contains such forecasts.

thereafter. Since shipboard terminal growth is a major factor in projecting maritime satellite traffic and revenue growth, the initial transition period should be of sufficient length to establish a more definitive growth trend for shipboard terminal installation and its resulting impact on traffic and revenue growth.

39. Second, the initial period should encompass INMARSAT planning for a second generation INMARSAT system and thus permit the Commission to consider the magnitude of future capital outlays and expenses that Comsat will make in connection with its INMARSAT obligations. In this respect, we note that the INMARSAT Council made an initial determination of the configuration of the first generation of INMARSAT space segment at its November 12–19 meeting in London. The Council awarded contacts to INTELSAT, the European Space Agency (ESA) and the MARISAT consortium under a combination arrangement for the procurement of the first generation INMARSAT space segment which we view as generally consistent with the Baseline Operational Plan reflected in the Comsat application now before the Commission.[43] Depending upon the service availability dates of the various proposals, the first generation INMARSAT system should provide services approximately through the 1988–1990 period. INMARSAT second generation planning will have to involve sufficient lead time to replenish first generation space segment. An important decision to be made will be whether to procure dedicated second generation space segment or whether to continue leasing space segment from INTELSAT and/or other entities. A decision to procure a dedicated system would involve contractual commitments and capital outlays approximately three to four years prior to need for replenishment. A decision to lease space segment would probably defer major second generation costs until the satellites are in orbit.[44]

40. In view of these factors, if we should adopt Comsat's proposal we believe that an initial transition period in which Comsat would be permitted to combine its net INMARSAT expenses and assets with its INTELSAT revenue requirements should end no later than 1988, if not sooner. This period would be of sufficient length to develop definitive trends in maritime satellite communications usage. Also, it would permit the Commission to consider future capital outlays and expenses for INMARSAT's second generation system in determining whether continued cross-subsidization is in the public interest. We invite comments on this approach and suggestions for any other limitations that interested parties believe may be necessary.

41. *Monitoring cross-subsidization.* The fourth issue is whether any measures should be taken to monitor the effects of any cross-subsidization in which Comsat is permitted to engage. We believe that the tentative proposals for changes in Comsat's accounting system that we made in the Comsat Study will provide a basis to develop such measures. In the Comsat Study, we proposed changes in Comsat's accounting system that would provide the Commission with information for measuring Comsat's operations (e.g., revenues, expenses, investment).[45] To supplement these changes, we believe that Comsat should be required to show sufficient detail in its accounting system to enable separate identification of expenses and investment attributable to its INTELSAT and INMARSAT lines of business. The purpose of this requirement would be to keep any cross-subsidization between Comsat's INTELSAT AND INMARSAT investments as visible as possible and permit the Commission to monitor the effects of such cross-subsidization on a continuing basis.

42. We request comments from interested parties on specific accounting requirements that should be imposed on Comsat. We will make any such comments part of the record in Docket No. 80–634 and consider them in formulating comprehensive proposals for changes in Comsat's accounting system.[46]

C. Procedural Schedule

43. As in our initial notice in this proceeding, we instruct the Chief, Common carrier Bureau, to supplement the record by obtaining any information necessary for the conduct of this proceeding and consideration of the issues posed in this further notice. In view of the national interest and foreign policy concerns necessitating expeditious consideration of these issues, we will strictly adhere to the procedural deadlines established in this further notice.

44. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceedings. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 CFR 1.1231.

45. Accordingly, it is ordered, that, pursuant to sections 4 (i) and 4 (j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) (1976) and section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553 (b) (1970), a further notice of proposed rulemaking into the above-captioned matter is instituted.

46. It is further ordered, that interested parties may file comments on or before

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[43] The INMARSAT Council still has before it a number of open questions with respect to the first generation INMARSAT space segment; *e.g.*, the feasibility of deploying MAREC's in the IOR. We understand that such questions will be addressed at the INMARSAT Council meeting to be held in London in February 1981.

[44] A decision by INMARSAT in favor of a lease arrangement for a second generation system could reduce capital investment requirements and expenses associated with providing maritime satellite communications, and thereby reduce the amount of loss that Comsat would seek to subsidize. Continued lease of space segment from INTELSAT would be by means of maritime satellite packages added on to INTELSAT VI generation satellites. INTELSAT has already developed a decision schedule for INTELSAT VI planning (BG–13 10/9/80). The schedule calls for release of the RFP in March, 1981; receipt of proposals by July, 1981; contract award in March, 1982; and delivery of the first spacecraft by March, 1986.

[45] *See* Communications Satellite Corporation, 77 FCC 2d at 719–722.

[46] Docket No. 80–634 is a rulemaking proceeding recently instituted to consider the need for any changes in Comsat's corporate structure and operation in view of our tentative findings and conclusions in the Comsat Study. *See* FCC 80–588, October 29, 1980. In our initial notice in that proceeding, we stated that we will issue a Further Notice of Proposed Rulemaking regarding changes in Comsat's accounting system and in the reporting requirements imposed on Comsat by the Commission's rules.

February 27, 1981, and reply comments on or before March 20, 1981.

47. It is further ordered, that, in accordance with the provisions of § 1.419 of the Commission's rules and regulations, all participants in the proceeding ordered herein shall file with the Commission an original and five (5) copies of all comments and reply comments. In reaching this decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. Copies of comments and reply comments filed in this proceeding shall be available for public inspection during regular business hours in the Commission's reference room at its headquarters at 1919 M street, NW., Washington, D.C.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 81-1620 Filed 1-15-81; 8:45 am]

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47 CFR Ch. I

[CC Docket No. 79-245]

American Telephone and Telegraph Co., Manual and Procedures for the Allocation of Costs; Order Cancelling Comment and Reply Comment Dates

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; Cancellation of comment and reply comment dates.

SUMMARY: This Order cancels dates established in Notice of Proposed Rulemaking in CC Docket No. 79-245, Manual and Procedures for the Allocation of Costs, for filing comments on long-term cost allocation procedures. Those dates were January 11, 1981 for initial comments and March 7, 1981 for reply comments.

DATES: Supplemental Notice will be issued which will provide dates for submitting comments on long-term cost allocation procedures.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Albert Halprin, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C. 20554 (202-632-9342).

In the matter of American Telephone and Telegraph Co., manual and procedures for the allocation of costs, CC Docket 79-245.

Order (45 FR 46121)

Adopted: December 29, 1980.

Released: January 5, 1981.

1. This Order cancels dates established in Notice of Proposed Rulemaking in CC Docket No. 79-245 (78 FCC 2d 1296), released June 26, 1980, for filing comments on long-term cost allocation procedures. Those dates were January 11, 1981 for initial comments and March 7, 1981 for reply comments.

2. The Commission adopted a Report and Order in Docket 79-245 on December 19, 1980, in which it explained that consideration of long term approaches would occur through further proceedings in this docket. Filing dates for comments will be issued in a forthcoming Supplemental Notice.

3. Accordingly it is ordered, that filing dates established in Notice of Proposed Rulemaking in CC Docket No. 79-245 for comments on long term cost allocation procedures are hereby cancelled.

4. It is further ordered, That the Secretary shall cause this Order to be published in the **Federal Register.**

Federal Communications Commission.

Philip L. Verveer,

Chief, Common Carrier Bureau.

[FR Doc. 81-1626 Filed 1-15-81; 8:45 am]

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47 CFR Part 73

[BC Docket No. 78-253]

Inquiry Into Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System; Order Extending Time for Filing Comments and Reply Comments

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment and reply comment period.

SUMMARY: This action extends time for filing comments and reply comments on the *Notice of Proposed Rule Making* in BC Docket No. 78-253, *An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System*, in response to motions filed by the National Association of Broadcasters and the Corporation for Public Broadcasting.

DATES: Comments must be filed on or before March 2, 1981, and reply comments must be filed on or before April 13, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Molly Pauker, Broadcast Bureau (202) 632-6302.

SUPPLEMENTARY INFORMATION:

Adopted: January 8, 1981.

Released: January 12, 1981.

By the Chief, Policy and Rules Division:

1. On September 9, 1980, the Commission adopted a Notice of Proposed Rule Making, 45 FR 69178, In BC Docket No. 78-253, An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System. The deadlines for comments and reply comments were set for January 15, 1981, and March 1, 1981, respectively.

2. We have received two requests for extension of time for responsive filings. The Corporation for Public Broadcasting seeks a comment date of February 15, 1981, and the National Association of Broadcasters seeks a comment date of March 1, 1981.

3. We believe that, in view of the magnitude of the record to date and the complexity of the issues involved, that the public interest will be served by an extension of time in which all interested parties may file responsive pleadings.

4. Accordingly, it is ordered, That the date for filing comments is extended to and including March 2, 1981, and the deadline for filing reply comments is extended to and including April 13, 1981.

5. This action is taken pursuant to authority contained in Sections 4(i), 5(d)(1) and 303(r) of the Communications Act of 1934, as amended, and § 0.281 of the Commission's Rules.

Federal Communications Commission.

Henry L. Baumann,

Chief, Policy and Rules Division, Broadcast Bureau.

[FR Doc. 81-1666 Filed 1-15-81; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 81

(PR Docket No. 80-711; FCC 80-635)

Regarding Public Coast Station Replies to General Calls on Channel 16

AGENCY: Federal Communications Commission.

ACTION: Proposed Rule Making.

SUMMARY: The FCC has adopted a Notice of Proposed Rule Making relative to public coast stations answering

general calls on Channel 16. This action was prompted by a petition for rule making. The intended effect of this action is to allow public coast stations to answer general calls not addressed to it by call sign.

DATES: Comments must be received on or before February 13, 1981, and reply comments must be received on or before February 27, 1981.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Roy Carleton Howell, Private Radio Bureau, (202) 632-7175.

SUPPLEMENTARY INFORMATION:

Adopted: November 6, 1980.

Released: November 19, 1980.

By the Commision:

Background

1. On February 29, 1980, Gulf Coast Communications, Inc. (Gulf Coast) General Telephone and Electronics, and Tampa Marine Radio Service were all parties to an administrative law hearing, File Nos. 40-M-RL-28/179-M-ML-54/585-M-RL-111/79-M-RL-116; Docket 78-259, *et seq.* An important issue in this hearing was whether § 81.312(a) (6) of the Commission's Rules and Regulations is violated when a Tampa Bay, Florida public coast station answers calls on Channel 16 not addressed to it by specific call sign.

2. The Private Radio Bureau (Bureau) filed its Proposed Findings of Fact in this hearing; and, in regard to this issue as to whether § 81.312 (a) (6) is violated when a Tampa Bay public coast station answers calls on Channel 16 not addressed to it by specific call sign, the Bureau took the following position:

> Section 81.312 (a) (6) prohibits a public coast station operating on a shared frequency with another public coast station from answering a ship station until the ship station has transmitted the call sign or name of the particular coast station with which it wants to communicate. Emergency calls are excepted.[1]

3. Even though there are three public coast stations in the Tampa Bay area which share the Channel 16 frequency, nevertheless the Bureau's position on § 81.312 (a) (6) is that calls not specifically addressed to the call signs of the three Tampa Bay public coast stations may not be answered. The Bureau's position in its Proposed Findings of Fact was correctly premised on the plain meaning of § 81.312 (a) (6), which provides:

> Except in the event of an emergency involving safety, a public coast station, with respect to operation on any frequency which is used also by other coast stations within the same communication area, shall not answer, or attempt to answer, a ship station until the latter has transmitted the call sign or name of the particular coast station with which it desires to communicate.

4. Subsequently on March 27, 1980, a Petition For Emergency Stay was filed by Gulf Coast. Gulf Coast was seeking urgent relief from the severe restrictions placed on it as a result of the Bureau's interpretation of § 81.312 (a) (6) of the Commission's Rules and Regulations. Essentially, Gulf Coast considered the Bureau's interpretation of § 81.312 (a) (6) to mean that unless a vessel specifically uses its station call sign KU 2383, the call may not be answered by Gulf Coast. Thus, when a vessel calls "Marine Operator" in the Tampa area neither Gulf Coast nor any of the other public coast stations answer the call for fear of violating the subject rule. This in turn was resulting in repeated unanswered calls and lack of service to the public.

5. In response to Coast's Petition For Emergency Stay, the Bureau granted waivers to § 81.312 (a) (6) to Gulf Coast and all other public coast stations in the Tampa Bay area. The effect of these waivers was to allow public coast stations in the Tampa Bay area to answer calls from vessels, which don't use the public coast station's specific call sign. Therefore, when a vessel calls the "Marine Operator" in the Tampa Bay area, in lieu of the particular station call sign, any public coast station may answer the call. The Bureau's rationale in granting these waivers was to insure that all vessel calls were answered by a public coast station.[2]

6. In addition to Gulf Coast's Petition For Emergency Stay, it simultaneously filed a Petition for Rulemaking to amend or delete § 81.312 (a) (6) of the commission's Rules and regulations; and, this Notice of Proposed Rulemaking is in response to Gulf Coast's Petition For Rulemaking.

Proposal

7. The issue in this Notice of Prqposed Rulemaking is whether § 81.312 (a) (6) should be amended or deleted. Gulf Coat believes that if § 81.312 (a) (6) of the Commission's Rules and Regulations is amended, then the new version of the subject rule should provide the following:

> *Except in the event of an emergency involving safety, a public coast station, with respect to operation on any frequency which is used also by other coast stations within the same communication area, shall not answer, or attempt to answer, a ship station until the later has transmitted the call sign or name of the particular coast station with which it desires to communicate.* Provided, however, that this subparagraph does not apply to public coast stations providing service to Tampa Bay, Florida.[3]

The proposed amended version of § 81.312 (a) (6) by Gulf Coast would essentially exempt only public coast stations in the Tampa Bay, Florida area from the subject rule.

8. However, the crux of Gulf Coast's argument in regard to § 81.312 (a) (6) is that indeed the subject rule should be deleted. The Commission agrees with Gulf Coast's position that § 81.312 (a) (6) should be deleted.

Rationale for Deletion of § 1.312 (a) (6)

9. The Tampa Bay area is major international port. A significant proportion of imports and exports arrive in Tampa Bay and depart this area in foreign cargo vessels. A significant percentage of these foreign vessels are officered and crewed by non-English speaking crews.

> The captain of a Greek ship, for example, may only speak enough English to phonetically identify his ship by call sign and to request "Marine Operator". There is no practical method of instructing foreign flag deepwater vessels to call KUZ383 instead of Marine Operator.[4]

Insofar as many foreign vessels do not adequately employ the use of the English language, therefore § 81.312 (a) (6) is unduly restrictive; and, in turn this results in many unanswered calls from foreign vessels.

10. Gulf Coast argues that its experience is that approximately eighty percent of its calls for public correspondence service on Channel 16 are addressed to "Marine Operator" or by other names and not by call sign. Gulf Coast further argued the following:

> These calls cannot be answered under the Bureau's reading of the terms of § 81.312 (a) (6). But when a vessel calls "Marine Operator" on Channel 16 and does not receive an answer, the call is repeated and repeated again. Channel 16 then is cluttered with unanswered, repeated calls for the "Marine Operator". Each repeated unanswered call on Channel 16, of course, carries with it a finite probability (however

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[1] The Private Radio Bureau filed its Proposed Findings of Fact in the hearing February 29, 1980. Paragraph 49, p. 61 of the Proposed Findings made the preceding statement with respect to Issue (B) (4).

[2] Gulf Coast's Petition for Emergency Stay was filed simulataneously with its Petition for Rulemaking to delete or amend § 81.312(a) (6), therefore the duration of these waivers to § 81.312 (a) (6) was contingent upon the outcome of this rulemaking.

[3] See, page 7 of Gulf Coast's Petition For Rulemaking (emphasis added).

[4] See, page 4 of Gulf Coast's Petition For Rulemaking for this Hypothetical argument for deletion of § 81.312 (a) (6).

small) that a distress message could unknowingly be covered up.[5]

11. On May 12, 1980, General Telephone and electronics (General) filed comments in support of Gulf Coast's Petition For Rulemaking. General agreed with the positions of Gulf Coast and the Commission's herein. General argued that § 81.312 (a) (6) of the Commission's Rules and Regulations should be deleted. Furthermore, General made the following argument in support of its position:

"General can see no benefit from continuing the restriction in § *81.312* Subsection (a) (6). It causes a disservice to the public by restricting service only to those who use the "magic words". It adds no further protection to public coast stations from another station "jumping in" on its calls. As stated above, § *81.312* Subsection (a) (7) already provides this protection. Furthermore, § *81.312* Subsection (A) (7) recognizes that there will be times when the specified station will not answer and permits another station to answer. The rules should similarly reflect that there are times when no operator is specified. When no station is specified, any station should be permitted to answer." [6]

Conclusion

12. In view of the foregoing reasons and analyses, the Commission proposes to delete § 81.312(a)(6) in its entirety. Section 81.312(a)(6) serves only to confuse marine users, particularly foreign vessels. Furthermore, because many ship operators don't know or remember particular call signs of all public coast stations (in the Tampa Bay area for example) it is not in the public's best interest to deny that ship licensee public coast service when said licensee makes a general call on Channel 16 for "Marine Operator".

13. Authority for issuance of this Notice is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Pursuant to procedures set out in Section 1.419 of the Rules and Regulations, 47 CFR 1.419, interested persons may file comments on or before February 13, 1981, and reply comments on or before February 27, 1981. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

14. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR 1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

15. For further information concerning this rulemaking contact Roy C. Howell, Rules Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, (202) 632-7175.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

Part 81 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 81.312 [Amended]

In § 81.312 paragraph (a)(6) is removed, and reserved.

[FR Doc. 81-1662 Filed 1-15-81; 8:45 am]

BILLING CODE 5712-01-M

[5] See, page 3 of Gulf Coast's Petition For Rulemaking.

[6] See pages 3 and 4 of General Telephone's Comments In Support of (Gulf Coast's Petition) For Rulemaking (emphasis added).

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1056

[Ex Parte No. MC-19 (Sub-No. 36)]

Practices of Motor Common Carriers of Household Goods (Revision of Operations Regulations)

AGENCY: Interstate Commerce Commission.

ACTION: Denial of extension of time in notice of proposed rulemaking.

SUMMARY: The Commission intends to cancel the operational regulations now appearing in 49 CFR Part 1056 applicable to motor common carriers of household goods and to adopt new regulations in conformity with the Household Goods Transportation Act of 1980. It is intended to eliminate all regulation of household goods transportation cost estimating which pertains to the procedure or form of estimates or which require the final charges for the transportation of a shipment to be determined by an estimate. Further charges to the regulations are also intended.

Public notice of this proceeding was served October 16, 1980, and published at 45 FR 70923, October 27, 1980. In that notice, it was provided that comments by interested persons were scheduled as due 30 days from the date of publication in the **Federal Register**. That November 26, 1980, date was extended to December 11, 1980, at 45 FR 76718, November 20, 1980. A further extension of the time for filing comments in this proceeding was granted to December 31, 1980, at 45 FR 83642, December 19, 1980. A request for an additional extension of time for filing comments in this proceeding is denied by this decision.

DATES: Comments on this proceeding are due December 31, 1980. Comments received after December 31, 1980 will be given consideration if received within a reasonable time provided such consideration does not impede the decisionmaking process.

FOR FURTHER INFORMATION CONTACT: W. F. Sibbald, Jr. (202) 275-7148.

SUPPLEMENTARY INFORMATION: By petition filed December 30, 1980, Western Union Telegraph Company has requested a 30-day extension of time for filing comments in this proceeding on the basis that it was unaware of the institution of the proceeding until recently.

The comment period was extended twice, and embraced a total of 65 days, which is sufficient opportunity for notice and comment. The request is denied, but the Commission may consider late filed comments received within a reasonable time after December 31, 1980, if consideration will not interfere with the Commission's internal schedule of deliberations or the time limit set forth in Section 6 of the Household Goods Transportation Act of 1980.

It is ordered: The request for a 30-day extension of time for the filing of comments is denied.

Decided: January 7, 1981.

By the Commission, Darius W. Gaskins, Jr. Chairman.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-1573 Filed 1-15-81; 8:45 am]

BILLING CODE 7035-01-M

49 CFR Part 1109

[Ex Parte No. 393]

Standards for Railroad Revenue Adequacy

AGENCY: Interstate Commerce Commission.

ACTION: Extension of Time to Proposed Repeal of Existing Rules and Notice of Proposed Standards.

SUMMARY: In this proceeding, published at 45 FR 80150, December 3, 1980, the Commission proposed new standards for determining the adequacy of the revenues of individual railroads. The proposed new standards are intended to reflect the increased importance of railroad revenue adequacy determinations have on our exercise of jurisdiction under the Staggers Rail Act of 1980.

Comments were due on January 19, 1981, but in response to a petition filed with the Commission, a 4-day extension is being granted.

DATE: Comments are now due January 23, 1981.

ADDRESS: An original and 15 copies should be sent to: Room 5356, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder (202) 275–7693, or Bruce Stram (202) 275–7381.

SUPPLEMENTARY INFORMATION: The American Association of Railroads (AAR) have petitioned for a four day extension to January 23, 1981. In light of the briefness of the requested extension and the substantial difficulties the AAR has encountered in developing its comments, the petition shall be granted.

Decided: January 12, 1981.

By the Commission, Darius W. Gaskins, Jr., Chairman.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-1671 Filed 1-15-81; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 230

Taking of Bowhead Whales by Indians, Aleuts, or Eskimos for Subsistence Purposes

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rulemaking.

SUMMARY: At its 32nd Annual Meeting held in Brighton, England, in July 1980, the International Whaling Commission (IWC) adopted an amendment to the Schedule of the International Convention for the Regulation of Whaling, 1946 (Convention), which established a three-year quota for the taking of the Bering Sea stock of bowhead whales for calendar years 1981, 1982, and 1983 of 45 landed or 65 struck, whichever occurs first, with a maximum of 17 landed in any year. All amendments to the Schedule of the Convention adopted by the 32nd Annual Meeting, including the three-year quota, became effective on November 25, 1980. 45 FR 85031 (December 24, 1980).

On March 28, 1980, the National Oceanic and Atmospheric Administration (NOAA) promulgated regulations under the Whaling Convention Act of 1949, 16 U.S.C. 916 et seq. (Act), which allocated the then available 1980 quota among the nine Alaskan villages which engage in subsistence whaling (45 FR 20486). These proposed rules amend these regulations to implement the 1981, 1982, and 1983 management program.

DATE: Comments may be submitted on or before February 27, 1981.

ADDRESS: Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT: Mr. Richard B. Roe, Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235, Telephone: (202) 634–7461.

SUPPLEMENTARY INFORMATION: Prior to 1977, the IWC Schedule exempted the native subsistence harvest of bowhead whales from its otherwise total prohibition of the hunting of bowheads. In 1977, the IWC removed that exemption and has established annual quotas each year from 1977 through 1980. In 1980, the quota was 18 landed or 26 struck, whichever came first.

Recent scientific analyses have indicated that the bowhead whale population may decline even in the absence of any further hunting. Thus, a sustained harvest of bowhead whales at current levels over an extended period of time could endanger the herd and jeopardize the Eskimos' own interests.

At the 32nd Annual Meeting of the IWC, the United States proposed a transition period priorto lowering hunt levels during which NOAA and the Department of the Interior would cooperate with the Eskimos in developing and studying the implications of more biological evidence, exploring subsistence alternatives, and improving hunting practices and weapons to increase the efficiency of the hunt. The IWC responded by establishing a three-year block quota, beginning in 1981, of 45 whales landed or 65 struck, whichever occurs first, with the maximum landed in any one year of 17.

On October 22, 1980, NOAA published an advance notice of proposed rulemaking regarding implementing the three-year quota (45 FR 70032). With respect to the proposed rulemaking, NOAA invited comments on how the quota should be allocated over the three-year period, how the quota should be allocated among the villages, and how takings over or under annual allocations should affect the remaining quota.

Eight comments were received. They reflect a broad range of views on implementation on the quota, Eskimo cooperation, jurisdictional issues, changes in the quota, and efficiency of the harvest.

Three commenters urged that Eskimo cooperation in all aspects of the harvest be given primary concern. NOAA recognizes this as one of its highest priorities and will continue to work toward that end.

There was one comment that no regulation should be issued until the question of jurisdiction of the International Whaling Commission (IWC) over subsistence whaling has been judicially resolved. The government currently is involved in litigation of this question, *Adams* v. *Klutznick*, Civil No. A78–184 (D. Alaska). Its position is that the IWC has jurisdiction and it will continue to regulate whaling under the Act as it has in the past, unless there is a disposition of this case to the contrary. One commenter suggested that regulation should be proceeding simultaneously under the Marine Mammal Protection Act of 1972 (MMPA) to be available in the event the courts find that the IWC does not have jurisdiction. NOAA does not intend to institute MMPA hearings at this time. More expeditious regulatory approaches are likely to be available if necessary.

There were several comments regarding the IWC quota itself. One commenter wanted it raised. Another urged that single figure quotas be adopted, and a third wanted a zero quota. A fourth took the position that quotas should be determined under MMPA. After taking into account opposing views, the U.S. Government

has accepted the quota adopted by the IWC, and does not intend through this regulatory process to reopen debate on the quota itself.

The block quota is allocated among the three years to provide a realistic perspective on how the quota might be gradually reduced over a three year period and to provide for planning for ways to mitigate the adverse affects of reducing the quota. It is important to note, however, that flexibility is also provided for in the proposed regulations. The bowhead hunt is unpredictable, affected by widely varying climatic conditions. Inclement weather or adverse ice conditions may prevent some villages from taking any whales in one year or may preclude harvest by any village for one year. The regulatory system must have flexibility to be able to respond to the variable conditions in which the hunt is conducted. Therefore, unused quotas from one village may be reallocated to another village within annual quota limitations and unused quotas from one year may be allocated to subsequent years within the maximum of 17 whales in any one year. Therefore the quotas will be reviewed at the end of each spring and fall whaling season and amended if appropriate.

Comments reflected concern about enforcement of the quota. Two commenters suggested the 1981 quota be reduced by the number of whales struck in excess of the 1980 quota. Possible violations of the 1980 quotas are under investigation by the Department of Justice at this time. No other action which must be characterized as punitive will be taken during this investigation.

With regard to the 3-year quota two commenters suggested that whales taken in excess of village quotas in one year be subtracted from that village's quota in subsequent years. Violations of village quotas under the three year block quota will be taken into consideration in subsequent years to the extent that, when either 45 whales are landed or 65 are struck, further whaling will be prohibited. Two commenters who believe we should adopt quotas lower than the IWC quota urged we not reassign unused quotas as a means of reducing the quota. One commenter urged us to reassign quotas. Because we do not intend to reduce the quota below that adopted by the IWC we will consider reassigning unused portions until the IWC quota has been reached.

Another large group of comments concerned the efficiency of the hunt. The government, in cooperation with the Eskimos, is committed to employing all possible ways to achieving efficiency. Studies are planned for completion this year to improve hunting gear and methods, and we believe it is premature at this time to consider issuing regulations on this issue before we can review the results of our efforts.

The comments concerning the efficiency of the hunt which we will not adopt at this time include imposition of license fees, and numbering weapons. One commenter supported license fees because the Act does not limit the fees to commercial operations only, because the costs associated with monitoring the catch are as great with subsistence as with commercial catch, and because a license fee would reduce whaling effort. We maintain our previous position that these fees are not appropriate in the case of subsistence harvest. The fact that the Act does not address different kinds of whaling activities is not dispositive. We do not believe it appropriate to charge fees for taking animals where no profit is involved, when the whales taken constitute an important, historic element of the Eskimos diet, and where the hunt is of central importance to the cultural fabric of the community. There is a significant difference between this kind of harvest which involves subsistence and tradition, and one which is conducted for commercial profit or for sport. We disagree that the licensing fees would be an effective means of reducing effort. As noted above, the Eskimos and the government are committed to a cooperative effort to improve the efficiency of the hunt. We believe this cooperative effort is more effective than imposing a fee for cultural and subsistence uses.

Another suggestion is that each harpoon and darting gun dart be sequentially numbered before the spring hunt to obtain a rough index of the magnitude and efficiency of the hunt and to provide information regarding the number of harpoons needed to kill individual whales. the commenter believed this would be feasible because all weapons come from one source in Pennsylvania. We conjecture that this commenter envisions a system in which all weapons would be numbered prior to the hunt, and the difference between that total number and the number remaining at the end of the hunt would reflect and efficiency.

The value of numbering weapons has been extensively examined in the past and found to be too full of obstacles to be of merit. While it is true that the bombs are all manufactured in one location, there is no single inventory of bombs. There are existing supplies of bombs and gear which create the same problem as an open market. Harpoons are not manufactured in one place and there is no control over their source. Moreover, even if there were controlled conditions regarding weapons, we do not believe the procedure would result in usable data. Weapons are lost in ways other than insertion into a bowhead whale. Gear may be lost overboard or used for other hunting purposes. In summary, the difficulties involved in implementing a numbering system outweigh the value of the information collected.

Another commentor suggested harvest be limited to immature animals. By accepting IWC jurisdiction over bowhead whaling, we have deferred to its discretion in imposing limits. We see no reason to impose such a restriction that the IWC did not believe necessary to adopt. Furthermore, most animals taken are immature and there is little to be gained by adding such a regulation.

Another suggestion was that the regulations required by the Administrator to suspend licenses from whaling captains who intentionally or negligently fail to comply with the regulations. This comment was received last year and no new reasons were put forth for its adoption. We do not believe there is any reason to narrow the Administrator's prosecutorial discretion in this manner.

The comments have been taken into consideration in developing these proposed regulations.

Regulations in effect during 1978, 1979, and 1980 allocated the available quotas to nine whaling villages. There is no substantive difference between the regulations established for 1980 and those proposed for 1981 through 1983 other than total quotas.

Total proposed quotas are 17 landed or 25 struck, whichever occurs first, for calendar year 1981; 15 landed or 22 struck, whichever occurs first, for calendar year 1982; and 13 landed or 18 struck, whichever occurs first, for calendar year 1983.

Village allocations proposed herein reflect the preference of distribution originally suggested by the Alaska Eskimo Whaling Commission in 1978 with ratios being preserved as closely as possible.

In order to assure participation from those members of the public sector affected by the proposed regulation, NOAA will send copies of the proposed regulation directly to the Alaska Eskimo Whaling Commission, the village councils of Savoonga, Gambell, Wales, Kivalina, Point Hope, Wainwright, Barrow, Kaktovik, and Nuigsut, and U.S. conservation organizations.

Note.—The Department of Commerce has determined that no environmental impact

statement needs to be prepared in connection with these regulations. The National Marine Fisheries Service has determined that this document does not contain a major proposal requiring preparation of a regulatory analysis under Executive Order 12044.

A Final Environmental Impact Statement (FEIS), October 1977, a Final Supplement to the FEIS, March 1979, an Environmental Assessment of the 1980 regulations, and an Environmental Assessment of the 1981 through 1983 regulations are available upon request from the Information Contact previously indicated.

1. 50 CFR Part 230 is proposed to be amended by revising Section 230.10(b) to read as follows:

§ 230.10 Licenses required to engage in whaling.

* * * * *

(b) No permit or license shall be issued except as provided in § 230.13 and §§ 230.70 through 230.77. Licenses issued under § 230.73 shall be governed solely by the requirements of §§ 230.70 through 230.77.

2. 50 CFR Part 230 is proposed to be amended by revising §§ 230.70–230.77 and the undesignated center heading to read as follows:

Subsistence

Sec.
230.70 General.
230.71 Definitions.
230.72 Prohibited acts.
230.73 Licenses.
230.74 Quotas.
230.75 Salvage of stinkers.
230.76 Reporting by whaling captains.
230.77 Penalties.

Authority: Whaling Convention Act (WCA 16 U.S.C. 916a–1).

Subsistence

§ 230.70 General.

The provisions of §§ 230.70 through 230.77 govern subsistence whaling for bowhead whales.

§ 230.71 Definitions.

As used in §§ 230.70 through 230.77 of this Part 230:

(a) "Assistant Administrator" means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration;

(b) "Bowhead" means a whale of the Bering Sea stock of bowhead whales; *Balaena mysticetus;*

(c) "Calf" means any bowhead which is less than 21 feet in length as measured from the point of the upper jaw to the notch between the tail flukes;

(d) "Landing" means bringing a bowhead or any parts thereof onto the ice or land in the course of whaling operations;

(e) "Whaling captain" or "captain" means any Indian, Aleut, or Eskimo domiciled in a whaling village who is in charge of a vessel and a whaling crew;

(f) "Stinker" means a dead unclaimed bowhead found upon a beach, stranded in shallow water, or floating at sea;

(g) "Strike" means hitting a bowhead with a harpoon, lance, or explosive dart;

(h) "Whaling" means the hunting, striking, harassing, killing, or landing of bowheads, but does not include the salvage or processing of any stinker;

(i) "Whaling crew" means those persons under the control of a captain, who collectively participate as a unit in whaling;

(j) "Whaling village" means any of the villages of Gambell, Savoonga, Wales, Kivalina, Point Hope, Wainwright, Barrow, Nuigsut, and Kaktovik in the State of Alaska; and

(k) "Wasteful manner" means a method of whaling which is not likely to result in the landing of a struck bowhead or which does not include all reasonable efforts to retrieve the bowhead.

§ 230.72 Prohibited acts.

(a) No person shall engage in whaling except a whaling captain licensed pursuant to § 230.73 or a member of a whaling crew under the control of a captain.

(b) No whaling captain shall engage in whaling for any calf or any bowhead whale accompanied by a calf.

(c) No whaling captain shall engage in whaling in a wasteful manner.

(d) No whaling captain shall engage in whaling without an adequate crew or without adequate supplies and equipment.

(e) No person may receive money for participation in native subsistence whaling.

(f) No whaling captain shall continue to whale after, (1) the quota set forth in § 230.74 for his village of domicile is reached, or (2) the license under which he is whaling is suspended as proved in § 230.73(b), or (3) the Assistant Administrator has declared that the whaling season is closed pursuant to § 230.74(c).

(g) No whaling captain shall claim domicile in more than one whaling village during any given calendar year.

(h) No person may salvage a stinker without complying with the provisions of § 230.75.

(i) No whaling captain shall engage in whaling with a harpoon, lance, or explosive dart which does not bear a permanent distinctive mark identifying the captain as the owner thereof.

§ 230.73 Licenses.

(a) A license is hereby issued to whaling captains.

(b) The Assistant Administrator may suspend the license of any whaling captain who fails to comply with these regulations.

§ 230.74 Quotas.

(a) During the calendar year 1981, the quota for bowheads is allocated among whaling villages as follows:

(1) Savoonga—2 whales landed or 3 struck, whichever occurs first;
(2) Gambell—2 whales landed or 3 struck, whichever occurs first;
(3) Wales—1 whale landed or 1 struck, whichever occurs first;
(4) Kivalina—1 whale landed or 1 struck, whichever occurs first;
(5) Pt. Hope—2 whales landed or 3 struck, whichever occurs first;
(6) Wainwright—2 whales landed or 3 struck, whichever occurs first;
(7) Barrow—4 whales landed or 7 struck, whichever occurs first;
(8) Kaktovik—2 whales landed or 3 struck, whichever occurs first;
(9) Nuigsut—1 whale landed or 1 struck, whichever occurs first;
(Totals)—(17) whales landed or (25) struck.

(b) During the calendar year 1982, the initial quota for bowheads is allocated as follows:

(1) Savoonga—2 whales landed or 3 struck, whichever occurs first;
(2) Gambell—2 whales landed or 3 struck, whichever occurs first;
(3) Wales—1 whale landed or 1 struck, whichever occurs first;
(4) Kivalina—1 whale landed or 1 struck, whichever occurs first;
(5) Pt. Hope—2 whales landed or 3 struck, whichever occurs first;
(6) Wainwright—2 whales landed or 3 struck, whichever occurs first;
(7) Barrow—4 whales landed or 6 struck, whichever occurs first;
(8) Kaktovik—1 whale landed or 2 struck, whichever occurs first;
(9) Nuigsut—0 whales landed or 0 struck;
(Totals)—(15) whales landed or (22) struck.

(c) During the calendar year 1983, the initial quota for bowheads is allocated as follows:

(1) Savoonga—2 whales landed or 3 struck, whichever occurs first;
(2) Gambell—2 whales landed or 3 struck, whichever occurs first;
(3) Wales—1 whale landed or 1 struck, whichever occurs first;
(4) Kivalina—0 whales landed or 0 struck;
(5) Pt. Hope—2 whales landed or 3 struck, whichever occurs first;
(6) Wainwright—1 whale landed or 1 struck, whichever occurs first;
(7) Barrow—4 whales landed or 6 struck, whichever occurs first;
(8) Kaktovik—1 whale landed or 1 struck, whichever occurs first;
(9) Nuiqsut—0 whales landed or 0 struck;
(Totals)—(13) Whales landed or (18) struck.

(d) If, for any reason, the landing or struck quota for whaling villages is not reached in any given year, the unused part of the quota may be reassigned to succeeding years to the extent that the total bowheads permitted to be landed or struck in 1982 or 1983 shall not exceed those prescribed for 1981 (17 landed or 25 struck, whichever occurs first) and that the 3-year total will not exceed 45 bowheads landed or 65 bowheads struck.

(e) When the number of bowheads struck or landed by whaling captains domiciled in a whaling village as set forth in paragraphs (a), (b), and (c) of this Section, whaling by all captains domiciled in that whaling village shall cease. All license holders shall be notified promptly by the Assistant Administrator for Fisheries using all reasonable means of communication. Licenses held by whaling captains domiciled in a whaling village which has reached its quota shall not be valid for the remainder of the calendar year after the quota for that whaling village has been reached.

(f) The Assistant Administrator for Fisheries shall monitor the bowhead whale hunt and keep tally of the number of bowheads landed and struck. When the number of bowhead whales landed or struck reaches the sum total of the village allocations set forth in § 230.74(a), (b), or (c) for the appropriate calendar year, the Assistant Administrator for Fisheries may declare that the whaling season is closed and there shall be no further whaling during that calendar year. Closure shall become effctive upon receipt by the **Federal Register** of notice by the Assistant Administrator for Fisheries that the season has been closed pursuant to this regulation.

(g) If for any reason the landing or struck quota for whaling villages is not reached, the part of the quota which remains may be reassinged by the Assistant Administrator to a second whaling village for the same calendar year: Provided, that if any other whaling village has exceeded its quota, the Assistant Administrator shall not reassign the quota if he determines that it is likely to result in the total number of whales landed or struck exceeding 17 landed or 25 struck, whichever occurs first and that the 3-year total will not exceed 45 landed or 65 struck. In making such reassignment, the Assistant Administrator shall consult with representatives of as many whaling villages as time reasonably permits.

§ 230.75 Salvage of stinkers.

(a) Any person salvaging a stinker shall submit to the Assistant Administrator or his representative an oral or written report describing the circumstances of the salvage within 12 hours of such salvage. He shall provide promptly to the Assistant Administrator or his representative each harpoon, lance, or explosive dart found in or attached to the stinker. The device shall be returned to the owner thereof promptly unless it is retained as evidence of a possible violation.

(b) There shall be a rebuttable presumption that a stinker has been struck by the captain whose mark appears on the harpoon, lance, or explosive dart found in or attached thereto, and, if no strike has been reported by such captain, such strike shall be deemed to have occurred at the time of recovery of the device.

§ 230.76 Reporting by whaling captains.

(a) A representative of the Assistant Administrator may request each whaling captain licensed pursuant to § 230.73 to provide written statement of his name and village of domicile and a description of the distinctive marking to be placed on each harpoon, lance, and explosive dart. Representatives of the Assistant Administrator may provide each captain with a form approved by the Assistant Administrator to facilitate reporting under this paragraph.

(b) Each whaling captin shall provide to appropriate representatives, on request, an oral or written report of whaling activities including but not limited to the striking, attempted striking, or landing of a bowhead whale and, where possible, specimens from landed whales. The Assistant Administrator is authorized to provide technoligical assistance to facilitate prompt reporting and collection of specimens from landed whales, including but not limited to ovaries, ear plugs, and baleen plates. The report shall include at least the following information:

(1) The number, dates, and locations of every strike, attempted strike, or landing;

(2) The length (as measured from the point of the upper jaw to the notch between the tail flukes), the extreme width of the flukes, and the sex of the bowhead(s) landed;

(3) The length and sex of a fetus, if present, in a landed bowhead whale;

(4) An explanation of circumstances associated with the striking or attempted striking of any bowhead whale not landed; and

(5) The number of bowhead whales sighted by the whaling captain or any member of the whaling crew.

§ 230.77 Penalties.

Any person who whales in contravention of these regulations, or violates any other provision of the Whaling Convention Act shall be subject to the penalties set forth in 16 U.S.C. 916e and 916f, and any other penalties provided by law.

Dated: December 29, 1980.

William Stevenson,

Deputy Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 81-1455 Filed 1-15-81; 8:45 am]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 46, No. 11
Friday, January 16, 1981

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

Food and Nutrition Service

Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools; Income Poverty Guidelines

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: The Department announces new guidelines to be used by schools participating in the National School Lunch, School Breakfast, and the Special Milk Programs, and commodity only schools in determining a child's eligibility for free and reduced price meals and free milk for the remainder of this fiscal year (through September 30, 1981). These new guidelines differ from previous guidelines in three ways: (1) they are based on Office of Management and Budget guidelines that are *not* adjusted by the Department; (2) they remove the hardship provisions; and (3) in place of the hardship provisions, they include a standard deduction. The Department is required by Public Law 96–499 to make these changes in the guidelines. These changes will affect the eligibility of some children for free and reduced price meals and free milk.

EFFECTIVE DATE: January 1, 1981.

IMPLEMENTATION DATE: See dates in Supplementary Information below and in Emergency Final Rules published in the Rules and Regulations Section of today's Federal Register.

FOR FURTHER INFORMATION CONTACT: Stanley C. Garnett, Branch Chief, Policy and Program Development Branch, School Programs Division, USDA, FNS, Washington, D.C. 20250, (202) 447–9069. The Impact Analysis Statement is available from Mr. Garnett.

SUPPLEMENTARY INFORMATION:

Classification

This notice has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified as "not significant".

Background

The Department requires schools that charge for meals and mik separately from other fees to serve free meals and, at the option of the School Food Authority, free milk to all children from any family whose income is at or below 125 percent of the income level specified by the Department for that family's size. The Department also requires schools that charge for meals separately from other fees to serve reduced price meals to all children from any family whose income is more than 125 percent of the income level specified by the Department for that family's size but at or below 195 percent of that income level.

Definition of Income

There is no change in the definition of income. "Income", as the term is used in this notice, is similar to that defined in the Bureau of the Census report, "Characteristics of the Low-Income Population: 1971," Current Population Reports, series P–60, No. 86, December 1972. "Income" means income before deductions for income taxes, employees' socila security taxes, insurance premiums, bonds, etc. It includes the following: (1) Monetary compensation for services, including wages, salary, commissions, or fees; (2) net income from nonfarm self-employment; (3) net income from farm self-employment; (4) social security; (5) dividends or interest on savings or bonds, income from estates or trusts, or net rental income; (6) public assistance or welfare payments; (7) unemployment compensations; (8) Government civilian employee, or military retirement, or pensions or veterans' payments; (9) private pensions or annuities; (10) alimony or child support payments; (11) regular contributions from persons not living in the household; (12) net royalties; and (13) other cash income. Other cash income would include cash amounts received or withdrawn from any source including savings, investments, trust accounts, and other resources which would be available to pay the price of a child's meal.

"Income", as the term is used in this notice, does not include any income or benefits received under any Federal program which are excluded from consideration as income by any legislative prohibition, for example, income received by volunteers for services performed in the National Older Americans Volunteer Program as stipulated in the Domestic Volunteer Service Acts of 1973, Pub. L. 93–113, Title IV, c 418 (87 Stat. 413, 42 U.S.C. 5058). Furthermore, the value of assistance to children or their families shall not be considered as income if prohibited by the authorizing legislation, e.g., the National School Lunch Act, the Child Nutrition Act of 1966, and the Food Stamp Act of 1964.

In applying guidelines, a School Food Authority may consider both the income of the family during the past 12 months and the family's current rate of income to determine which is the better indicator of the need for free and reduced price meals and free milk. However, if one or more of a child's parents or guardians become unemployed and the family's income drops due to this unemployment so that the child should be eligible for free or reduced price meals and free milk, during the period of unemployment the School Food Authority shall provide that child with the type of meal for which the child is eligible.

Elimination of Secretary's Adjustment of Office of Management and Budget Guidelines

Section 11(b)(1) of the National School Lunch Act requires the Secretary to issue income poverty guidelines based on the nonfarm income poverty guidelines issued by the Office of Management and Budget (OMB) adjusted to reflect changes in the Consumer Price Index between the previous calendar year and March of the calendar in which the Secretary's guidelines would become effective. The Department generally issues the guidelines to be effective July 1. Thus the guidelines, when effective, are only three months behind changes in prices. Public Law 96–499, which became law on December 5, 1980, deletes this

adjustment for the remainder of fiscal year 1981. Therefore, the guidelines contained in the notice reflect the average of the Consumer Price Index for 1980 without the above described adjustment.

Replacement of Hardship Provisions with Standard Deduction

In the past, the Department allowed a family to deduct from its stated income the cost of certain "hardship" conditions that could not be reasonably anticipated or controlled by the household. The hardship conditions were: (1) unusually high medical expenses; (2) shelter costs in excess of 30 percent of income; (3) special education expenses due to the mental or physical condition of a child; and (4) disaster or casualty losses.

Pub. L. 96-499 deletes these hardship conditions for the remainder of fiscal year 1981. In their place, the law establishes a standard deduction for all families. The standard deduction is the same amount for all States except Hawaii, Alaska, and Guam. The standard deduction is adjusted to reflect the higher cost of living in those States and in Guam. The Department has included all appropriate standard deductions in the attached guidelines.

Implementation

Requirements for implementation of these new guidelines are set forth in the amendments made to 7 CFR 245.3 appearing in today's Rules and Regulations Section of the **Federal Register**. These changes in the income guidelines will expire on September 30, 1981.

No School Food Authority is required to amend its free and reduced price policy statement as a result of this notice.

The new guidelines are also intended to apply to independent centers and sponsoring organizations of centers which participate in the Child Care Food Program (7 CFR Part 226) or Special Milk Program (7 CFR Part 215). The Department will shortly issue a separate notice that will apply the new guidelines to these institutions.

New Guidelines

The following are the new income poverty guidelines to be effective until September 30, 1981. These guidelines include the standard deduction which replaces all hardship deductions.

Income Poverty Guidelines.—*Feb. 1, 1981—Sept. 30, 1981*

[48 States, District of Columbia, Territories Excluding Guam]

Family size	Poverty level			125 percent of poverty			195 percent of poverty		
	Year	Month	Week	Year	Month	Week	Year	Month	Week
1	$4,750	$396	$91	$5,700	$475	$110	$8,350	$696	$161
2	5,970	498	115	7,220	602	139	10,730	894	206
3	7,190	599	138	8,750	729	168	13,110	1,093	252
4	8,410	701	162	10,270	856	198	15,490	1,291	298
5	9,630	803	185	11,800	983	227	17,870	1,489	344
6	10,850	904	209	13,320	1,110	256	20,250	1,688	389
7	12,070	1,006	232	14,850	1,238	286	22,620	1,885	435
8	13,290	1,108	256	16,370	1,364	315	25,000	2,083	481
For each additional family member add	1,220	102	23	1,530	128	29	2,380	198	46
ALASKA									
1	3,960	497	115	7,150	596	138	10,480	873	202
2	7,480	623	144	9,050	754	174	13,450	1,121	259
3	9,000	750	173	10,950	913	211	16,410	1,368	316
4	10,520	877	202	12,850	1,071	247	19,370	1,614	373
5	12,040	1,003	232	14,750	1,229	284	22,340	1,862	430
6	13,560	1,130	261	16,650	1,388	320	25,300	2,108	487
7	15,080	1,257	290	18,550	1,546	357	28,270	2,356	544
8	16,600	1,383	319	20,450	1,704	393	31,230	2,603	601
For each additional family member add	1,520	127	29	1,900	158	37	2,960	247	57
HAWAII AND GUAM									
1	5,450	454	105	6,540	545	126	9,600	800	185
2	6,650	571	132	8,290	691	159	12,330	1,028	237
3	8,250	688	159	10,040	837	193	15,060	1,255	290
4	9,650	804	186	11,790	983	227	17,790	1,483	342
5	11,050	921	213	13,540	11,128	260	20,520	1,710	395
6	12,450	1,038	239	15,290	1,274	294	23,250	1,938	447
7	13,850	1,154	266	17,040	1,420	328	25,980	2,165	500
8	15,250	1,271	293	18,790	1,566	361	28,710	2,393	552
For each additional family member add	1,400	117	27	1,750	146	34	2,730	228	53

NOTE.—Do not allow hardship deductions from the above income poverty guidelines. The standard deduction has been included in all of the above income levels.

National Average Minimum Value of Donated Foods for the Period January 1, 1981, through June 30, 1981

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice of reduction in level of commodity assistance.

SUMMARY: This notice announces a reduction in the level of assistance per lunch under the National School Lunch Program, and per lunch and supper under the Child Care Food Program, for the period January 1, 1981 through June 30, 1981.

FOR FURTHER INFORMATION CONTACT: Gwena Kay Tibbits, Chief, Program Monitoring and Policy Development Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-8386.

SUPPLEMENTARY INFORMATION: Pursuant to sections 6(e) and 17(h) of the National School Lunch Act, as amended, and the regulations governing the Food Distribution Program (7 CFR Part 250) and Cash in Lieu of Commodities (7 CFR Part 240), notice was given in the **Federal Register** of Friday, August 15, 1980 (45 FR 54386) that the national average minimum value of donated foods, or cash in lieu thereof, per lunch under the National School Lunch Program (7 CFR Part 210) and per lunch and supper under the Child Care Food Program (7 CFR Part 226), was to be 15.50 cents for the period July 1, 1980 through June 30, 1981. This value was derived at by applying the annual percentage change in a three-month simple average value of the Price Index Used in Schools and Institutions for March, April and May of 1980 (from 230.9 in 1979 to 228.5 in 1980). The Index, prescribed in section 5(b) of Pub. L. 96-627, is computed using five major food components in the Bureau of Labor Statistics' Producer Price Index (cereal and bakery products, meats, poultry, and fish, dairy products, processed fruits and vegetables, and fats and oils). Each component is weighted using the same relative weight as determined by the Bureau of Labor Statistics.

Section 202(a) of Pub. L. 96-499, enacted December 5, 1980, provides that for the fiscal year ending September 30, 1981, the mandated level of commodity assistance under section 6(e) of the National School Lunch Act shall be

reduced by 2 cents after the required adjustment per Index changes has been made. This reduction shall become effective on January 1, 1981. Thus, the level of assistance for the period July 1, 1980, through December 31, 1980 remains at 15.50 cents per meal. For the period January 1, 1981 through June 30, 1981, the 2-cent reduction will be applied to the 15.50 cent rate of assistance, making the new level 13.50 cents per meal. Because the level of assistance required under section 6(e) is determined on a school-year basis, a new level of assistance will take effect on July 1, 1981 on the basis of 1980–1981 changes in the Price Index for Schools and Institutions, and the 2-cent reduction will be applied to that rate from July 1, 1981 through September 30, 1981.

(Sec. 202, Pub. L. 96–499, 95 Stat. 2599.)
(Catalog of Federal Domestic Assistance Nos. 10.555 and 10.556)

Effective Date: This notice is effective as of January 1, 1981.

Dated: January 8, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81-1303 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-30-M

Forest Service

Mill Creek Wilderness Study Area, Jefferson National Forest, Giles County, Va.; Intent To Prepare an Environmental Impact Statement

Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 (Pub. L. 91–190), the Forest Service, Department of Agriculture, will prepare an environmental impact statement for determining the suitability or nonsuitability of the Mill Creek Wilderness Study Area for preservation as wilderness.

Preparation of an environmental impact statement is a required part of the process in determining the suitability of Congressionally-designated Wilderness Study Areas. The Mill Creek Wilderness Study Area was so designated by Congress in the Eastern Wilderness Act of 1975 (Pub. L. 93–622). The Study Area encompasses approximately 4,000 acres on the Blacksburg Ranger District, Jefferson National Forest, Southern Region.

A range of alternatives for the area will be considered. One of them will be a no-action (no change) alternative which will be to continue present management of the area. Other alternatives will consider different management options for portions of the area—ranging from a non-wilderness to a wilderness classification.

The draft environmental impact statement will incorporate input from local, state and Federal agencies that have an interest in the area or specific knowledge that will be useful in the study process. University personnel with expertise in specific fields will be consulted.

Public input from citizen workshops and RARE II hearings that were held to discuss wilderness study areas will be included in the study, as will comments from interested individuals or organizations.

A public hearing on the draft environmental impact statement and the suitability of the Study Area for preservation as wilderness will be held in the Summer of 1981. Adequate notice of the hearing will be published in local newspapers prior to the hearing. At least 30 days before the date of the hearing, the Governor of Virginia, the governing board of Giles County, and Federal departments and agencies concerned with the area will be invited to submit their views on the proposed action at the hearing or by no later than 30 days following the date of the hearing. The draft environmental impact statement should be available for public review in the Summer of 1981, with a 3-month review period. The final environmental impact statement is scheduled for filing by December 1981.

R. Max Peterson, Chief of the Forest Service, is the official responsible for the environmental impact statement. The Secretary of Agriculture will make his recommendation based on this analysis. Written comments and suggestions concerning this notice of intent or the proposal should be sent to Forest Supervisor, Jefferson National Forest, 210 Franklin Road, Roanoke, Virginia 24001, by February 15, 1981.

For further information about the proposal or the environmental impact statement or other documents relevant to the proposal, contact: Charles Blankenship, Jefferson National Forest, 210 Franklin Road, Roanoke, Virginia 24001 (Phone 703–982–6270).

Dated: January 6, 1981.

J. Lamar Beasley,

Acting Chief, Forest Service.

[FR Doc. 81-1346 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-11-M

Mountain Lake Wilderness Study Area, Jefferson National Forest, Craig and Giles Counties, Va., Monroe County, W. Va.; Intent To Prepare an Environmental Impact Statement

Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 (Pub. L. 91–190), the Forest Service, Department of Agriculture, will prepare an environmental impact statement for determining the suitability or nonsuitability of the Mountain Lake Wilderness Study Area for preservation as wilderness.

Preparation of an environmental impact statement is a required part of the process in determining the suitability of Congressionally-designated Wilderness Study Areas. The Mountain Lake Wilderness Study Area was so designated by Congress in the Eastern Wilderness Act of 1975 (Pub. L. 93–622). The Act identified the Study Area as encompassing 8,400 acres. Corrected acreage, according to resource data, is 11,827 acres. There are 1,543 acres in the Study Area classified as the Mountain Lake Scenic Area, which was established in 1960 by the Regional Forester, Southern Region under the authority of Regulation U–3 to protect and maintain the scenic resource. The Study Area is located on the Blacksburg Ranger District, Jefferson National Forest, Southern Region.

A range or alternatives for the area will be considered. One of them will be a non-action (no change) alternative which will be to continue present management of the area. Other alternatives will consider different management options for portions of the area—ranging from a non-wilderness to a wilderness classification.

The draft environmental impact statement will incorporate input from local, state and Federal agencies that have an interest in the area or specific knowledge that will be useful in the study process. University personnel with expertise in specific fields will be consulted. Public input from citizen workshops and RARE II hearings that were held to discuss wilderness study areas will be included in the study, as will comments from interested individuals or organizations.

A public hearing on the draft environmental impact statement and the suitability of the Study Area for preservation as wilderness will be held in the Summer of 1981. Adequate notice of the hearing will be published in local newspapers prior to the hearing. At least 30 days before the date of the hearing, the Governor of Virginia and West Virginia, the governing boards of Giles, Craig and Monroe Counties, and

Federal departments and agencies concerned with the areas will be invited to submit their reviews on the proposed action at the hearing or by not later than 30 days following the date of the hearing. The draft environmental impact statement should be available for public review by July 1981 with a 3-month review period. The final environmental impact statement is scheduled for filing by December 1981.

R. Max Peterson, Chief of the Forest Service, is the official responsible for the environmental impact statement. The Secretary of Agriculture will make his recommendation based on this analysis. Written comments and suggestions concerning this notice of intent or the proposal should be sent to Forest Supervisor, Jefferson National Forest, 210 Franklin Road, Roanoke, Virginia 24001, by February 15, 1981.

For further information about the proposal or the environmental impact statement, or other documents relevant to the proposal, contact: Charles Blankenship, Jefferson National Forest, 210 Franklin Road, Roanoke, Virginia 24001 (phone 703–982–6270).

Dated: January 6, 1981.

J. Lamar Beasley,

Acting Chief, Forest Service.

[FR Doc. 81-1347 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-11-M

Rural Electrification Administration

Central Power Electric Cooperative; Finding of No Significant Impact

Notice is hereby given that the Rural Electrification Administration (REA) has made a Finding of No Significant Impact which concludes that there is no need for REA to prepare an environmental impact statement in connection with construction by Central Power Cooperative (Central), of Minot, North Dakota, of approximately 51.2 km (32 miles) of 115 kV transmission line and an associated 115/69 kV transmission substation to be financed with REA loan funds.

The planned 115 kV transmission line will be built between the Department of Energy's Leeds Substation located in Benson County, North Dakota, and the proposed Agate 115/69kV transmission substation to be located in Towner County, North Dakota. Central has prepared a Borrower's Environmental Report (BER) concerning the proposed project. REA has reviewed the BER and determined that it represents an accurate assessment of the environmental impact of the project. REA has prepared an Environmental Assessment concerning the proposed project and its impacts.

Threatened and endangered species, important farmland, archaeological and historic sites, wetlands, flood plains and potential impacts of the project are adequately considered in the BER. REA's independent evaluation of the proposed project leads it to conclude that its proposed financial assistance for this project does not represent a major Federal action that will significantly affect the qualify of the human environment.

Based on this independent evaluation and a review of Central's BER, a Finding of No Significant Impact was reached in accordance with Section IV.B and IV.D.1 of REA Bulletin 20–21:320–21, Part I.

Various alternatives to the proposed transmission line and substation were reviewed by Central and REA. The alternatives included no action, energy conservation, alternative line routes and an alternative line. After reviewing these alternatives, REA determined that the proposed 115 kV transmission line and associated substation is the best alternative for providing power to existing and future Central loads within the area.

Copies of REA's Finding of No Significant Impact and Central's BER may be reviewed in the office of the Director, Power Supply Division, Room 5829, South Agriculture Building, Rural Electrification Administration, Washington, D.C. 20250 and at the office of the cooperative, Central Power Electric Cooperative, P.O. Box 1576, Minot, North Dakota 58701.

This program is listed in the Catalog of Federal Domestic Assistance as 10.850—Rural Electrification Loans and Loan Guarantees.

Dated at Washington, D.C., this 9th day of January 1981.

Robert W. Feragen,

Administrator.

[FR Doc. 81-1669 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-15-M

Deseret Generation and Transmission Cooperative; Draft Environmental Impact Statement and Notice of Public Hearing

Notice is hereby given that the Bureau of Land Management (BLM) and the Rural Electrification Administration (REA) have jointly prepared a Draft Environmental Impact Statement (DEIS) in accordance with Section 102(2)(c) of the National Enviromental Policy Act of 1969. This action is in connection with an anticipated request for an REA loan guarantee commitment from Deseret Generation and Transmission Cooperative (Deseret), P.O. Box BB, Sandy, Utah 84070. The anticipated financial assistance would allow Deseret to secure funds for the contruction of the proposed two unit (800 MW) coal-fired steam electric Moon Lake Generating Station, Deserado Mine and associated transmission facilities. Deseret proposes to locate the generating station in Uintah County, Utah. The Deserado Mine will be located in Rio Blanco County, Colorado.

Additional information may be obtained from REA through requests submitted to Mr. Frank W. Bennett, Director, Power Supply Division, Rural Electrification Administration, U.S. Department of Agriculture, 12th and Independence Ave., S.W., Washington, D.C. 20250, (202) 447–6183. Comments are invited from the public and particularly from State and local agencies which are authorized to develop and enforce environmental standards, and from Federal agencies having jurisdiction by law or special expertise with respect to any environmental impact, from which comments have not been requested specifically.

Copies of the BLM–REA DEIS are being sent to various Federal, state and local agencies, as outlined in the Council on Environmental Quality Regulations. Copies are available upon request to the Utah State Office, Bureau of Land Management, 136 East South Temple, Salt Lake City, Utah 84111. The DEIS may be examined during regular business hours at the offices of REA in the South Agriculture Building, Room 5831, 12th And Independence Avenue, S.W., Washington, D.C. 20250, at the BLM Washington Office (WO–332), 18th and C Streets N.W., Washington, D.C. 20240, at BLM State and District Offices in Colorado and Utah, at Deseret's address, 8722 South 300 West, Sandy, Utah 89070 and at public libraries in appropriate towns in the affected counties.

All comments concerning the environmental impact of the proposed project should be addressed to: State Director (U910), Utah State Office, Bureau of Land Management, 136 East South Temple, Salt Lake City, Utah 84111. Comments must be received within forty-five (45) days from the date the Environmental Protection Agency (EPA) announces availability of the document in accordance with 40 CFR 1506.10, in order to be considered in connection with the proposed actions by BLM and REA.

Notice is also hereby given that oral and/or written comments regarding the adequacy of the DEIS can be presented

at public hearings scheduled on February 17 at the Salt Palace in Salt Lake City, Utah, on February 18, at the Unitah County Courthouse in Vernal, Utah, and on February 19 at the Rangely High School in Rangely, Colorado. The three public hearings will start at 7:00 p.m.

Any REA financing assistance which may be made pursuant to this proposal will be subject to, and the release of funds thereunder will be contingent upon REA's reaching satisfactory conclusions with respect to environmental effects. Final REA action will be taken only after compliance with the National Environmental Policy Act of 1969, and other environmentally related statutes, regulations, Executive Orders and Secretary's Memoranda normally considered by REA.

This Federal Assistance program is listed in the Catalog of Federal Domestic Assistance as 10.850—Rural Electrification Loans and Loan Guarantees.

Dated at Washington, D.C., this 13th day of January 1981.

Robert W. Feragen,

Administrator.

[FR Doc. 81-1664 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-15-M

Sam Houston Electric Cooperative, Inc.; Finding of No Significant Impact

Notice is hereby given that the Rural Electrification Administration (REA) has made a Finding of No Significant Impact which concludes that there is no need for REA to prepare environmental impact statement in connection with a proposed insured loan by REA for Sam Houston Electric Cooperative, Inc., (Sam Houston), of Livingston, Texas. The proposed insured loan will assist Sam Houston in constructing approximately 49.6 km (31 miles) of 138 kV transmission line, two associated switching stations, and two associated substations.

The 138 kV transmission line will originate at the proposed New Waverly Switching Station in Walker County, extend to the proposed Evergreen and Oakhurst Substations, and terminate at the proposed Staley Switching Station in San Jacinto County. Sam Houston has prepared a Borrower's Environmental Report (BER) concerning the proposed project. REA has reviewed the BER and determined that it represents an accurate assessment of the environmental impact of the project. REA has prepared an Environmental Assessment concerning the proposed project and its impacts.

Threatened and endangered species, important farmland, archaeological and historic sites, wetlands, flood plains, and potential impacts of the project are adequately considered in the BER. REA's independent evaluation of the proposed project leads it to conclude that its proposed financing assistance for this project does not represent a major Federal action that will significantly affect the quality of the human environment.

Based on this independent evaluation and review of Sam Houston's BER, a Finding of No Significant Impact was reached in accordance with Section IV.B and IV.D.1 of REA Bulletin 20-21:320-21, Part I.

Various alternatives to the proposed transmission line and substation were reviewed by Sam Houston and REA. The alternatives included no action and construction and utilization of other facilities. After reviewing these alternatives, REA determined that the proposed 138 kV transmission line and associated facilities are the best alternative for providing power and system reliability to existing and future Sam Houston loads within the area.

Copies of REA's Finding of No Significant Impact and Sam Houston's BER may be reviewed in or requested from the office of the Director, Distribution Systems Division, Room 3304, South Agriculture Building, Rural Electrification Administration, Washington, D.C. 20250 and at the office of the cooperative, Sam Houston Electric Cooperative, Inc., P.O. Box 1121, Livingston, Texas 77351.

This program is listed in the Catalog of Federal Domestic Assistance as 10.850—Rural Electrification Loans and Loan Guarantees.

Dated at Washington, D.C., this 12th day of January 1981.

Robert W. Feragen,

Administrator.

[FR Doc. 81-1665 Filed 1-15-81; 8:45 am]

BILLING CODE 3410-15-M

CHRYSLER CORPORATED LOAN GUARANTEE BOARD

Closed Meeting

The Chrysler Corporation Loan Guarantee Board will hold a meeting closed to the public on January 14, 1981 at 4 p.m., in Room 4121, Main Treasury Building, 15th Street and Pennsylvania Avenue, N.W., Washington, D.C.

The Board will continue its discussion of Chrysler Corporation's new Operating and Financing Plans and related documents and its request for additional guarantees. The Board expects to begin considering whether to grant preliminary approval to Chrysler's application for an additional $400 million of guarantees.

Discussions of the above matters are closed to the public pursuant to applicable exemptions under the Government in the Sunshine Act. The discussions at the meeting will involve significant amounts of non-public financial and commerical information received from Chrysler Corporation, relating to anticipated profitability, market positions, capital expenditures and cost reduction actions.

An open meeting is likely to disclose (1) confidential commerical and financial information, which is exempt under 5 U.S.C. 552b(c)(4); and (2) information the premature disclosure of which would be likely to significantly frustrate implementation of Board action, which is exempt under 5 U.S.C 552b(c)(9)(B).

The meeting was closed pursuant to a unanimous vote of the Board taken on December 17, 1980 to close all Board meetings held during the thirty days after the Board's December 18, 1980 meeting, at which the same subject matters are discussed.

Those persons expected to attend the meeting, or portions thereof, include the Board members, the Executive Director, General Counsel, and Secretary of the Board, and members of the respective staffs of each Board member.

Those persons desiring further information should contact Bruce D. Bolander, Secretary of the Board, at (202) 566-2278.

This notice is given as a result of a court order. The position of the Board is that it is not subject to the Government in the Sunshine Act.

Dated: January 13, 1981.

Bruce D. Bolander,

Secretary of the Board.

[FR Doc. 81-1655 Filed 1-15-81; 8:45 am]

BILLING CODE 4810-27-M

CIVIL AERONAUTICS BOARD

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q of the Board's Procedural Regulations [1]

Week Ended January 9, 1981.

Subpart Q. Applications

The due date for answers, conforming applications, or motions to modify scope are set forth below for each application. Following the answer period the Board

[1] See 14 CFR 302.1701 *et seq.*

may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Date filed, Docket No., and Description

1-7-81—39135—Jet America, 10880 Wilshire Boulevard, Suite 911, Los Angeles, California 90024.

Application of Jet America, pursuant to Section 401 of the Act and Subpart Q of the Board's Procedural Regulations, requests a determination of its fitness, willingness and ability to operate as a federally certificated air carrier and for a certificate of public convenience and necessity, authorizing the scheduled transportation of persons, property and mail in a medium haul market, proposing nonstop service between the cities of Long Beach, California and Chicago, Illinois.

Conforming Applications, motions to modify scope, and Answers may be filed by February 4, 1981.

1-7-81—39140—New York Air, LaGuardia Airport Station, Hangar 5, Flushing, New York 11317.

Application of New York Air pursuant to Section 401 of the Act and Subpart Q of the Board's Procedural Regulations, requests that the Board amend its certificate of public convenience and necessity for Route 260 by the addition of new nonstop authority between and among the terminal points New York/Newark, Washington, Boston, Syracuse, Albany, Rochester, Buffalo, Cleveland, Columbus, Dayton, Cincinnati, Detroit, Indianapolis, and Pittsburgh and the alternate terminal points:

Atlanta, Georgia;
Atlantic City, New Jersey;
Baltimore, Maryland;
Charlotte, North Carolina;
Chicago, Illinois;
Columbia, South Carolina;
Greensboro/High Point/Winston-Salem, North Carolina;
Greenville/Spartanburg, South Carolina;
Hartford, Connecticut/Springfield, Massachusetts;
Islip, Long Island, New York;
Jacksonville, Florida;
Louisville, Kentucky;
Memphis, Tennessee;
Milwaukee, Wisconsin;
Nashville, Tennessee;
Norfolk/Virginia Beach, Virginia;
Philadelphia, Pennsylvania;
Providence, Rhode Island;
Raleigh/Durham, North Carolina;
Richmond, Virginia;
St. Louis, Missouri;
White Plains/Westchester County, New York.

Conforming Applications, motions to modify scope, and Answers may be filed by February 4, 1981.

1-8-81—39142—Trans World Airlines, Inc., 605 Third Avenue, New York, New York 10158.

Application of Trans World Airlines, Inc. pursuant to Section 401 of the Act and Subpart Q of the Board's Procedural Regulations requests authority to engage in foreign air transportation between the terminal point St. Louis, Missouri, and the terminal points Mexico City and Acapulco, Mexico.

Conforming Applications, motions to modify scope, and Answers may be filed by February 5, 1981.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 81-1629 Filed 1-15-81; 8:45 am]

BILLING CODE 6320-01-M

[Docket Nos. 33361 and 32412]

Former Large Irregular Air Service Investigation and Application of Eric C. Pearson d.b.a. Pearson Alaska Airlines; Hearing

Notice is hereby given, pursuant to the Federal Aviation Act of 1958, as amended, that a hearing in the above-entitled proceeding is assigned to be held on February 18, 1981, at 10:00 a.m. (local time), in Room 1003, Hearing Room B, Universal North Building, 1875 Connecticut Avenue, N.W., Washington, D.C., before the undersigned administrative law judge.

Dated at Washington, D.C., January 12, 1981.

Joseph J. Saunders,

Chief Administrative Law Judge.

[FR Doc. 81-1630 Filed 1-15-81; 8:45 am]

BILLING CODE 6320-01-M

[Docket No. 39049]

Transamerica Airlines, Inc.; Compliance with Part 252 Enforcement Proceeding; Assignment of Proceeding

This proceeding has been assigned to Administrative Law Judge William A. Pope, II. Future communications should be addressed to Judge Pope.

Dated at Washington, D.C., January 12, 1981.

Joseph J. Saunders,

Chief Administrative Law Judge.

[FR Doc. 81-1631 Filed 1-15-81; 8:45 am]

BILLING CODE 6320-01-M

DEPARTMENT OF COMMERCE

Minority Business Development Agency

General Business Services Program; Financial Assistance Application Announcement

January 3, 1981.

The Minority Business Development Agency announces that it is seeking applications under its program to operate a grant for management and technical performance project for 12 months beginning May 1, 1981.

Funding Instrument: It is anticipated that the funding instruments as defined by the Federal Grant and Cooperative Agreement Act of 1977 will be a grant.

Program Description: The General Business Services Program (GBS) of the Minority Business Development Agency (MBDA) provides technical assistance to minority business persons and firms for the purpose of improving their stability by increasing their management and marketing capabilities.

MBDA offers competitive grants to consulting firms either "not for profit" or commercial entities. These firms must be capable of providing such services as:

——Preparation of business plans;
——Financial Packaging;
——Industrial Management Services;
——Personnel Management Services;
——Marketing Planning.

Applications are invited for the following grant:

H—GBS Grant for a Management and Technical Performance Project to operate in Dallas, TX, SMSA county of Dallas. Project will operate at a cost not to exceed $278,000 and the Project I.D. Number is 06-60-80001-01 under Catalog of Federal Domestic Assistance, Minority Business Development 11.800.

Eligibility Requirements: Any for-profit or non-profit institution is eligible to submit an application. If an award is made, continuation awards of up to two additional years may be made to the successful recipient without competition, provided that: (1) Funds have been appropriated for a project of this kind, (2) MBDA has determined that such funds are available, (3) there is a continuing need for a project of this kind and (4) the recipient has performed satisfactorily.

Application Materials: An application kit for these projects may be requested by writing to the following address: U.S. Department of Commerce, Minority Business Development Agency, Grants Administration Unit, 1100 Commerce Street, Room 7B19, Dallas, TX 75242, Attn: Richard L. Greene, Grant/Cooperative Agreement Specialist.

The closing date for submitting an application is February 17, 1981. An appliation kit is available by written request to the above address, Attn: Richard L. Greene, Grant/Cooperative Agreement Specialist.

(11.800 Minority Business Development Catalog of Federal Domestic Assistance)

Richard H. Sewing,

Regional Director.

[FR Doc. 81-1634 Filed 1-15-81; 8:45 am]

BILLING CODE 3510-21-M

General Business Services Program; Financial Assistance Application Announcement

The Minority Business Development Agency announces that it is seeking applications under its program to operate one project for a twelve month period beginning May 1, 1981. The total cost of the project will not exceed $358,000.

Funding Instrument: It is anticipated that the funding instrument, as defined by the Federal Grant and Cooperative Agreement Act of 1977, will be a grant.

Program Description: The General Business Services Program (GBS) of the Minority Business Development Agency (MBDA) provides technical assistance to minority businesspersons and firms for the purpose of improving their stability by increasing their management and marketing capabilities. MBDA offers competitive grants to consulting firms (either non-profit or commercial entities). These firms must be capable of providing such services as:

——Preparation of business plans;
——Financial packaging;
——Industrial management assistance;
——Personnel management services;
——Marketing planning;

and a broad range of other business services excluding legal services.

Applications are invited for the following project:

One grant for a management and technical assistance project to operate in the Memphis, Nashville and Louisville SMSAs in Tennessee and Kentucky. The project will operate at a cost not to exceed $358,000, and will also include supplying specialized consulting services. The Project I. D. Number is 04-10-80003-01.

Eligibility Requirements: There are no restrictions. Any profit or non-profit institution is eligible to submit an application.

Pre-application Conference: A Pre-application Conference for this project will be held on January 30, 1981, at 1:30 p.m. at the following address: U.S. Department of Commerce, Minority Business Development Agency, 1365 Peachtree Street, NE, Room 225, Atlanta, Georgia 30309.

Application Materials: An application kit for this project may be requested by writing the following address: U.S. Department of Commerce, Minority Business Development Agency, 1371 Peachtree Street, NE, Suite 505, Atlanta, Georgia 30309.

In requesting an application kit, the applicant must specify its profit status; i.e., State or Local Government, federally recognized Indian tribal units, educational institutions, hospitals, or other type of profit or non-profit institution. This information is necessary to enable MBDA to include the appropriate cost principles in the application kit.

Award Process: All applications that are submitted in accordance with the instructions in the application kit will be submitted to a panel for review and ranking. Specific criteria by which applications will be evaluated is included in the application kit.

Closing Date: Applicants are encouraged to obtain an application kit as soon as possible in order to allow sufficient time to prepare and submit an application before the closing date of February 13, 1981. Applications received after this date will not be considered.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

(This program is not subject to the requirements of OMB Circular A-95)

Dated: January 7, 1981.

Charles F. McMillan,

Regional Director.

[FR Doc. 81-1635 Filed 1-15-81; 8:45 am]

BILLING CODE 3510-21-M

General Business Services Program; Financial Assistance Application Announcement

The Minority Business Development Agency announces that it is seeking applications under its program to operate one project for a twelve month period beginning May 1, 1981. The total cost of the project will not exceed $436,000.

Funding Instrument: It is anticipated that the funding instrument, as defined by the Federal Grant and Cooperative Agreement Act of 1977, will be a grant.

Program Description: The General Business Services Program (GBS) of the Minority Business Development Agency (MBDA) provides technical assistance to minority businesspersons and firms for the purpose of improving their stability by increasing their management and marketing capabilities. MBDA offers competitive grants to consulting firms (either non-profit or commercial entities). These firms must be capable of providing such services as:

——preparation of business plans;
——financial packaging;
——industrial management assistance;
——personnel management services;
——marketing planning;

and a broad range of other business services excluding legal services.

Applications are invited for the following project:

One grant for a management and technical assistance project to operate in the Atlanta, Augusta and Savannah SMSAs in Georgia. The project will operate at a cost not to exceed $436,000, and will include supplying specializing consulting services. The Project I. D. Number is 04-10-80004-01.

Eligibility Requirements: There are no restrictions. Any profit or non-profit institution is eligible to submit an application.

Pre-application Conference: A Pre-application Conference for this project will be held on Janury 29, 1981 at 1:30 p.m. at the following address: U.S. Department of Commerce, Minority Business Development Agency, 1371 Peachtree Street, NE, Suite 505, Atlanta, Georgia 30309.

Application Materials: An application kit for this project may be requested by writing the following address: U.S. Department of Commerce, Minority Business Development Agency, 1365 Peachtree Street, NE, Room 225, Atlanta, Georgia 30309.

In requesting an application kit, the applicant must specify its profit status; i.e., State or Local Government, federally recognized Indian tribal units, educational institutions, hospitals, or other type of profit or non-profit institution. This information is necessary to enable MBDA to include the appropriate cost principles in the application kit.

Award Process: All applications that are submitted in accordance with the instructions in the application kit will be submitted to a panel for review and ranking. Specific criteria by which applications will be evaluated is included in the application kit.

Closing Date: Applicants are encouraged to obtain an application kit as soon as possible in order to allow sufficient time to prepare and submit an application before the closing date of February 13, 1981. Applications received after that date will not be considered.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

(This program is not subject to the requirements of OMB Circular A-95)

Dated: January 7, 1981.

Charles F. McMillan,

Regional Director.

[FR Doc. 81-1636 Filed 1-15-81; 8:45 am]

BILLING CODE 3510-21-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procedure List 1981; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to Procurement List 1981 a commodity to be produced by and services to be provided by workshops for the blind and other severely handicapped.

EFFECTIVE DATE: January 16, 1981.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, 2009 14th Street North, Suite 610, Arlington, Virginia 22201.

FOR FURTHER INFORMATION CONTACT: C. W. Fletcher (703) 557–1145.

SUPPLEMENTARY INFORMATION: On October 31, 1980 and September 19, 1980, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (45 FR 72248 and 45 FR 62520) of proposed additions to Procurement List 1981, November 12, 1980 (45 FR 74836).

After consideration of the relevant matter presented, the Committee has determined that the commodity and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c, 85 Stat. 77.

Accordingly, the following commodity and services are hereby added to Procurement List 1981:

Class 7530

Paper, Teletypewriter Roll
7530–00–142–9037

SIC 7349

Janitorial Service, Naval Air Station Miramar, San Diego, California

SIC 7699

Repair of Rubberized Items:
Mattress Pneumatic
(Nonimsulated 8465–00–254–8887)
(Insulated 8465–00–518–2781)
Ponchos (8405–00–935–3257)
Bag Clothing, Waterproof (8465–00–261–6909) Fort Bliss, Texas

C. W. Fletcher,

Executive Director.

[FR Doc. 81–1508 Filed 1–15–81; 8:45 am]

BILLING CODE 6820–33–M

Procurement List 1981; Proposed Deletions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed Deletions from Procurement List.

SUMMARY: The Committee has received proposals to delete from Procurement List 1981 services provided by workshops for the blind or other severely handicapped.

COMMENTS MUST BE RECEIVED ON OR BEFORE: February 18, 1981.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, 2009 14th Street North, Suite 610, Arlington, Virginia 22201.

FOR FURTHER INFORMATION CONTACT: C. W. Fletcher (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2), 85 Stat. 77. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed action.

It is proposed to delete the following services from Procurement List 1981, November 12, 1980 (45 FR 74836):

SIC 7395

Film Developing
Photographic Processing for the GSA Self-Service Store #60, Denver Federal Center, Denver, Colorado

SIC 7399

Repair of Field Jackets
Fort Riley, Kansas

C. W. Fletcher,

Executive Director.

[FR Doc. 81–1600 Filed 1–15–81; 8:45 am]

BILLING CODE 6820–33–M

COMMODITY FUTURES TRADING COMMISSION

Proposed Futures Contract; Proposed Rules of Major Economic Significance; Terms and Conditions of the Three-Month Domestic Certificates of Deposit Futures Contract of the Chicago Mercantile Exchange

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rules of contract markets.

SUMMARY: The Chicago Mercantile Exchange ("CME") has applied for designation as a contact market in $1,000,000 certificates of deposit with maturities of three months. The Commodity Futures Trading Commission ("Commission") has determined that the proposed terms and conditions of this proposed futures contract are of major economic significance and that, accordingly, publication of the proposed terms and conditions is in the public interest, will assist the Commission in considering the views of interested persons and is consistent with the purposes of the Commodity Exchange Act.

DATE: Comments must be received on or before March 17, 1981.

ADDRESS: Interested persons should submit their views and comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K. Street, N.W., Washington, D.C. 20581. Reference should be made to CME Three-Month Domestic CD Futures Contract.

FUR FURTHER INFORMATION CONTACT: Christine A. Rock, Staff Attorney, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581; Telephone: (202) 254–8955.

SUPPLEMENTARY INFORMATION: The terms and conditions of CME's proposed three-month domestic CD futures contract are as follows:

Chapter —

Domestic Certificates of Deposit

00. Scope of Chapter.—This chapter is limited in application to futures trading in Domestic Certificates of Deposit. The procedures for trading, clearing, delivery and settlement, and any other matters not specifically covered herein shall be governed by the rules of the Exchange.

01. Commodity Specifications.—Each futures contract shall be for a $1,000,000 Domestic Certificate of Deposit with a three-month maturity.

02. Futures Call.—

A. Trading Months and Hours: Futures contracts shall be scheduled for trading during such hours and delivery in such months as may be determined by the Board of Governors.

B. Size of Trading Unit: The size of the unit of trading shall be a Domestic Certificate of Deposit in the amount of $1,000,000.

C. Minimum Increments: Bids and offers shall be quoted in terms of the IMM Index, 100.00 minus yield on an annual basis for a 360-day year. (A deposit rate of 7.20% shall be quoted as 92.80.) Minimum fluctuations of the IMM Index shall be in multiples of .01 ($25.00).

D. Daily Limits: There shall be no trading at a level more than 0.60 IMM Index points above or below the preceding day's settlement index except as provided by Rule 07 (Expanded Daily Limits) and on the last day of trading when there shall be no limit.

E. Discretionary Position Limits: The Board may in its sole and complete discretion impose limits upon an individual or upon related accounts.

F. Termination of Trading: Futures trading shall terminate on the business

day immediately preceding the last delivery day of the contract month.

G. Contract Modification: Specifications shall be fixed as of the first day of trading of a contract except that all deliveries must conform to government regulations in force at the time of delivery. If any U.S. governmental agency or body issues an order, ruling, directive or law pertaining to the trading or delivery of Domestic Certificates of Deposit, such order, ruling, directive or law shall be construed to take precedence and become part of these rules, and all open and new contracts shall be subject to such government orders.

03. Delivery.—The following shall specifically apply to the delivery of Domestic Certificates of Deposit.

A. Par Delivery Unit: A par delivery unit shall be a $1,000,000 three-month Domestic Certificate of Deposit.

B. Delivery Days: Delivery shall be made on any business day that is not a bank holiday in either New York or Chicago, and in the period beginning on the Monday following the 15th day of the contract month, and ending on the last business day of the contract month.

C. Approved Delivery Banks: The Board of Governors shall maintain a list of U.S. banks whose domestic certificates of deposit constitute approved delivery units on the Domestic Certificate of Deposit contract. Individual Banks may be deleted from this list by the Board of Governors without prior notice.

D. Deliverable Issues: Any domestic certificate of deposit meeting the following conditions shall constitute a deliverable CD.

1. Having a fixed maturity value (principal plus interest at maturity) not less than $1,000,000 and not greater than $1,200,000.

2. Having no interest payments between the delivery date and maturity date.

3. Maturing not before the 16th of the month three months after the spot month nor after the last day of the month three months after the spot month.

4. Maturing on a business day that is not a banking holiday in either New York or Chicago.

E. Seller's Duties: The clearing member representing a customer making delivery in liquidation of his position, shall present to the Clearing House by 2:00 p.m., one business day before delivery day, a Seller's Delivery Commitment completed in full. If such commitment is received later than 2:00 p.m. on the business day prior to the last delivery day but not later than 9:00 a.m. on the last delivery day, seller's clearing member shall be assessed a fine on a per contract basis, the amount to be determined by the Board. Any papers received subsequent to 9:00 a.m. on the last delivery day shall constitute the seller's failure to perform and be acted upon in accordance with Rule 06.

Before 12:00 noon (Chicago time) on the delivery date, Seller's Clearing Member shall deliver a Domestic Certificate of Deposit of an Approved Delivery Bank, satisfying the conditions of Rule 03.D, to a bank registered with the Exchange and a member of the Federal Reserve System selected by the buyer.

F. Buyer's Duties: Upon notification of delivery by the Clearing House, the clearing member representing the buyer shall deliver to the Clearing House by 5:00 p.m. (Chicago time) on the day before the delivery date, a buyer's delivery commitment that includes: the buyer's name and account number, and the name of a Chicago bank registered with the Exchange and a member of the Federal Reserve System to which the delivery unit should be transferred. The clearing member representing the buyer shall, by 12:45 noon (Chicago time) by payment against delivery on the day of delivery, present to the seller's clearing member's bank or its designated agent a wire transfer of Federal funds for the net invoicing price.

G. Matching Longs and Shorts: The Clearing House shall pair Seller's and Buyer's Delivery Commitments by matching the oldest long positions with the Seller's Delivery Commitments as received. The Clearing House shall, as soon as practicable thereafter, present or make known the Buyer's Delivery Commitment to the appropriate, paired clearing member.

04. Par Delivery.—

A. Par Delivery: A delivery unit shall be a Domestic Certificate of Deposit of an approved delivery bank satisfying the conditions of 03–D.

B. Payment: The following formula shall be used to calculate the net invoicing price:

(maturity value [1]) ÷ [1 + (F yield [2]) days to maturity]/360

C. Delivery Points: Delivery shall be made to a bank, registered with the Exchange and a member of the Federal Reserve System, specified by the Buyer's clearing member. All banks selected by the buyer and by the seller to effectuate delivery must be members of the Federal Reserve System.

[1] Maturity value is the value of the delivery unit at maturity (principal + interest).

[2] The F yield is the difference between 100.00 and the IMM index at settlement on the day before delivery day, expressed in decimals.

F yield = (100.00 − F index) × 0.01

05. Emergencies, Acts of God, Acts of Government.—If delivery or acceptance or any precondition or requirement of either is prevented by strike, fire, accident, action of government or act of God, the seller or buyer shall immediately notify the Exchange President. If the President determines that emergency action may be necessary, he shall call a special meeting of the Board of Governors and arrange for the presentation of evidence respecting the emergency condition. If the Board determines that an emergency exists, it shall take such action as it deems necessary under the circumstances and its decision shall be binding upon all parties to the contract. For example, and without limiting the Board's power, it may: take action in accordance with Rule 06; extend delivery dates; and designate alternate approved banks in the event of conditions interfering with the normal operations of approved facilities.

In the event that the Board of Governors or Business Conduct Committee determines that there exists a shortage of deliverable domestic Certificates of Deposit, it may upon a two-thirds vote of the members present or upon a two-thirds vote of the members who respond to a poll take such action as may in the Board's or Committee's sole discretion appear necessary to prevent, correct, or alleviate the condition. Without limiting the foregoing, the Board or Committee may: (1) designate as deliverable Certificates of Deposit of banks not on the Approved Bank List and (2) determine a cash settlement based on the current cash value of a 3-month Certificate of Deposit as determined by using the current cash market yield curve on the last day of trading.

06. Failure To Perform.—If the clearing member with a delivery commitment fails to perform all acts required by this chapter, then that clearing member shall be deemed as failing to perform which may be punishable as a major violation. A clearing member failing to perform shall be liable to the clearing member to which it was matched on the failing transaction for any loss sustained. The Board shall determine and assess losses sustained, taking into account the settlement price, interest earnings foregone, and such other factors as it deems appropriate. The Board may also assess such penalties as it deems appropriate in addition to damages.

07. Expanded Daily Limits.—Whenever on two successive days any contract month closes at the normal daily limit in the same direction (not

necessarily the same contract month on both days) an expanded daily limit schedule shall go into effect as follows:

1. The third day's daily limit in all contract months shall be 150% of the normal daily limit.

2. If any contract month closes at its expanded daily limit on the third day in the same direction, then the fourth day's expanded daily limit and each successive day thereafter, shall be 200% of the normal daily limit, so long as any contract month closes at its expanded daily limit.

3. Whenever the foregoing daily limit schedule is in effect and no contract month closes at the limit in the same direction which initiated or maintained the expanded schedule, then the normal daily limit shall be reinstated on the following day.

* * * * *

The Commission also will make available any other materials submitted by the CME in support of its application for contract market designation to the extent that such materials are not entitled to confidential treatment under Part 145 of the Commission's regulations (17 CFR Part 145). Copies of such materials submitted by the CME in support of its application for designation will be available through the Commission's Secretary or its offices in Washington, New York, Chicago Minneapolis, Kansas City and San Francisco.

Any person interested in submitting written data, views or arguments on the terms and conditions of the proposed futures contract, or with respect to other materials submitted by the CME in support of its application for contract market designation, should send such comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, by March 17, 1981.

Issued in Washington, D.C., on January 12, 1981.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 81-1066 Filed 1-15-81; 8:45 am]

BILLING CODE 6351-01-M

Proposed Futures Contracts; Proposed Rules of Major Economic Significance; Terms and Conditions of the Three-Month Eurodollar Futures Contract of the Chicago Mercantile Exchange

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rules of contract markets.

SUMMARY: The Chicago Mercantile Exchange ("CME") has applied for designation as a contract market in one million dollar par value Eurodollar certificates of deposit or time deposits with maturities of three months. The Commodity Futures Trading Commission ("Commission") has determined that the proposed terms and conditions of this proposed futures contract are of major economic significance and that, accordingly, publication of the proposed terms and conditions is in the public interest, will assist the Commission in determining whether the CME should be so designated, and is consistent with the purposes of the Commodity Exchange Act.

DATE: Comments must be received on or before March 17, 1981.

ADDRESS: Interested persons should submit their views and comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581. Reference should be made to CME Three-Month Eurodollar Futures Contract.

FOR FURTHER INFORMATION CONTACT: Christine A. Rock, Attorney, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581; Telephone: (202) 254-8955.

SUPPLEMENTARY INFORMATION: The terms and conditions of CME's proposed three-month Eurodollar futures contract are as follows:

Chapter —Three-Month Eurodollars

00. Scope of Chapter.—This chapter is limited in application to futures trading in Eurodollars. The procedures for trading, clearing, delivery and settlement, and any other matters not specifically covered herein shall be governed by the rules of the Exchange.

01. Commodity Specifications.—Each futures contract shall be for a $1,000,000 Eurodollar Time Deposit or Eurodollar Certificate of Deposit with a three-month maturity.

02. Futures Call.—

A. Trading Months and Hours: Futures contracts shall be scheduled for trading during such hours and delivery in such months as may be determined by the Board of Governors.

B. Size of Trading Unit: The size of the unit of trading shall be Eurodollar Time Deposits or Eurodollar Certificates of Deposit in the amount of $1,000,000.

C. Minimum Increments: Bids and offers shall be quoted in terms of the IMM Index, 100.00 minus yield on an annual basis for a 360-day year. (A deposit rate of 7.20% shall be quoted as 92.80). Minimum fluctuations of the IMM Index shall be in multiples of .01 ($25.00).

D. Daily Limits: There shall be no trading at a level more than 0.60 IMM Index points above or below the preceding day's settlement index except as provided by Rule 07 (Expanded Daily Limits) and on the last day of trading when there shall be no limit.

E. Discretionary Position Limits: The Board may in its sole and complete discretion impose limits upon an individual or upon related accounts.

F. Termination of Trading: Futures trading shall terminate on the last business day immediately preceding the third Tuesday of the contract month.

G. Contract Modification: Specifications shall be fixed as of the first day of trading of a contract except that all deliveries must conform to government regulations in force at the time of delivery. If any U.S. govermental agency or body issues an order, ruling, directive or law pertaining to the trading or delivery of Eurodollars, such order, ruling, directive or law shall be construed to take precedence and become part of these rules, and all open and new contracts shall be subject to such government orders.

03. Delivery.—The following shall specifically apply to the delivery of Eurodollars:

A. Par Delivery Unit: A part delivery unit shall be a $1,000,000 three-month Eurodollar Certificate of Deposit or Time Deposit.

B. Delivery Day: Delivery shall be made on the third business day following the last day of trading if that day is followed by a banking business day in London, Chicago, and New York. If that day is the day before a bank holiday, delivery shall be made on the next business day that is not followed by a holiday or weekend in either New York, Chicago or London.

C. Approved Delivery Banks: The Board of Governors shall maintain a list of London branches of U.S. or European banks whose dollar-denominated liabilities constitute approved delivery units on the Eurodollar contract. The Board of Governors may, without prior notification, delete banks from the Approved Delivery Bank list.

D. Deliverable Issues: Any dollar-denominated time deposit or certificate of deposit of any Approved Delivery Bank meeting the following conditions shall constitute a deliverable deposit:

1. For time deposits: (a) value dated on delivery day in New York Clearing House funds; (b) the initial amount of the deposit will be $1,000,000.00,

2. For both time deposits and certificates of deposit: maturing at least

86 days and not more than 93 days after delivery date, and maturing on a business day, not a banking holiday, not the last banking day of the week or the last banking day before a holiday in either London, New York or Chicago.

3. For certificates of deposit: (a) having a fixed maturity value (principal + interest) not less than $1,000,000 nor greater than $1,200,000 and (b) having no interest payments between the delivery date and the maturity data.

E. Seller's Duties: The clearing member representing a customer making delivery in liquidation of his position, shall present to the Clearing House by 2:00 p.m. on the business day before the delivery day, a Seller's Delivery Commitment completed in full. If the delivery unit is a Eurodollar Certificate of Deposit, the Seller's Delivery Commitment shall indicate the maturity date and the maturity value of the delivery unit. If the delivery unit is a time deposit, the clearing member representing seller shall indicate the bank, yield and maturity date. If seller has failed to negotiate a deliverable time deposit or purchase a deliverable CD at time of submission of Seller's Delivery Commitment, seller's clearing member will notify the Clearing House by 2:00 p.m. Time deposits negotiated and CDs purchased by short following 2:00 p.m. on the business day preceding delivery day will not be deliverable. If such commitment is received later than 2:00 p.m. on the day before the delivery day, but not later than 9:00 a.m. on the delivery day, the short clearing member shall be assessed a fine on a per contract basis, the amount to be determined by the Board. Any papers received subsequent to 9:00 a.m. on the delivery day shall constitute the seller's failure to perform and be acted upon in accordance with Rule 06.

If the delivery unit is a Certificate of Deposit, before 11:00 a.m. on the delivery date the seller shall deliver a Certificate of Deposit of an Approved Delivery Bank, satisfying the conditions of Rule 03–D, to a bank designated by the Clearing House.

On the delivery date the clearing member representing the seller shall present to the buyer's clearing member a certified or cashier's check or a wire transfer of Fed funds in the amount of the seller's remaining obligation to the buyer.

F. Buyer's Duties: The clearing member with a long position at close of trading on the last day of trading shall present to the Clearing House by 2:00 p.m. on that day, a Buyer's Delivery Commitment completed in full and an IMM approved payment order from an approved delivery bank confirming delivery of New York Clearing House funds value dated on the delivery date to the IMM Eurodollar delivery account in a bank named by the Clearing House. If such commitment is received later than 2:00 p.m. on the last day of trading, but not later than 9:00 a.m. on the following business day, buyer's clearing member shall be assessed a fine on a per contract basis, the amount to be determined by the Board. If papers are not submitted by 9:00 a.m. on the business day following the last day of trading, the clearing member representing the buyer shall pay a penalty of no more than the interest yield on $1 million, at twice the average of the prime loan rates of the ten largest U.S. banks, ranked by deposit size, per contract.

Upon notification of a delivery of a Eurodollar time deposit in buyer's name or a certificate of deposit, buyer's clearing member shall present a certified or cashier's check or a wire transfer of Fed funds in the amount of buyer's remaining obligation to seller.

G. Matching Longs and Shorts: The Clearing House shall match the oldest short positions with the Buyer's Delivery commitments as received. In the event that the clearing member representing the buyer does not present the Buyer's Delivery Commitment to the Clearing House by the required time, the Clearing House will assign the open long position to the remaining open short position.

04. Par Delivery.—

A. Delivery Unit: A delivery unit shall be a $1,000,000 liability of a London branch of an approved delivery bank satisfying the conditions of 03.

B. Payment: If the unit of delivery is a Certificate of Deposit satisfying the conditions of 03–D, buyer's clearing member shall be invoiced according to the formula:

$$\text{maturity value}^{*} \times \left[1 - \frac{\text{days to maturity}}{360} (\text{F yield}^{**})\right] = \text{invoice price}$$

*maturity value = value at maturity of the delivered CD.

**F yield = (100–F index) x 0.01 where (F index) is the index level of the expiring Eurodollar contract at close of business on the last day of trading.

If the delivery unit is a time deposit, $1,000,000 in New York Clearing House funds will be transferred to the buyer's time deposit account at an Approved Delivery bank.

If the unit of delivery is a time deposit, the following formula shall be used to calculate the amount of any remaining obligations between buyer's clearing member and seller's clearing member.

$$\text{remaining obligation} = \frac{\text{days to maturity} \times (\text{LTD yield}^{***} - \text{F yield}^{**}) \times \$1{,}000{,}000}{360} \times \left[1 + \frac{\text{days to maturity}}{360} (\text{F yield})\right]$$

If this amount is positive, Buyer's clearing member will make payment to Seller's clearing member. If this amount is negative, Seller's clearing member will make payment to Buyer's clearing member.

05. Emergencies, Acts of God, Acts of Government.—If delivery or acceptance of any precondition or requirement of either is prevented by strike, fire, accident, action of government or act of God, the seller or buyer shall immediately notify the Exchange President. If the President determines that emergency action may be necessary, he shall call a special meeting of the Board of Governors and arrange for the presentation of evidence respecting the emergency condition. If the Board determines that an emergency exists, it shall take such action as it deems necessary under the circumstances and its decision shall be binding upon all parties to the contract. For example, and without limiting the Board's power, it may: take action in accordance with Rule 06; extend delivery dates; and designate alternate dates; and designate alternate approved banks in the event of conditions interfering with the normal operations of approved facilities.

In the event that the Board of Governors or Business Conduct Committee determines that there exists a shortage of deliverable Eurodollar deposits, it may upon a two-thirds vote of the members who respond to a poll take such action as may in the Board's or Committee's sole discretion appear necessary to prevent, correct, or alleviate the condition. Without limiting the foregoing the Board or Commitee may: (1) designate as deliverable deposits of banks not on the Approved Bank List and (2) determine a cash settlement based on the current cash value of a 3-month Eurodollar deposit as determined by using the current cash market yield curve on the last day of trading.

06. Failure to Perform.—If the clearing member with a delivery commitment fails to perform all acts required by this chapter, then that clearing member shall be deemed as failing to perform which may be punishable as a major violation. A clearing member shall be liable to the clearing member to which it was matched on the failing transaction for any loss sustained. The Board shall determine and assess losses sustained, taking into account the settlement price, interest earnings foregone, and such other factors as it deems appropriate. The Board may also assess such penalties as it deems appropriate in addition to damages.

07. Expanded Daily Limits.—Whenever on two successive days any contract month closes at the normal daily limit in the same direction (not necessarily the same contract month on both days) an expanded daily limit schedule shall go into effect as follows:

1. The third day's daily limit in all contract months shall be 150% of the normal daily limit.

2. If any contract month closes at its expanded daily limit on the third day in the same direction, then the fourth day's expanded daily limit and each successive day thereafter, shall be 200% of the normal daily limit, so long as any contract month closes at its expanded daily limit.

3. Whenever the foregoing daily limit schedule is in effect and no contract month closes at the limit in the same direction which initiated or maintained the expanded schedule, then the normal daily limit shall be reinstated on the following day.

* * * * *

The Commission also will make available any other materials submitted by the CME in support of its application for contract market designation to the extent that such materials are not entitled to confidential treatment under Part 145 of the Commission's regulations (17 CFR Part 145). Copies of such materials submitted by the CME in support of its application for designation will be avialable through the Commission's Secretary or its offices in Washington, New York, Chicago, Minneapolis, Kansas City and San Francisco.

Any person interested in submitting written data, views or arguments on the terms and conditions of the proposed futures contract, or with respect to other materials submitted by the CME in support of its application for contract market designation, should send such comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, by March 17, 1981.

Issued in Washington, D.C., on January 12, 1981.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 81-1669 Filed 1-15-81; 8:45 am]

BILLING CODE 6351-01-M

Proposed Futures Contracts; Proposed Rules of Major Economic Significance; Terms and Conditions of the 90-Day Certificates of Deposit Futures Contract of the New York Futures Exchange, Inc.

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rules of contract markets.

SUMMARY: The New York Futures Exchange, Inc. ("NYFE") has applied for designation as a contract market in $1,000,000 par value certificates of deposit with maturities of 90 days that are issued by major United States banks. The Commodity Futures Trading Commission ("Commission") has determined that the proposed terms and conditions of this proposed futures contract are of major economic significance and that, accordingly, publication of the proposed terms and conditions is in the public interest, will assist the Commission in determining whether the NYFE should be so designated, and is consistent with the purposes of the Commodity Exchange Act.

DATE: Comments must be received on or before March 17, 1981.

ADDRESS: Interested persons should submit their views and comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581. Reference should be made to NYFE 90-Day CD Futures Contract.

FOR FURTHER INFORMATION CONTACT: Christine A. Rock, Attorney, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581; Telephone: (202) 254-8955.

SUPPLEMENTARY INFORMATION: The terms and conditions of NYFE's proposed 90-day certificates of deposit ("CD") futures contract are as follows:

CD Futures Contract

1000 Scope of Chapter

This chapter governs transactions involving contracts for the future delivery of ninety day certificates of deposit ("CD's") issued by major United States banks ("CD Futures Contracts"). The CD Futures Contract and all trading therein shall be subject to the rules contained in this chapter, the Rules of the Exchange and the Rules of the Clearing Corporation.

1001 Obligation of Parties to Contract

The seller under any CD Futures Contract sells and agrees to delivery to the purchaser, and the purchaser buys and agrees to receive from the seller, the delivery unit specified in these Rules in the delivery month and for the price agreed upon at the time the contract is transacted, in accordance with the Rules of the Exchange and the Rules of the Clearing Corporation.

1002 Standards

The contract grade for delivery in satisfaction of CD Futures Contracts shall be CDs issued by those major U.S. banks whose CDs are approved by the Board as being deliverable in satisfaction of CD Futures Contracts and which have a maturity of "ninety (90) days" from the day of delivery specified in the contract. The term "ninety (90) days" or "90-days" as used in these rules shall refer to CDs maturing on any Exchange business day within the half-month maturity period which includes the 90th calendar day from the date of settlement of the contract.

(a) The Board shall approve for delivery without discount, only CDs of those major U.S. banks whose CDs trade at the highest prices (lowest interest rate) and at prices equivalent to each other's and which are accepted as good delivery without specific name in cash market transactions by the major New York dealers regularly trading in such certificates.

(b) In the event of an emergency situation affecting the adequacy of the supply of CDs outstanding deliverable under paragraph (a) of this rule, the Board shall have the authority to approve for delivery CDs of major U.S. banks which trade at prices closest to those CDs specified in paragraph (a) of this rule. Such CDs shall be deliverable at a discount approximately equivalent to the cash market discount.

The cash market discount for CDs of each bank approved under this paragraph shall be determined by averaging the quotations of major New York CD dealers during the five business days prior to the day of delivery, after removing the highest and lowest quotes, based on the mean between the dealers' representative bid and asked quotations. The dealers whose quotations shall be used for this purpose shall be those as approved by the Board.

(c) Once trading has been initiated in a contract month, no deletions of approved banks under paragraph (a) of this rule shall be made for that contract month except under extreme adverse conditions which may impair that bank's ability to issue new or redeem its outstanding CDs.

(d) The list of banks approved pursuant to paragraph (a) of this rule shall be posted on the Exchange bulletin board prior to the opening of trading in a delivery month. Additions to or deletions from the list of approved banks as specified in paragraph (a) of this rule shall be made only for new contract months prior to their introduction for trading and only after survey of the New York cash dealer market and determination by the Board that such additions or deletions of banks correspond with such current CD cash market practice.

(e) CDs delivered under these rules shall mature "ninety (90) days" after delivery in the half month period designated at the beginning of trading in that delivery month. The first half month period shall be that period which includes the first and fifteenth day of the delivery month. The second half month period shall be that period which includes the sixteenth and the last day of the delivery month. CDs which mature on a weekend or a New York State bank holiday shall not be deliverable.

(f) CDs delivered under these rules shall not have an issuance date which is earlier than the first business day of the sixth month prior to the CD's maturity date.

(g) Only standard bearer form CDs paying a fixed rate of interest payable at maturity shall be deliverable. No variable coupon rate, semi-annual payment with interest payment due prior to maturity or any other non-conventional type of CD shall be deliverable.

(h) The following formulae shall be used to calculate the settlement value, principal value and accrued interest of a delivery unit at the time of delivery:

$$S = P\left(\frac{360 + (L_1 R_1)}{360 + (L_2 R_2)}\right)$$

$$I = P \times R_1\left(\frac{L_1 - L_2}{360}\right)$$

$$Q = S - I$$

Where—

S = Settlement value of a delivery unit.
L_1 = Original Life of CD.
L_2 = Remaining Life of CD.
R_1 = Coupon rate of CD.
R_2 = Yield to maturity (settlement price) of CD.
P = Par value.
I = Accrued interest.
Q = Principal value of a delivery unit.

1003 Unit of Trading

The unit of trading for CD Futures Contracts shall be CDs having a par value of $1,000,000.

1004 Months Traded

Trading in CD Futures Contracts may be conducted in the first and second half month periods during the six nearby calendar months and the first half month periods during March, June, September and June thereafter.

1005 Price Basis

Prices quoted shall be complements of 100% of the yield to maturity (100-yield to maturity) based on total dollars invested (e.g.: a CD future priced at 9.50% yield to maturity basis would be quoted on an Exchange Index at 90.50). Minimum price fluctuations shall be one basis point (.01%) per 100 points. For the purpose of calculating variation margin, the value of one basis point shall be set at $24.50 per contract.

1006 Limits on Daily Price Changes

(a) There shall be no trading at a price more than 1.00% (100 basis points) above or below the preceding day's settlement price for contracts in the same delivery month. Exceptions are provided for in paragraphs (b) and (c) below.

(b) Whenever on two successive days any contract month closes at the normal daily price limit in the same direction (not necessarily the same contract month on both days) an expanded daily price limit schedule shall go into effect as follows:

(1) The third day's daily price limit shall be 150% of the normal daily price limit.

(2) If any contract month closes at its expanded daily price limit on the third day in the same direction when the fourth day's expanded daily price limit shall be 200% of the normal daily price limit.

(3) If any contract month closes at its expanded daily price limit on the fourth day in the same direction, then there shall be no daily price limit on the fifth day. The normal daily price limit will be reinstated on the sixth day.

(4) Whenever the foregoing price limit schedule is in effect and no contract month closes by more than the expanded daily price limit in the same direction which initiated or maintained the expanded schedule, then the normal daily price limit shall be reinstated on the following day.

(c) There shall be no limit on daily contract price changes for the delivery month on and after the first exchange business day of the delivery month of the contract.

1007 Position Limits

The Board from time to time may set limits on the maximum net long or net short position in any one contract delivery month or in all months combined in the contract which any individual or organization acting alone or in concert with any other person may hold or control in CD Futures Contracts at the end of any business day.

1008 Reportable Positions

The Board from time to time may set the number of contracts, long or short, in any one contract delivery month or in all months combined in the contract whether owned or controlled or carried for any individual or organization, either alone or in conjunction with any other person, which shall be a reportable position. Every member and member organization shall report each and every reportable position to the Exchange at such times and in such form and manner as shall be prescribed by the Exchange.

1009 Hours of Trading

The hours of Futures trading in CD futures Contracts shall be from 9:00 a.m. to 3:00 p.m. Eastern time on all exchange business days except that on the last day of trading, trading shall be closed at 11:00 a.m. of that day.

1010 Last Day of Trading

(a) No trades in CD Futures Contracts deliverable in any first half month shall be made after the Tuesday closest to the seventh calendar day of that first half month period.

(b) No trades in CD Futures Contracts deliverable in any second half month period shall be made after the Tuesday closest to the twenty-first calendar day of the second half month period.

(c) Should such Tuesday be an Exchange holiday or precede an Exchange holiday, or the closest Tuesdays to the seventh and twenty-first calendar days not be determinable, the Board shall set the delivery day for that half month period.

1011 Delivery of Futures Contracts

All deliveries must be made through the Clearing Corporation. No deliveries shall be made in a current half delivery month except on the day specified for such delivery in these rules. At the conclusion of trading in the current delivery half month, all open positions must be satisfied by actual delivery of CDs meeting the standards of Rule 1002 or otherwise as provided for in the Rules of the Exchange.

1012 Tender of Delivery Notices

(a) A clearing member holding open positions in the CD Futures Contract in the current delivery month at the time trading in that contract has ceased in accordance with Rule 1010 of these rules, shall furnish delivery notices to the Clearing Corporation on a form prescribed by the Clearing Corporation not later than 1:00 p.m. of the last day of trading in that contract.

(b) Delivery notices from clearing members representing sellers shall contain the following information:

1. Name of bank CD to be delivered.
2. Interest rate of CD.
3. Original date of issuance of CD.
4. Date of maturity of CD.
5. Such other information as the Clearing Corporation may require.

1013 Copy of Delivery Notice to Commission

Every clearing member shall furnish promptly to the Commission a copy of each delivery notice specified in Rule 1012 of these rules issued by such member in conjunction with the delivery of CDs.

1014 Delivery Through the Clearing Corporation

(a) Delivery of CDs as required by these rules shall be made not later than —— p.m., on the Exchange business day following the last day of trading. In the event that day is a bank holiday in New York State, delivery shall be made on the next business day common to the Exchange and banks in New York State.

(b) The Clearing Corporation will advise clearing members holding open long positions of the details and settlement amounts of each delivery assigned to them, based on the settlement price established on the last day of trading in the delivery half month and the information furnished to it in the delivery notices tendered to it in accordance with Rule 1012 of these rules, no later than 2:00 p.m. of the Exchange business day prior to the delivery date.

1015 Payment by Buyers

Payment by buyers shall be remitted in Federal funds to the Clearing Corporation designated delivery bank not later than —— p.m. on the day specified for delivery. Calculation of the value of the delivery unit shall be in accordance with the formulae in Rule 1002(h) of these rules.

1016 Delinquency in Performance

If a clearing member fails to perform any acts required by this chapter or fails to deliver or accept delivery as required under Clearing Corporation Rules 502 and 503, respectively, the clearing member will be subject to disciplinary action, and the Exchange may assess such clearing member for the expenses associated therewith.

* * * * *

The Commission also will make available any other materials submitted by the NYFE in support of its application for contract market designation to the extent that such materials are not entitled to confidential treatment under Part 145 of the Commission's regulations (17 CFR Part 145). Copies of such materials submitted by the NYFE in support of its application for designation will be available through the Commission's Secretary or its offices in Washington, New York, Chicago, Minneapolis, Kansas City and San Francisco.

Any person interested in submitting written data, views or arguments on the terms and conditions of the proposed futures contract, or with respect to other materials submitted by the NYFE in support of its application for contract market designation, should send such comments to Jane K. Stuckey, Secretary, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, by March 17, 1981.

Issued in Washington, D.C., on January 12, 1981.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 81-1870 Filed 1-15-81; 8:45 am]

BILLING CODE 6351-01-M

Quarterly Publication of Indexes; Order

The Commodity Futures Trading Commission hereby determines, pursuant to subparagraph (a)(2) of the Freedom of Information Act, 5 U.S.C. 552(a)(2), that quarterly publication of the indexes required to be kept thereunder of:

(A) final Commission opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) statements of policy and interpretations which have been adopted by the Commission and are not published in the **Federal Register**; and

(C) Commission administrative staff manuals and instructions to staff that affect a member of the public; is unnecessary and impractical. One of the reasons for this determination is that the records referred to in paragraph A above are continually being generated, so that any publication of an index of them would be quite lengthy and might soon become out-of-date. With respect to the items referred to in paragraph B above, all currently-effective Commission statements of policy and interpretations, except for one, have been published in the **Federal Register** and the Commission now generally publishes such documents in the **Federal Register** so that there will be few, if any, which are unpublished in the future. The Commission has determined that it is unnecessary to publish an index of this one document. Furthermore, the records listed in paragraph C are gradually generated and no need is seen for quarterly publication of an index of them. Finally, publication of the indexes would require an additional expenditure of the Commission's limited resources.

Instead of publication, the Commission's Office of the Secretariat will provide copies of the indexes of these records upon request at the direct cost of duplication. A listing of Commission indexes currently available is Appedix A hereto.

Issued by the Commission in Washington, D.C. on January 9, 1981.

Jane K. Stuckey,

Secretary of the Commission.

Appendix A—*Commodity Futures Trading Commission Indexes Available for Public Inspection and Copying*

Agency	Index title: period covered, brief description of contents	Order from; price; make checks payable to Commodity Futures Trading Commission	For inspection, copying, or additional information contact
Commodity Futures Trading Commission.	Index of final Commission opinions, including concurring and dissenting opinions, and orders in the adjudication of cases. April 21, 1975 to date [1].	Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581. Price: 10 cents per page.	Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, (202) 254-6314.

Appendix A—*Commodity Futures Trading Commission Indexes Available for Public Inspection and Copying* —Continued

Agency	Index title; period covered, brief description of contents	Order from; price; make checks payable to Commodity Futures Trading Commission	For inspection, copying, or additional information contact
Commodity Futures Trading Commission.—Continued	Index of statements of policy and interpretations adopted by the Commission and not published in the Federal Register. April 21, 1975 to date.	Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581. Price: 10 cents per page.	Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581, (202) 254-6314.
Do	Index of Commission administrative manuals and instructions to staff that affect a member of the public. April 21, 1975 to date [2].	do	Do.

[1] This index consists of separate chronological listings of final Commission opinions and orders in enforcement cases and reparations proceedings before the Commission.

[2] Commission instructions no longer in use are not included in this index.

DEPARTMENT OF EDUCATION

Advisory Council on Developing Institutions; Meeting

AGENCY: Advisory Council on Developing Institutions.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Developing Institutions. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATE: January 29–30, 8 a.m. to 5 p.m.

ADDRESS: F.O.B. 6, Room 1130, 400 Maryland Avenue, SW., Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Dr. Paul H. Carnell, Executive Director, Advisory Council on Developing Institutions, Regional Office Building 3, (202) 245–2455, 7th and D Streets, SW., Washington, D.C. 20202.

SUPPLEMENTARY INFORMATION: The Advisory Council on Developing Insitutions is established under Section 303 of the Higher Education Act of 1965, as amended (20 U.S.C. 1051–1056), unless otherwise noted. The Council is established to identify developing institutions through which the purposes of this title may be achieved; and establish the priorities and criteria to be used in making grants under section 304(a).

The meeting of the Council shall be open to the public. The proposed agenda includes:

1. Swearing-in of new members.
2. An Analysis of the Application Review Award Process.
3. A Progress Report on the "Study of the Strengthening Developing Institutions Program."

Records are kept of all Council proceedings, and are available for public inspection at the Office of the Executive Director of the Advisory Council on Developing Institutions, Room 3068, Regional Office Building 3, 7th and D Streets, SW., Washington, D.C. 20202.

Signed at Washington, D.C., on January 13, 1981.

Paul H. Carnell,

Executive Director, Advisory Council on Developing Institutions.

[FR Doc. 81-1555 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP81-30-000]

Algonquin Gas Transmission Co.; Filing

January 13, 1981.

Take notice that on January 9, 1981, Algonquin Gas Transmission Company (Algonquin Gas) filed three tariff sheets relating to Rate Schedule SNG–1 to provide for extra-schedule deliveries of synthesized natural gas (SNG) pursuant to urgent customer requests. Algonquin Gas also requests such other authorization as may be necessary to effectuate such deliveries.

By its proposal, Algonquin Gas states that it will deliver to its regular SNG–1 customers such extra-schedule quantities of SNG as are available from the SNG plant at Freetown, Massachusetts which is owned and operated by Algonquin Gas' wholly-owned subsidiary, Algonquin SNG, Inc. Deliveriers will be made during the remainder of the 1980–81 SNG delivery season. Algonquin Gas states that the price will be based on the incremental cost of feedstock plus the established rate for converting feedstock into SNG. It also states that its intent is neither to gain nor lose in net income as a result of making such proposed extra-schedule SNG deliveries. The full details of Algonquin Gas' filing are on file with the Commission and open for public inspection.

Algonquin further states that its proposal is designed to meet two *force majeure* situations, namely the inability of its distributor-customers to receive LNG supplies due to the interruption of shipping at Algeria, and the 20% colder-than-normal winter currently being experienced. Accordingly, Algonquin Gas requests Commission acceptance of its tariff filing and the issuance of any necessary authorization on an expedited basis.

Algonquin states that a copy of its letter and enclosure has been mailed to all affected customers and interested state commissions and is being posted as provided by our Regulations.

Take further notice that the above referenced tariff sheets were accepted for filing by letter order of the Director of the Office of Pipeline and Producer Regulation subject to noticing and review of any comments received. Said tariff sheets are to be effective for the period January 9, 1981 through March 31, 1981.

The January 9, 1981 order indicates that the proposed tariff sheets provide for an increase in the level of service without a change in rate, and that the revenues collected thereunder shall be subject to a revenue-cost comparison pursuant to the post audit procedures of § 10.6 of Rate Schedule SNG–1, which are intended to protect customers against overcollection of revenues.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with §§ 1.8 and 1.10 of the Commission's Rules of Practice and Procedure (18 CFR 1.8, 1.10). All such petitions or protests should be filed on or before January 23, 1981. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene.

Lois D. Cashell,

Acting Secretary.

[FR Doc. 81-1590 Filed 1-15-81; 8:45 a.m.]

BILLING CODE 6450-85-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-1626-7]

Availability of Environmental Impact Statements

AGENCY: Office of Evironmental Review (A-104) U.S. Environmental Protection Agency.

PURPOSE: This notice lists the environmental impact statements (EIS's) which have been officially filed with the EPA and distributed to Federal agencies and interested groups, organizations and individuals for review pursuant to the Council on Environmental Quality's regulations (40 CFR Part 1506.9).

PERIOD COVERED: This notice includes EIS's filed during the week of January 5, 1981 to January 9, 1981.

REVIEW PERIODS: The 45-day review period for draft EIS's listed in this notice is calculated from January 16, 1981 and will end on March 2, 1981. The 30-day review period for final EIS's as calculated from January 16, 1981 will end on February 16, 1981.

EIS AVAILABILITY: To obtain a copy of an EIS listed in this notice you should contact the Federal agency which prepared the EIS. This notice will give a contact person for each Federal agency which has filed an EIS during the period covered by the notice. If a Federal agency does not have the EIS available upon request you may contact the Office of Environmental Review, EPA, for further information.

BACK COPIES OF EIS'S: Copies of EIS's previously filed with EPA or CEQ which are no longer available from the originating agency are available with charge from the following source: Information Resources Press, 1700 North Moore Street, Arlington, Virginia 22209 (703) 558-8270.

SUMMARY OF NOTICE: This notice sets forth a list of EIS's filed with EPA during the week of January 5, 1981 to January 9, 1981. The Federal agency filing the EIS, the name, address, and telephone number of the Federal agency contact for copies of the EIS, the filing status of the EIS, the actual date the EIS was filed with EPA, the title of the EIS, the State(s) and county(ies) of the proposed action and a brief summary of the proposed Federal action and the Federal agency EIS number, if available, is listed in this notice. Commenting entities on draft EIS's are listed for final EIS's. All additional information relating to EIS's such as time extensions or reductions of prescribed review periods, withdrawals, retractions, corrections or supplemental reports is also noticed under the appropriate agency.

FOR FURTHER INFORMATION CONTACT: Kathi L. Wilson, Office of Environmental Review, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460 (202) 245-3006.

Dated: January 13, 1981.

William N. Hedeman, Jr.,

Director, Office of Environmental Review (A-104).

U.S. ARMY CORPS OF ENGINEERS

Contact: Mr. Richard Makinen, Office of Environmental Policy, Attn: DAEN-CWR-P, Office of the Chief of Engineers, U.S. Army Corps of Engineers, 20 Massachusetts Avenue, Washington, D.C. 20314 (202) 272-0121.

Draft

UVAS CREEK FLOOD PROTECTION PLAN, GILROY: Santa Clara County, California, January 6: Proposed is a flood control plan for Uvas Creek located along the city of Gilroy, Santa Clara County, California. The preferred alternative consists of: (1) A new or reconstructed levee along the north side of the creek, setback wherever possible; (2) reconstruction of about 1,000 feet of existing levee downstream of Miller Avenue; (3) raising of up to 1,000 feet of levee upstream of Miller Avenue; (4) relocation of Thomas Road; and (5) construction of a new bridge upstream of the existing structure. (San Francisco District) (EIS order No. 810007).

EXTENSION: The review period for the above EIS has been extended until March 29, 1981. (No. 810007.)

Draft Supplement

MANKATO-N. MANKATO-LE HILLIER FLOOD CONTROL (DS-2): Blue Earth County, Minnesota, January 5: Proposed is the alternation or relocation of two MN-169/60 bridges over the Blue Earth River in Blue Earth County, Minnesota. The bridges must be raised or replaced to an elevation approximately 17 feet above the existing bridges. The alternatives differ only in location and would consist of a new bridge built immediately upstream of the existing bridges and new off and on ramps to replace an existing at-grade intersection. This statement supplements an amended final EIS filed in April 1972. (St. Paul District) (EIS order No. 810003).

Report

REPORT—MISSOURI RIVER MANAGEMENT PLAN: Several, January 9: This supplemental report provides information concerning a management plan for the Missouri River as related to final EIS, No. 790003, filed 1-2-79 on the Missouri River bank stabilization and navigation project, continuing construction and maintenance. (Missouri River division) (EIS order No. 810019).

REESTABLISHMENT OF EIS AVAILABILITY DATE: Based on the actual availability of the following EIS's EPA has reestablished the date of availability and subsequently the end of the review periods for the following EIS's:

Rouge River Basin, Elk Creek Lake, OR—Date of EIS availability is December 12, 1981—End of Review is January 22, 1981. (No. 800946FS.)

Maalaea Harbor for Light-Draft Vessels, HI—Date of EIS availability is December 29, 1981—End of Review is January 27, 1981. (No. 800887F.)

DEPARTMENT OF ENERGY

Contact: Dr. Robert Stern, Acting Director, NEPA Affairs Division, Department of Energy, Mail Station 4G-064, Forrestal Bldg., Washington, D.C. 20585.

Draft

SOLVENT REFINED COAL-1 DEMONSTRATION PROJECT: Daviess County, Kentucky, January 9: Proposed is a cost sharing agreement for the construction and operation of a 6,000 TPSD solvent refined coal demonstration project with the potential for ultimate development of a 30,000 TPSD commercial facility at Newman in Daviess County, Kentucky. The alternatives consider: (1) Site locations, (2) design options, (3) plant layout, and (4) termination of contract. (DOE/EIS-0073-D/VI) (EIS order No. 810017).

ENVIRONMENTAL PROTECTION AGENCY

Draft

Contact: RTP Library, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, (919) 541-2777.

BENZENE STORAGE TANK EMISSIONS, STANDARDS: Regulatory, January 7: Proposed are benzene emissions standards which would limit emissions from existing and new storage tanks. Several control options are considered both for new and existing plants including no additional standard and the prohibition of benzene tanks. The other options address the possible use of: (1) Internal floating roofs (contact or noncontact), (2) secondary seals, (3) contact internal floating roofs with liquid-mounted primary seals and a continuous secondary seal, and (4) vapor control systems. (EPA-45013-80-034A.)

EXTENSION: The review period for the above EIS has been extended until March 10, 1981. (No. 810011.)

Final

Contact: Mr. Edward Vest, Region VII, Environmental Protection Agency, 324 East 11th Street, Kansas City, Missouri 64106, (816) 374-2921.

MARION COUNTY SEWERAGE FACILITIES, GRANT: Marion County, Kansas, January 7: Proposed is the awarding or non-approval of funding for the constructing of a conventional sewerage collection and treatment system to serve the Marion County Lake Improvement District, Kansas. The project includes: (1) A conventional gravity collection system, and (2) a force main to the city of Marion's proposed treatment plant. Alternatives include: (1) A total retention lagoon, (2) new on-site systems, (3) pressure sewer and vacuum sewer collection systems, and (4) community leach fields. (EPA-907/9-80-004.) Comments made by: COE, USDA, HHS, HUD, DOI, State agencies, individuals and businesses. (EIS order No. 810013.)

Draft

Contact: Ms. Lisa Corbin, Region X, Environmental Protection Agency, 1200 6th Avenue, Seattle, Washington 98101, (206) 442–1285.

CITY OF COEUR D'ALENE WWT FACILITY, GRANT: Kootenai County, Idaho, January 7: Proposed is the awarding of a grant for the upgrading of sewage treatment facilities in the city of Coeur D'Alene, Kootenai County, Idaho. The alternatives consider: (1) no action, (2) upgrading of existing facilities and construction of additional facilities, (3) closure of existing plant and construction of a new trickling filter/activated sludge plant, and (3) upgrading the existing plant and construction of an additional plant. All of the alternatives would include sewer interceptor extensions. (EPA–910/9–80–076) (EIS order No. 810012).

GENERAL SERVICE ADMINISTRATION

Contact: Mr. Carl W. Penland, Acting Director, Environmental Affairs Division, General Services Administration, 18th and F Streets, NW., Washington, D.C. 20405, (202) 566–1416.

Draft

POST OFFICE AND COURTHOUSE RENOVATION, CHARLESTON: Charleston County, January 9: Proposed is the renovation of and annex construction to the US post office and courthouse in the city and county of Charleston, South Carolina. The annex will contain 25,270 sq. ft. of occupiable space. The alternatives consider: (1) No action, (2) construction of annex, (3) relocation of post office, (4) relocation of courthouse, (5) leasing of existing space, (6) acquisition of adjacent building, and (7) use of existing Government-owned buildings. (ESC–81001) (EIS order No. 810020).

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SECTION 104H

The following are community development block grant statements prepared and circulated directly by applicants pursuant to section 104 (H) of the 1974 Housing and Community Development Act. Copies may be obtained from the office of the appropriate local executive. Copies are not available from HUD.

Final

PUEBLO DOWNTOWN HOTEL/CONVENTION CENTER, UDAG: Pueblo County, Colorado, January 1: Proposed is the awarding of a UDAG for the Pueblo Downtown Hotel/Convention Center project in the city and county of Pueblo, Colorado. The complex will be composed of separate but integrated facilities including: (1) A conference center, (2) a hotel, (3) a retail complex, (4) a parking facility, and (5) associated on-site improvements. Comments made by: AHP, EPA, FEMA, State, and local agencies. (EIS order No. 810010).

DEPARTMENT OF INTERIOR

Contact: Mr. Bruce Blanchard, Director, Environmental Project Review, Room 4256 Interior Bldg., Department of the Interior, Washington, D.C. 20240 (202) 343–3891.

Bureau of Land Management

Draft

MOON LAKE POWER PLANT UNITS 1 AND 2, RIGHT-OF-WAY: Uintah County, Utah, January 8: Proposed is the awarding of right-of-way for the Moon Lake Power Plant units 1 and 2 in Uintah County, Utah. The electricity generated would be distributed by one 345 kV transmission line and four 138 kV lines. The alternatives consider various options for plant sites, coal supply, coal transport, water source, and power transmission systems. The USDA/REA is a joint lead agency and proposes to issue loan guarantees. The FS is a cooperating agency. (FES–81–2). (USDA–REA–(ADM)–81–1–0). (EIS order No. 810016).

Final

EASTERN SAN DIEGO COUNTY PLANNING AREA MANAGEMENT: San Diego County, California, January 6: Proposed is a grazing and wilderness management plan for the eastern San Diego County planning unit (McCain Valley) in the El Cento resource area of the Riverside district, California. The planning area encompasses 98,902 acres of public land. Grazing management would be implemented on 67,903 acres, and wilderness designation recommended for 41,776 acres. The grazing alternatives include: (1) No grazing, (2) intensive use, (3) limited use, and (4) no action. The wilderness alternatives are: (1) Maximize wilderness, (2) no wilderness, and (3) limited wilderness. Comments made by: DOI, EPA, USDA, State and local agencies, groups, individuals, and business. (EIS order No. 810006).

Final

MOUNT DOME PLANNING UNIT LIVESTOCK GRAZING MGMT.: Siskiyou and Modoc Counties, California, January 6: Proposed is the implementation of a livestock grazing management plan for the Mount Dome area in Siskiyou and Modoc Counties, California. Components include: (1) Adjustments of authorized livestock use; (2) introduction of grazing treatments; and (3) range projects and facilities including vegetation manipulation and construction of reservoirs, fencing, pipeline, water tank and troughs. The alternatives include moderate, primitive, limited or exclusive uses and no action. (FES–81–2). Comments made by: FERC, DOI, EPA, USDA, HHS, AHP, State agencies, groups, and individuals. (EIS order No. 810005).

Bureau of Indian Affairs

Final

WILDHORSE RESERVOIR AND LANDS, RECREATIONAL LEASE: Elko County, Nevada, January 6: Proposed is the leasing of 150 acres of Federal lands, known as the Wildhorse Marina, within the Wildhorse Reservoir, Elko County, Nevada. The alternatives consider: (1) No action, (2) retain present administration in addition to further recreational development, (3) lease or convey all or portions of the reservoir area to nontribal entities, and (4) seek DOI sponsorship of legislation for the conveyance in trust of the BIA-administered areas of Wildhorse Reservoir to the tribes (Proposed Action of draft EIS). (FES–80–55). Comments made by: DOI, DOC, USDA, EPA, COE, AHP, State and Local Agencies, Groups, Individuals, and Businesses. (EIS order No. 810009).

Water and Power Resources Service

Draft

ACREAGE LIMITATION, RECLAMATION ACT OF 1902: Programmatic, January 8: Proposed are three alternatives for regulatory procedures under the Reclamation Act of 1902, specifically regarding acreage limitation provisions. The act allows Federal assistance through irrigation development so that opportunities can be provided in arid parts of the Western U.S. Acreage limitations provide that federally developed water could not be sold for use on more than 160 acres in individual ownership and that the user had to live on or near the benefited land. (DES–81–1). (EIS order No. 810015).

EXTENSION: The review period for the above EIS has been extended until March 16, 1981. (No. 810015).

O'NEILL UNIT, PICK-SLOAN BASIN PROGRAM, NB, published FR December 17, 1980—review extended from February 10, 1981 (prior extension) to March 2, 1981. (No. 800958).

DEPARTMENT OF LABOR

Contact: Ms. Joanne Lindhart, Chief, Office of Environmental Impact Assessment, Department of Labor, Room N–3673, Washington, D.C. 20210 (202) 523–7111.

Final

OCCUPATIONAL NOISE EXPOSURE STANDARDS, AMENDMENT: Regulatory, January 6: Proposed is the amendment of the standard for occupational exposure to noise. The amendment imposes requirements for hearing conservation programs. The alternatives consider: (1) Revision of the permissible exposure limits for noise, (2) initiation of hearing conservation programs at higher or lower levels, (3) revision of the monitoring, testing, and training provisions, and (4) no regulatory action. Comments made by: USDA, HEW, DOT, DOI, STAT, DOD, HUD, EPA, CEQ, ERDA, groups, and individuals. (EIS ORDER No. 810008).

DEPARTMENT OF TRANSPORTATION

Contact: Mr. Martin Convisser, Director, Office of Environment and Safety, U.S. Department of Transportation, 400 7th Street, SW., Washington, D.C. 20590, (202) 426–4357.

Federal Highway Administration

Draft

US 27 BYPASS OF DECATUR: Adams County, Indiana, January 8: Proposed is the relocation of US 27 to create a bypass of the city of Decatur in Adams County, Indiana. The bypass would extend from 0.5 mile south of the intersection of US 27 and In–124 to US 27/US 33, and vary from 9.4 to 12.7 miles depending on the alternative chosen. The alternatives considered are: (1) Construction on a new alignment west of Decatur, (2) Construction on a new alignment east of Decatur, and (3) widening and upgrading of the existing alignment. (FHWA–IND–EIS–79–05–D). (EIS order No. 810014).

EXTENSION: The review period for the above EIS has been extended until March 9, 1981. (No. 810004).

Final

I-78 COMPLETION, BERKELEY HEIGHTS TO SPRINGFIELD: Somerset and Union Counties, New Jersey, January 9: Proposed is the completion of I-78 from the present termini of I-78 in the vicinity of Plainfield Avenue in Berkeley Heights to the vicinity of Baltusrol Road in Springfield and within the counties of Somerset and Union, New Jersey. The facility would be a six lane, controlled access freeway extending for 5.5 miles. In addition to no build eight alternatives are considered. (FHWA-NJ-EIS-76-02-F). Comments made by: USDA, DOC, DOI, HUD, DOT, EPA, COE, and State and local agencies. (EIS order No. 810018).

Report

REPORT—NB-31 IMPROVEMENT, I-80 TO NB-31/50: Sarpy County, Nebraska, January 5: This supplemental report is an addendum to the final EIS, No. 800639, filed 8-26-80 concerning the improvement of NB-31 from I-80 to the junction of NB-31/50 in Sarpy County, Nebraska. (EIS order No. 810004).

EXTENSION: US 70 Improvement, Portales-Clovis Section, NM, published FR January 9, 1981—review extended from February 23, 1981 to February 26, 1981. (No. 810001).

[FR Doc. 81-1063 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-37-M

[OPP-180548; PH-FRL 1628-2]

California; Issuance of Specific Exemption for Carbofuran on Artichokes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted a specific exemption to the California Department of Food and Agriculture (hereafter referred to as the "Applicant") for the use of carbofuran to control the cribrate weevil on 625 acres of globe artichokes in Monterey County, California. The specific exemption is issued under the Federal Insecticide, Fungicide, and Rodenticide Act.

DATE: The specific exemption expires on August 25, 1981.

FOR FURTHER INFORMATION CONTACT: Jack E. Housenger, Registration Division (TS-767), Office of Pesticide Programs, Environmental Protection Agency, Rm. E-107, 401 M St. SW., Washington, D.C. 20460, (202-426-0223).

SUPPLEMENTARY INFORMATION: The cribrate weevil, *Otiorhynchus cribricollis*, has caused repeated and increasing damage to artichokes since it was found in artichoke fields in 1956. The spread of this pest has been slow but steady since adults do not fly. They spread by moving from plant to plant or by being carried with propagating stock to new fields. Damage occurs both to the roots by the larvae and to the foliage and buds by the adults. Control is achieved by killing the adults.

The Applicant claims that there are no registered alternatives for the control of cribrate weevils on artichokes. Aldrin and endrin had been successfully used until these uses were cancelled. No cultural or biological control methods are known. The Applicant reported that losses for the 1979 growing season exceeded $194,000. A negligible crop loss is anticipated with the use of carbofuran treatments.

The Applicant proposed to treat 625 acres of artichokes with a maximum of two applications at a rate of 0.5 to 1.0 pound active ingredient (a.i.) carbofuran per acre. All applications are to be made by ground equipment with a 30-day preharvest interval and a 24-hour field reentry interval to be observed. The second half of the 1980 growing season and the first half of the 1981 growing season will be covered by this exemption.

EPA has determined that residues of carbofuran and its metabolites from the proposed use should not exceed 1.0 part per million (ppm), of which no more than 0.2 ppm is carbamate. EPA also notes that control of the cribrate weevil now on this limited acreage could retard the spread of this pest to new acreage in the future. No undue adverse effects on the environment are anticipated from this use of carbofuran.

After reviewing the application and other available information, EPA has determined that the criteria for an exemption have been met. Accordingly, the Applicant has been granted permission to use the pesticide noted above until August 25, 1981, to the extent and in the manner set forth in the application. The specific exemption is also subject to the following conditions:

1. The product Furadan 4 Flowable, EPA Reg. No. 279-2876, may be used. If an unregistered label is used in connection with this product, it must contain the identical applicable precautions and restrictions which appear on the registered label.

2. A maximum of two applications per season may be made.

3. Furadan may be applied at a rate of 1 to 2 pints of formulation (0.5 to 1.0 pound a.i.) per acre.

4. Applications may be made using ground equipment. A minimum of 50 gallons of water per acre will be used.

5. All applications will be made by or under the direct supervision of State-certified applicators.

6. A maximum of 625 acres of globe artichokes in the county named above may be treated.

7. A total of 2,500 pounds of carbofuran is authorized.

8. No applications may be made within 30 days of harvest.

9. A field reentry interval of at least 24 hours shall be observed.

10. Carbofuran may not be applied directly to any body of water, and drift reduction precautions must be observed. Carbofuran may not be applied where excessive runoff is likely to occur. Care must be taken to prevent contamination of water by the cleaning of equipment or disposal of wastes or excess pesticides.

11. Residue levels of carbofuran in or on artichokes resulting from this use are not expected to exceed 1.0 ppm, of which no more than 0.2 ppm is carbamate. Artichokes with residue levels not exceeding this level may enter interstate commerce. The Food and Drug Administration, U.S. Department of Health and Human Services, has been advised of this action.

12. The EPA shall be immediately informed of any adverse effects resulting from the use of carbofuran in connection with this exemption.

13. The Applicant is responsible for ensuring that all of the provisions of this specific exemption are met and must submit an interim report by March 31, 1981, on the 1980 treatments and by February 28, 1982, on the 1981 treatments.

(Sec. 18 as amended 92 Stat. 819; (7 U.S.C. 136)).

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81-1642 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-32-M

[OPTS-51193, TSH-FRL 1628-3]

Certains Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Section 5(d)(2) requires EPA to publish in the **Federal Register** certain information about each PMN within 5

working days after receipt. This Notice announces receipt of two PMN's and provides a summary of each.

DATES: Written comments by:

PMN 80-330 February 2, 1980
PMN 80-340 February 9, 1981

ADDRESS: Written comments to: Document Control Officer (TS-793), Management Support Division, Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. E-447, 401 M St., SW., Washington, D.C. 20460, (202-755-8050).

FOR FURTHER INFORMATION CONTACT: Carolyn Brown, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-221, 401 M St., SW., Washington, D.C. 20460, (202-426-3980).

SUPPLEMENTARY INFORMATION: Section 5(a)(1) of TSCA (90 Stat. 2012 (15 U.S.C. 2604)), requires any person who intends to manufacture or import a new chemical substance to submit a PMN to EPA at least 90 days before manufacture or import commences. A "new" chemical substance is any substance that is not on the Inventory of existing substances compiled by EPA under section 8(b) of TSCA. EPA first published the Initial Inventory on June 1, 1979. Notices of availability of the Inventory were published in the **Federal Register** of May 15, 1979 (44 FR 28558-Initial) and July 29, 1980 (45 FR 505444-Revised). The requirement to submit a PMN for new chemical substances manfactured or imported for commercial purposes became effective on July 1, 1979.

EPA has proposed premanufacture notification rules and forms in the **Federal Register** issues of January 10, 1979 (44 FR 2242) and October 16, 1979 (44 FR 59764). These regulations, however, are not yet in effect. Interested persons should consult the Agency's Interim Policy published in the **Federal Register** of May 15, 1979 (44 FR 28564) for guidence concerning premanufacture notification requirements prior to the effective date of these rules and forms. In particular, see page 28567 of the Interim Policy.

A PMN must include the information listed in section 5(d)(1) of TSCA. Under section 5(d)(2) EPA must publish in the **Federal Register** nonconfidential information on the identity and use(s) of the substance, as well as a description of any test data submitted under section 5(b). In addition, EPA has decided to publish a description of any test data submitted with the PMN and EPA will publish the identity of the submitter unless this information is claimed confidential.

Publication of the section 5(d)(2) notice is subject to section 14 concerning disclosure of confidential information. A company can claim confidentiality for any information submitted as part of a PMN. If the company claims confidentially for the specific chemical identity or use(s) of the chemical, EPA encourages the submitter to provide a generic use description, a nonconfidential description of the potential exposures from use, and a generic name for the chemical. EPA will publish the generic name, the generic use(s), and the potential exposure descriptions in the **Federal Register.**

If no generic use description or generic name is provided, EPA will develop one and after providing due notice to the submitter, will publish an amended **Federal Register** notice. EPA immediately will review confidentiality claims for chemical identity, chemical use, the identity of the submitter, and for health and safety studies. If EPA determines that portions of this information are not entitled to confidental treatment, the Agency will publish an amended notice and will place the information in the public file, after notifying the submitter and complying with other applicable procedures.

After receipt, EPA has 90 days to review a PMN under section 5(a)(1). The section 5(d)(2) **Federal Register** notice indicates the date when the review period ends for each PMN. Under section 5(c), EPA may, for good cause, extend the review period for up to an additional 90 days. If EPA determines that an extension is necessary, it will pubish a notice in the **Federal Register.**

Once the review period ends, the submitter may manufacture the substance unless EPA has imposed restrictions. When the submitter begins to manufacture the substance, he must report to EPA, and the Agency will add the substance to the Inventory. After the substance is added to the Inventory, and company may manufacture it without providing EPA notice under section 5(a)(1)(A).

Therefore, under the Toxic Substances Control Act, summaries of the data taken from the PMN's are published herein.

Interested persons may, on or before the dates shown under "Dates," submit to the Document Control Officer (TS-793), Management Support Division, Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. E-447, 401 M St., SW, Washington, DC 20460, written comments regading these notices. Three copies of all comments shall be submitted, except that individuals may submit single copies of comments. The comments are to be identified with the document control number "[OPTS-51193]" and the specific PMN number. Comments received may be seen in the above office between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

(Sec. 5, 90 Stat. 2012 (15 U.S.C. 2604))

Dated: January 8, 1981.

Edward A. Klein,

Director, Chemical Control Division.

PMN 80-330

The following information is taken from data submitted by the manufacturer in the PMN.

Close of Review Period. February 17, 1981.

Manufacturer's Identity. Claimed confidential business information. Organizational description provided:

Annual sales—In excess of $500 million.

Manufacturing site—West-north central U.S.

Standard Industrial Classification Code—286 "Industrial Organic Chemicals."

Specific Chemical Identity. Claimed confidential business information. Generic name provided: Amino alcohol.

Use. Claimed confidential business information. Generic use information provided: PMN substance will be used in an open use that will release less than 5,000 kilograms (kg) to the environment per year with potential exposure to both chemical and non-chemical industrial employees.

Production Estimates

First year—50,000 kg.
Second year—60,000 kg.
Third year—70,000 kg.

Physical/Chemical Properties

Viscosity (23°C, 73°F)—12.5 cps.
Density (23°C, 73°F)—0.9019 g/ml.
Flashpoint (Closed cup)—203°F (95°C).
Coefficient of expansion (23-63°C, 73-145°F)—7.35×10^{-4}/°C, (4.09×10^{-4}/°F).
Freezing point—< −78°C, (< −108°F).
Vapor pressure (100°F, 38°C)—6.00 Torr.
Boiling range—238-240°C, (460-464°F).
pH of 10% aqueous solution—11.4.
Solubility in water (23°C, 73°F)—>10%.

Toxicity Data

Ames test—Nonmutagenic.
Acute oral LD_{50} (male, female rats)—1.72 ml/kg.

Primary ocular irritation—Severely irritating. All adverse effects were reversible in 30 days.

Primary dermal irritation—Severely irritating, corrosive. All adverse effects were reversible in 30 days.

Activity	Exposure route(s)	Maximum number exposed	Maximum duration		Concentration (ppm)	
			Hours/day	Day/year	Average	Peak
Manufacture	Dermal	10	8	21	0–1	
Do	Ocular					
Do	Inhalation					
The manufacturer states that workers will be potentially exposed to the new chemical substance during sampling, drum filling, and cleanup operations.						
Use	Dermal	10	24	30	0–1	
Do	Ocular				40	
Do	Inhalation				40	
Disposal	Dermal	10	5	30	0–1	
Do	Ocular				4–0	
Do	Inhalation					

Environmental Release/Disposal. The manufacturer states that less than 10 kg/yr of the chemical will be released into the air, with the duration of release reported as 24 hr/da, 21 da/yr; and that all air emissions will be incinerated. The manufacturer also states that less than 100 lb/yr of this chemical will be sewered to an onsite evaporative lagoon designed for long-term chemical storage.

PMN 80–340.

The following information is taken from data submitted by the manufacturer in the PMN.

Close of Review Period. February 24, 1981.

Manufacturer's Identity. Claimed confidential business information.

Specific Chemical Identity. Polymer of: Polymer diol, monocarboxylic acid diol, diamine, and a diisocyanate.

Use. No data were submitted.

Production Estimates

	Kilograms per year	
	Minimum	Maximum
First year	30,000	100,000
Second year	100,000	300,000
Third year	300,000	500,000

Physical/Chemical Properties. No data were submitted.

Toxicity Data. The manufacturer states that an Ames test has been conducted on the substance. It was found to be nonmutagenic when tested using the microbial plate assay for mutagenic potential both with and without S–9 enzymatic activation. The result indicated that neither the substance nor its metabolites are mutagenic.

Exposure. The manufacturer states that: The substance will be produced at one plant controlled by the submitter; five 8-hour shifts using four employees per week will be required to produce the maximum quantities indicated for 1983; and that direct exposure occurs only during accidental situations such as spills or leaks during loading or transferring of the product both at the manufacturing location and at the customer's site.

Environmental Release/Disposal. The manufacturer states that because the product is manufactured in closed kettles, environmental release at the manufacturing location or at the customer's site under normal operating conditions is nil.

[FR Doc. 81–1641 Filed 1–15–81; 8:45 am]

BILLING CODE 6560–31–M

[OPP–180528; PH–FRL 1627–8]

New Mexico; Crisis Exemption for Fenvalerate on Lettuce

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA gives notice that the New Mexico Department of Agriculture (hereafter referred to as "New Mexico") has availed itself of a crisis exemption for the use of fenvalerate to control *Heliothis* species on 3,300 acres of lettuce in the Mesilla Valley, New Mexico. New Mexico had submitted a request for a specific exemption for this use on August 25, 1980.

FOR FURTHER INFORMATION CONTACT: Jack E. Housenger, Registration Division (TS–767), Office of Pesticide Programs, Environmental Protection Agency, Rm. E–107, 401 M St., SW., Washington, D.C. 20460, (202–426–0223).

SUPPLEMENTARY INFORMATION: New Mexico reported that the State has experienced infestations of *Heliothis* species in lettuce for the past three years. The pest destroys the head and makes the lettuce unmarketable. This year New Mexico anticipated a severe infestation of this pest in lettuce because there was an outbreak of *Heliothis* spp. in cotton which is intermingled with lettuce fields. New Mexico stated that the time element became to critical to wait for a specific exemption so it initiated a crisis exemption on September 8, 1980. A total loss of the lettuce crop could mean a monetary loss of up to $28.7 million for growers in the State, New Mexico claimed.

According to New Mexico, methomyl, Orthene, Dipel, Phosdrin, Nudrin, Thiodan, and Thuricide are registered for use against *Heliothis* spp., but they have given erratic results.

New Mexico used Pydrin (fenvalerate), EPA Reg. No. 201–401, manufactured by Shell Chemical Co. A maximum of 3,300 pounds active ingredient (a.i.) was used at a rate of 0.1 to 0.2 pound a.i. per acre. A minimum of 3 gallons per acre with the specified dosage was applied by air; a minimum of 10 gallons per acre with the specified dosage was applied by ground. A maximum of 5 applications were to be made at 5–7 day intervals and a 7-day pre-harvest interval was to be observed. State-certified applicators or personnel under their direct supervision made the applications. Pydrin residue levels in lettuce were set at 1 part per million. On December 19, the agency raised the residue levels to 2 parts per million.

In order to reduce possible adverse effects on man and the environment, buffer zones were established according to the specific exemption issued last year for Pydrin; New Mexico Department of Agriculture personnel monitored the applications; wrapper leaves were to be trimmed on the lettuce where Pydrin applications were made; and all applicable directions, restrictions, and precautions on the product label were to be made available to the personnel involved. Since the program was expected to be needed for more than 15 days, New Mexico requested a specific exemption for its continuation.

(Sec. 18 as amended 92 Stat. 891; (7 U.S.C. 136))

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81–1644 Filed 1–15–81; 8:45 am]

BILLING CODE 6560–32–M

[OPP-180531A; PH-FRL 1628-4]

Oklahoma; Issuance of Specific Exemption for Diazinon in Wheat Fields

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA granted a specific exemption to the Oklahoma Department of Agriculture (hereafter referred to as the "Applicant") for the use of Diazinon to control white grubs on a maximum of 10,000 acres of winter wheat in 10 counties in Oklahoma. The specific exemption was issued under the Federal Insecticide, Fungicide, and Rodenticide Act.

DATE: The specific exemption expired on November 30, 1980.

FOR FURTHER INFORMATION CONTACT: Edward Gross, Registration Division (TS-767), Office of Pesticide Programs, Environmental Protection Agency, Rm. E-124, 401 M St. SW., Washington, D.C. 20460, (202-426-0223).

SUPPLEMENTARY INFORMATION: On September 18, 1980, the Applicant initiated a crisis exemption for the use of Diazinon 14G and Diazinon AG500 in Blaine, Canadian, Garfield, Grant, Kingfisher, and Major Counties, Oklahoma, for the control of white grubs in winter wheat. Notice of this crisis exemption appeared in the **Federal Register** of December 12, 1980.

According to the Applicant, white grubs infested land to be planted to winter wheat in Blaine, Canadian, Cotton, Garfield, Grant, Kay, Jackson, Kingfisher, Major, and Tillman Counties. The Applicant stated that white grubs exceeded economic threshold levels of 3 per square foot. There are no pesticides registered for use on white grubs in winter wheat. Data indicate that Diazinon, which contains the active ingredient O, O-diethyl O-(2-isopropyl-6-Methl-4-pyrimidinyl) phosphorothioate, is effective. The Applicant estimated that without the use of Diazinon, losses will range from $400,000 to $600,000 this year.

The Applicant proposed to use a maximum of 20,000 pounds of the active ingredient (a.i.) in a single pre-plant application. Diazinon is manufactured by Ciba-Geigy Corp. as Diazinon 14G, EPA Reg. No. 100-469 and Diazinon AG500, EPA Reg. No. 100-461.

EPA determined that residues of the a.i. in or on winter wheat grain should not exceed 0.03 part per million (ppm) from this use. This level has been judged adequate to protect the public health. It was expected that the proposed use would not present an undue hazard to the environment.

After reviewing the application and other available information, EPA determined that the criteria for a specific exemption had been met. Accordingly, the Applicant was granted permission to use the pesticide noted above until November 30, 1980, to the extent and in the manner set forth in the application. The specific exemption was also subject to the following conditions:

1. The products Diazinon 14G and Diazinon AG500 might be used.

2. Diazinon might be applied in the ten counties named above.

3. The dosage rate was not to exceed 7-14 pounds per acre of Diazinon 14G or 1½ quarts per acre of Diazinon AG500.

4. A single application was authorized.

5. Application was restricted to ground equipment only.6. The product was to be soil incorporated immediately after application.

7. Turn areas or row ends were to be soil incorporated.

8. Areas recently treated with Diazinon were not to be retreated. Infested areas were to be treated only once.

9. Granules which were spilled during loading or application were to be either covered or soil incorporated.

10. All applicable restrictions and precautions addressed on the label were to be adhered to.

11. The EPA was to be immediately informed of any adverse effects resulting from the use of Diazinon.

12. The Applicant was responsible for assuring that all of the provisions of this specific exemption were met and must submit a report summarizing the results of this program by May 1, 1981.

13. Residues of the a.i. in wheat grain or forage were not expected to exceed 0.03 ppm from this use. Wheat grain with residues not in excess of this level may be offered in interstate commerce. The Food and Drug Administration, U.S. Department of Health and Human Services, has been advised of this action.

(Sec. 18 as amended, 92 Stat. 819, [7 U.S.C. 136])

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81-1640 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-32-M

[OPP-180546; PH-FRL 16228-1]

Pennsylvania; Issuance of Specific Exemption for Permethrin in Mushroom Houses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted a specific exemption to the Pennsylvania Department of Agriculture (hereafter referred to as the "Applicant") for the use of permethrin to control adult sciarid flies in the mushroom houses in Pennsylvania. The specific exemption is issued under the Federal Insecticide, Fungicide, and Rodenticide Act.

DATE: The specific exemption expires on August 22, 1981.

FOR FURTHER INFORMATION CONTACT: Jack E. Housenger, Registration Division (TS-767), Office of Pesticide Programs, Environmental Protection Agency, Rm. E-107, 401 M St. SW., Washington, D.C. 20460 (202-426-0223).

SUPPLEMENTARY INFORMATION: The sciarid fly is a serious pest of mushrooms in Pennsylvania. The sciarid flies transmit mushroom diseases in addition to causing damage from larval feeding. The Applicant reports that the shift in marketing from processing to fresh by the Pennsylvania mushroom industry makes the requirement for higher mushroom quality more vital.

According to the Applicant, pesticides registered for use on mushrooms are not providing effective control of the adult sciarid flies. Resistance is developing to some of the pesticides, phytotoxicity is a problem in some, and pyrethrins are generally not available and are expensive, the Applicant reports. Data indicate that permethrin is effective in controlling sciarid fly populations. The Applicant estimates that without the use of permethrin, a 15-to-17 percent yield loss will occur, amounting to a 4,800 pound loss per double house per crop.

The Applicant proposed to treat a maximum of 38.8 million square feet of mushroom houses with Pounce Mushroom Spraymist, an unregistered product. The product is to be applied as an aerosol with a mechanical fog applicator.

EPA has determined that residues of permethrin, per se, should not exceed 0.05 part per million (ppm) in or on mushrooms from the proposed use. This level has been judged adequate to protect the public health. The risk from applicator exposure is expected to be significantly reduced by the protective clothing and respirator requirements EPA has imposed.

After reviewing the application and other available information, EPA has determined that the criteria for an exemption have been met. Accordingly, the Applicant has been granted a specific exemption to use the pesticide noted above until August 22, 1981, to the extent and in the manner set forth in the application. The specific exemption is also subject to the following conditions:

1. The product Pounce Mushroom Spraymist, manufactured by the FMC Corp., may be used.

2. Pounce is to be applied with a mechanical fog applicator at a rate of 2 to 2.5 ounces of formulation in 30 ounces of water per double house (35,000 cubic feet).

3. A maximum of 20 applications may be made prior to pinning of first break.

4. Pounce may not be applied once pins begin to form.

5. Pounce may not be used when mushrooms are present.

6. Prior to application, all doors, windows, and ventilators should be closed. All entrances should be locked or barricaded, pilot lights turned off, warning signs posted, and precautions taken to prevent persons and animals from entering the area.

7. During treatment, a pesticide respirator, which has been jointly approved by the Mining Enforcement and Safety Administration (formerly the U.S. Bureau of Mines) and the National Institute of Occupational Safety and Health, must be worn.

8. Applicators must wear protective clothing and rubber gloves. They must wash thoroughly with soap and water after handling permethrin and before eating or smoking. They must remove contaminated clothing and wash it before reuse.

9. It is recommended that a closed system be used for mixing/loading operations of Pounce Mushroom Spraymist.

10. No applications may be made within 6 days before harvest.

11. Mushroom houses should be ventilated to remove fog after the treatment time has elapsed. Fans should be used in houses that do not have forced air circulation.

12. Permethrin is extremely toxic to fish and aquatic invertebrates. Care must be taken not to contaminate water by the cleaning of equipment or disposal of wastes or excess pesticides.

13. Applications will be made by or under the direct supervision of applicators State-certified for this category of pest control.

14. A maximum of 10,000 gallons of Pounce Mushroom Spraymist may be used.

15. Residues of permethrin, per se, are not expected to exceed 0.5 ppm in or on mushrooms. Mushrooms with residues that do not exceed this level may enter interstate commerce. The Food and Drug Administration, U.S. Department of Health and Human Services, has been advised of this action.

16. Participants are to be notified of their obligation to report any adverse effects arising from the use of Pounce Mushroom Spraymist. The EPA must be immediately informed of any adverse effects resulting from this use.

17. The Applicant is responsible for ensuring that all of the provisions of this specific exemption are met and must submit a final report summarizing the results of this program by January 31, 1982.

(Sec. 18 as amended 92 Stat. 819, (7 U.S.C. 136))

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81-1643 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-32-M

[OPP-30000/25C; PH-FRL 1627-6]

Preliminary Notice of Determination Concluding the Rebuttable Presumption Against Registration of Pesticides Containing Ethylene Dibromide; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has extended the period for submission of comments in regard to the preliminary determination concluding the rebuttable presumption against the registration and reregistration (RPAR) of pesticide products containing ethylene dibromide (EDB).

DATE: The comment period now closes on March 10, 1981.

ADDRESS COMMENTS TO: Document Control Officer (TS-793), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. E-447, 401 M St., SW., Washington, D.C. 20460.

Three copies of the comments should be submitted bearing the identifying notation [OPP 30000/25B].

FOR FURTHER INFORMATION CONTACT: Richard Johnson, Special Pesticide Review Division (TS-791), Office of Pesticide Programs, Environmental Protection Agency, Rm. 709, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-7451).

SUPPLEMENTARY INFORMATION: On December 2, 1980, EPA issued a preliminary determination concluding the RPAR on EDB. Notice of this action was published in the **Federal Register** of December 10, 1980 (45 FR 81516). The determination was not final, pending external review by the U.S. Department of Agriculture and the Scientific Advisory Panel. Registrants and other interested persons were given the same 30-day period in which to submit comments that the Federal Insecticide, Fungicide, and Rodenticide Act provides for comments from the Secretary of Agriculture and the Scientific Advisory Panel. That comment period ends on January 9, 1981.

EPA has received requests for an additional 60 days in which to submit comments on the preliminary determination. The agency has determined that additional time would be beneficial to ensure the submission of complete and accurate responses to this preliminary notice of determination. Therefore, all registrants, applicants for registration, and other interested persons shall have until March 10, 1981, to submit rebuttal evidence and other comments or information. These submissions should be sent to the Document Control Officer at the address given above. All comments should bear the identifying notation 30000/25B. All written comments filed will be available for public inspection in the office of the Document Control Officer at the above address from 8:00 a.m. to 4:00 p.m. daily except legal holidays.

(Sec. (3) as amended (Pub. L. 92.516, 86 Stat. 973; Pub. L. 94-140, 89 Stat. 755; 7 U.S.C. 136 et seq.))

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81-1646 Filed 1-15-81; 8:45 am]

BILLING CODE 6560-32-M

[OPP-180517A; PH-FRL 1627-7]

Wyoming; Amendment to Specific Exemption for Strychnine To Control Rabid Skunks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has issued an amendment to a specific exemption granted to the Wyoming Department of Agriculture (hereafter referred to as the "Applicant") to use strychnine baits to control rabid skunks in Wyoming.

DATE: The amendment extends the expiration date to December 31, 1980.

FOR FURTHER INFORMATION CONTACT: Libby Welch, Registration Division (TS–767), Office of Pesticide Programs, Environmental Protection Agency, Rm. E–124, 401 M St., SW., Washington, D.C. 20460, (202–426–0223).

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 13, 1980 (45 FR 74990), EPA announced that EPA had granted a specific exemption to the Applicant to use strychnine baits to control rabid skunks in Campbell and Crook Counties, Wyoming. The specific exemption expired on October 31, 1980. Since then, the Applicant has requested that the specific exemption be extended. No additional material will be required.

After reviewing the application and other available information, EPA has determined that the requested revision should not result in any additional environmental problems. Accordingly, EPA has granted the amendment so that applications of strychnine baits may be made until December 31, 1980, if necessary. All other provisions and restrictions of the specific exemption granted on May 23, 1980, still apply.

(Sec. 18 as amended 92 Stat. 819; (7 U.S.C. 136))

Dated: January 9, 1981.

Edwin L. Johnson,

Deputy Assistant Administrator for Pesticide Programs.

[FR Doc. 81–1645 Filed 1–15–81; 8:45 am]

BILLING CODE 6560–32–M

FEDERAL COMMUNICATIONS COMMISSION

[Report No. A–22]

FM Broadcast Applications Accepted for Filing and Notification of Cut-Off Date

Released: December 22, 1980.

Cut-Off Date: February 4, 1981.

Notice is hereby given that the applications listed in the attached appendix are hereby accepted for filing. They will be considered to be ready and available for processing after February 4, 1981. An application, in order to be considered with any application appearing on the attached list or with any application on file by the close of business on February 4, 1981, which involves a conflict necessitating a hearing with any application on this list, must be substantially complete and tendered for filing at the offices of the Commission in Washington, D.C., not later than the close of business on February 4, 1981.

Petitions to deny any application on this list must be on file with the Commission no later than the close of business on February 4, 1981.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

BPH–800716AD, WOWW, Pensacola, Florida, Colonial Broadcasting Company, Inc.; HAS: 107.3 MHz; Channel No. 297C; ERP: 100 kW; HAAT: 360 ft. (Lic); REQ: 107.3 MHz; Channel No. 297C; ERP: 100 kW; HAAT: 469 ft.

BPH–800725AD (new), Buffalo, Wyoming, Buffalo Communication Corporation; REQ: 92.7 MHz; Channel No. 224A; ERP: 3 kW; HAAT: 25 ft.

BPH–800903AD, WFMF, Baton Rouge, Louisiana, Baton Rouge Broadcasting Co., Inc.; HAS: 102.5 MHz; Channel No. 273C; ERP: 100 kW; HAAT: 560 ft. (Lic); REQ: 102.5 MHz; Channel No. 273C; ERP: 84.6 kW; HAAT: 1558 ft.

BPH–800904AD (new), Hampton, Iowa, Wayne E. Grant; REQ: 104.9 MHz; Channel No. 285A; ERP: 3 kW; HAAT: 300 ft.

BPH–800910AD, WNSL, Laurel, Mississippi, Voice of the New South, Inc.; HAS: 100.3 MHz; Channel No. 262C; ERP: 28 kW; HAAT: 165 ft. (Lic); REQ: 100.3 MHz; Channel No. 262C; ERP: 30 kW; HAAT: 400 ft.

BPH–800911AC, KNEY, Pierre, South Dakota, Sorenson Broadcasting Corporation; REQ: 95.3 MHz; Channel No. 237A; ERP: 3 kW; HAAT: 300 ft.

BPH–800915AE (new), Booneville, Arkansas, Booneville Broadcasting Company; REQ: 92.1 MHz; Channel No. 221A; ERP: 3 kW; HAAT: 300 ft.

BPH–800918AC (new), Mountain Home, Arkansas, B & M Communications, Inc.; REQ: 105.5 MHz; Channel No. 288A; ERP: 1.13 kW; HAAT: 457 ft.

BPH–800923AB (new), Columbus, Kansas, Columbus FM 98, Inc.; REQ: 98.3 MHz; Channel No. 252A; ERP: 3 kW; HAAT: 300 ft.

BPH–800923AC, KNEV, Reno, Nevada; McClatchy Newspapers; HAS: 95.5 MHz; Channel No. 238C; ERP: 50 kW; HAAT: 530 ft. (Lic); REQ: 95.5 MHz; Channel No. 238C; ERP: 60 kW; HAAT: 2269 ft.

BPH–800923AD (new), Mexia, Texas, Limestone Broadcasting, Inc.; REQ: 104.9 MHz; Channel No. 285A; ERP: 3 kW; HAAT: 292 ft.

BPH–800923AD, KYND, Pasadena, Texas, Southern Broadcasting Company; HAS: 92.5 MHz; Channel No. 223C; ERP: 97 kW; HAAT: 600 ft. (Lic); REQ: 92.5; MHz; Channel No. 223C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800923AF (new), North Platte, Nebraska, Tri-State B/Cting Association, Inc.; REQ: 103.5 MHz; Channel No. 278C; ERP: 100 kW; HAAT: 366 ft.

BPH–800925AB (new), West Plains, Missouri, C M Broadcasting Company; REQ: 102.3 MHz; Channel No. 272A; ERP: 3 kW; HAAT: 300 ft.

BPH–800926AA, KORT-FM, Grangeville, Idaho, 4–K Radio, Inc.; HAS: 92.7 MHz; Channel No. 224A; ERP: .79 kW; HAAT: 67 ft. (Lic); REQ: 92.7 MHz; Channel No. 224A; ERP: .410 kW; HAAT: 710 ft.

BPH–800929AB (new), Boyce, Louisiana, KGIM Broadcasting Corporation; REQ: 98.3 MHz; Channel No. 252A; ERP: 3 kW; HAAT: 300 ft.

BPH–800929AE, KSRR, Houston, Texas, KAUM, Inc.; HAS: 96.5 MHz; Channel No. 243C; ERP: 100 kW; HAAT: 580 ft. (Lic); REQ: 96.5 MHz; Channel No. 243C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AF, KFMK, Houston, Texas, First Media Corporation; HAS: 97.9 MHz; Channel No. 250C; ERP: 100 kW; HAAT: 440 ft. (Lic); REQ: 97.9 MHz; Channel No. 250C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AG, KILT-FM, Houston, Texas, Lin-Texas Broadcasting Corporation; HAS: 100.3 MHz; Channel No. 262C; ERP: 97 kW; HAAT: 790 ft. (Lic); REQ: 100.3 MHz; Channel No. 262C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AH, KIKK-FM, Houston, Texas, Viacom Broadcasting, Inc.; HAS: 95.7 MHz; Channel No. 239C; ERP: 96 kW; HAAT: 790 ft. (Lic); REQ: 95.7 MHz; Channel No. 239C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AI, KLOL, Houston, Texas, Rusk Corporation; HAS: 101.1 MHz; Channel No. 266C; ERP: 97 kW; HAAT: 790 ft. (Lic); REQ: 101.1 MHz; Channel No. 266C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AJ, KLEF, Houston, Texas, Entertainment Communications, Inc.; HAS: 94.5 MHz; Channel No. 233C; ERP: 100 kW; HAAT: 590 ft. (Lic); REQ: 94.5 MHz; Channel No. 233C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AK, KRBE, Houston, Texas, GCC Communications of Houston, Inc.; HAS: 104.1 MHz; Channel No. 281C; ERP: 96 kW; HAAT: 790 ft. (Lic); REQ: 104.1 MHz; Channel No. 281C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800929AL, KODA, Houston, Texas, Westinghouse Broadcasting Co., Inc.; HAS: 99.1 MHz; Channel No. 256C; ERP: 97 kW; HAAT: 790 ft. (Lic); REQ: 99.1 MHz; Channel No. 256C; ERP: 100 kW; HAAT: 1425 ft.

BPH–800930AC, KUFO, Odessa, Texas; Stream Broadcasting of Texas, Inc.; HAS: 97.9 MHz; Channel No. 250C; ERP: 34 kW; HAAT: 100 ft. (Lic); REQ: 97.9 MHz; Channel No. 250C; ERP: 100 kW; HAAT: 359 ft.

BPH–801002AC (new), Auburn, Nebraska, Midway Broadcasters; REQ: 105.5 MHz; Channel No. 288A; ERP: 3 kW; HAAT: 100 ft.

BPED–780802AK (new), Norwich, Connecticut, Ct. Educ. Telecommunications Corp.; REQ: 89.1 MHz; Channel No. 206B; ERP: 5.05 kW; HAAT: 589 ft.

BPED–790928AC, KSMC, Moraga, California, Students of St Marys College of Ca; HAS: 89.5 MHz; Channel No. 208D; ERP: .055 kW; HAAT: 95 ft. (Lic); REQ: 89.5 MHz; Channel No. 208A; ERP: .800 kW; HAAT: 80 ft.

BPED–791015AD, WLKL, Mattoon, Illinois, Community Dist. #517 Lake Land College; HAS: 90.3 MHz; Channel No. 212DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 89.9 MHz; Channel No. 210A; ERP: 1.3 kW; HAAT: 206 ft.

BPED–791220AI, KTAI, Kingsville, Texas, Texas A & I University; HAS: 91.1 MHz; Channel No. 216DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 91.1 MHz; Channel No. 216A; ERP: .1 kW; HAAT: 100 ft.

BPED–791221AO, WXBA, Brentwood, New York, Brentwood Union Free School District; HAS: 88.5 MHz; Channel No. 203DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 88.1 MHz; Channel No. 201A; ERP: .18 kW; HAAT: 53 ft.

BPED–791226AW, KVIK, Travis AFB, California, Vanden High School; HAS: 91.5 MHz; Channel No. 218D; TPO: .01 kW. (Lic); REQ: 91.5 MHz; Channel No. 218A; ERP: .369 kW; HAAT: −41.7 ft.

BPED–791226BF, WVHP–FM, Highland Park, New Jersey, Highland Park High School; HAS: 90.3 MHz; Channel No. 212DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 90.3 MHz; Channel No. 212A; ERP: .15 kW; HAAT: 67.6 ft.

BPED–791226BO, KTCC, Colby, Kansas, Colby Community Junior College; HAS: 91.9 MHz; Channel No. 220D; TPO: .01 kW; (Lic); REQ: 91.9 MHz; Channel No. 220A; ERP: .100 kW; HAAT: 73 ft.

BPED–791226BR, (New), Becker, Minnesota, Becker Public School District #726; REQ: 88.9 MHz; Channel No. 205A; ERP: .10 kW; HAAT: 79 ft.

BPED–791226BY, WWLR, Lyndon, Vermont, Lyndon State College; HAS: 91.7 MHz; Channel No. 219D; TPO: .01 kW. (Lic); (Lyndonville, Vermont); REQ: 91.5 MHz; Channel No. 218A; ERP: 2.73 kW; HAAT: −182 ft. (Lyndon, Vermont).

BPED–791226CG, WQFS, Greensboro, North Carolina, Trustees of Guilford College; HAS: 90.7 MHz; Channel No. 214DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 90.9 MHz; Channel No. 215A; ERP: 1.91 kW; HAAT: 198 ft.

BPED–791226DB, KQAL, Winona, Minnesota, Winona State University; HAS: 89.5 MHz; Channel No. 208DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 89.5 MHz; Channel No. 206A; ERP: 1.32 kW; HAAT: −148 ft.

BPED–791227AZ, WCBN–FM, Ann Arbor, Michigan, The Regents of the University of Michigan; HAS: 88.3 MHz; Channel No. 202D; TPO: .01 kW. (Lic); REQ: 88.3 MHz; Channel No. 202A; ERP: .200 kW; HAAT: 178 ft.

BPED–791227DI, WNTE, Mansfield, Pennsylvania, Mansfield State College; HAS: 89.5 MHz; Channel No. 208D; TPO: .01 kW; HAAT: 320 ft. (Lic); REQ: 89.5 MHz; Channel No. 208A; ERP: .113 kW; HAAT: −344 ft.

BPED–791228AF, WHFR, Dearborn, Michigan, Henry Ford Community College; REQ: 89.3 MHz; Channel No. 207A; ERP: .268 kW; HAAT: 60 ft.

BPED–791228AH, WDCV–FM, Carlisle, Pennsylvania, trustees of Dickinson College; REQ: 88.3 MHz; Channel No. 202A; ERP: .454 kW; HAAT: −50 ft.

BPED–791228AL, WGRN, Greenville, Illinois, Greenville College Ed. B/C Fndatn., Inc.; HAS: 89.3 MHz; Channel No. 207DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 89.5 MHz; Channel No. 208A; ERP: .226 kW; HAAT: 163 ft.

BPED–791228AO, WERB, Berlin, Connecticut, Berlin Board of Education; HAS: 89.9 MHz; Channel No. 210DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 97.3 MHz; Channel No. 247D; ERP: .024 kW; HAAT: −69 ft.

BPED–791228AX, WBCX, Gainesville, Georgia, Brenau College; HAS: 89.1 MHz; Channel No. 206D; TPO: .01 kW; (Lic); REQ: 89.1 MHz; Channel No. 206A; ERP: .1 kW; HAAT: 482 ft.

BPED–791228BA, WDBK, Blackwood, New Jersey, Camden County College; HAS: 91.5 MHz; Channel No. 218DS; ERP: .01 kW; HAAT: —— ft. (Lic); REQ: 91.5 MHz; Channel No. 218A; ERP: .100 kW; HAAT: 81 ft.

BPED–791228BC, KPGR, Pleasant Grove, Utah, Alpine School District; HAS: 88.1 MHz; Channel No. 201D ERP: .001 kW; HAAT: −1180 ft. (Lic); REQ: 88.1 MHz; Channel No. 201A; ERP: .115 kW; HAAT: −1126 ft.

BPED–791228BD, WMTB–FM, Emmitsburg, Maryland, Mount Saint Marys College; HAS: 89.9 MHz; Channel No. 210DS; ERP: .01 kW; HAAT: ft. (Lic); REQ: 89.9 MHz; Channel No. 210A; ERP: .118 kW; HAAT: 740 ft.

BPED–791228BF, KCEP, Las Vegas, Nevada, Economic Opportunity Board; HAS: 88.1 MHz; Channel No. 201DS; ERP: .01 kW; HAAT: ft. (Lic); REQ: 89.1 MHz; Channel No. 201B; ERP: 4.7 kW; HAAT: 118 ft.

BPED–791228BH, WRDL, Ashland Ohio, Ashland College; HAS: 89.5 MHz; Channel No. 201DS; ERP: .01 kW; HAAT: ft. (Lic); REQ: 88.9 MHz; Channel No. 205A; ERP: 3 kW; HAAT: 172 ft.

BPED–791228BM, KCNT, Hastings, Nebraska, Central Technical Community College area; HAS: 88.1 MHz; Channel No. 201DS; ERP: .01 kW; HAAT: ft.(Lic); REQ: 88.1 MHz; Channel No. 201A; ERP: 2.32 kW; HAAT: 162 ft.

BPED–791231AR, KAYE–FM, Tonkawa, Oklahoma, Northern Oklahoma College; HAS: 90.5 MHz; Channel No. 213DS; ERP: .01 kW; HAAT: ft. (Lic); REQ: 90.7 MHz; Channel No. 214A; ERP: 1.21 kW; HAAT: 66 ft.

BPED–791231BV, KWTS, Canyon, Texas, West Texas State University; HAS: 91.1 MHz; Channel No. 216DS; ERP: .012 kW; HAAT: −9 ft. (Lic); REQ: 91.1 MHz; Channel No. 216A; ERP: .125 kW; HAAT: −9 ft.

BPED–791231BY, KEOL, La Grande, Oregon, State Bd. of Higher Education; HAS: 91.1MHz; Channel No. 216D; TPO: .01 kW; ft. (Lic); REQ: 91.7 MHz; Channel No. 219A; ERP: .307 kW; HAAT: −749 ft.

BPED–791231CA, KLCD, Decorah, Iowa, Minnesota Public Radio, Inc.; HAS: 89.5 MHz; Channel No. 208DS; ERP: .01 kW; HAAT: ft. (Lic); REQ: 89.5 MHz; Channel No. 208A; ERP: .10 kW; HAAT: 182 ft.

BPED–791231CR, WJSC–FM, Johnson, Vermont, VSC board of trustees; HAS: 90.1 MHz; Channel No. 211D; TPO: .01 kW; (Lic); REQ: 90.7 MHz; Channel No. 214A; ERP: .155 kW; HAAT: −485 ft.

BPED–800306AD, KWAX, Eugene, Oregon, Oregon State Board of Higher Education; HAS: 91.1 MHz; Channel No. 216C; ERP: 20 kW; HAAT: −46 ft. (Lic); REQ: 91.1 MHz; Channel No. 216C; ERP: 20 kW; HAAT: 1,015 ft.

BPED–800502AD, WWSU, Fairborn, Ohio, Wright State University; HAS: 88.5 MHz; Channel No. 203DS; ERP: .01 kW; HAAT: ft. (Lic); (Dayton, Ohio); REQ: 106.9 MHz; Channel No. 295D; ERP: .007 kW; HAAT: 211 ft. (Fairborn, Ohio).

BPED–800706AJ, (new), Woodlake, California, Farmworkers Communications, Inc.; REQ: 90.5 MHz; Channel No. 213B; ERP: .870 kW; HAAT: 2,511 ft.

[FR Doc. 81–1621 Filed 1–15–81; 8:45 am]

BILLING CODE 6712–01–M

[Report No. B–10]

FM Broadcast Applications Accepted for Filing and Notification of Cut-Off Date

Released: December 22, 1980.

Cut-Off Date: February 19, 1981.

Notice is hereby given that the applications listed in the attached appendix are accepted for filing. Because the applications listed in the attached appendix are in conflict with applications which were accepted for filing and listed previously as subject to a cut-off date for conflicting applications, no application which would be in conflict with the applications listed in the attached appendix will be accepted for filing.

Petitions to deny the applications listed in the attached appendix and minor amendments thereto must be on file with the Commission not later than the close of business on February 19, 1981. Any application previously accepted for filing and in conflict with the applications listed in the attached appendix may also be amended as a matter of right not later than the close of business on February 19, 1981. Amendments filed pursuant to this notice are subject to the provisions of § 73.3572(b) of the Commission's Rules.

Federal Communications Commission.

William J. Tricarico,

Secretary.

BPH–800731AE (new), Elk City, Oklahoma, RONCA Broadcasting Company, Inc.; REQ: 96.5 MHz; Channel No. 243C; ERP: 100 kW; HAAT: 500 ft.

BPH–800818AA (new), Whitehouse, Texas, Smith County Broadcasters; REQ: 99.3 MHz; Channel No. 257A; ERP: 3 kW; HAAT: 300 ft.

BPH–800827AI (new), Cape Charles, Virginia, Ronald Smith; REQ: 96.1 MHz; Channel No. 241B; ERP: 50 kW; HAAT: 490 ft.

BPH–800925AA (new), Ponce, Puerto Rico, Family Broadcasting Group; REQ: 101.1 MHz; Channel No. 266B; ERP: 50 kW; HAAT: 46 ft.

BPH–800930AD (new), Ponce, Puerto Rico, Zaba Radio Corporation; REQ: 101.1 MHz; Channel No. 266B; ERP: 50 kW; HAAT: 363 ft.

BPH–800930AE (new), St Simons Island, Georgia, James U. Steele; REQ: 92.7 MHz; Channel No. 224A; ERP: 3 kW; HAAT: 300 ft.

BPH–801001AA (new), St Simons Island, Georgia, Burrows Broadcasting Company; REQ: 92.7 MHz; Channel No. 224A; ERP: 3 kW; HAAT: 300 ft.
BPH–801003AA (new), Malakoff, Texas, Henderson County Radio; REQ: 95.9 MHz; Channel No. 240A; ERP: 3 kW; HAAT: 300 ft.
BPH–801003AC (new), Carthage, Texas, East Delta Communications, Inc.; REQ: 98.9 MHz; Channel No. 255C; ERP: 100 kW; HAAT: 549.3 ft.
BPH–801003AD (new), Athens, Texas, Seven Seals Broadcasting Co., Inc.; REQ: 95.9 MHz; Channel No. 240A; ERP: 1.6 kW; HAAT: 400 ft. (Allocated to Malakoff, Tx.)
BPH–801003AE (new), Whitehouse, Texas, North American Broadcasting Co., Inc.; REQ: 99.3 MHz; Channel No. 257A; ERP: 3 kW; HAAT: 300 ft.
BPH–801003AF (new), St Simons Island, Georgia, Dale Bell; REQ: 92.7 MHz; Channel No. 224A; ERP: 3 kW; HAAT: 147 ft.
BPH–801003AI (new), Ephrata, Washington, Robert L. & Lougena J. Wikstrom; REQ: 95.9 MHz; Channel No. 240A; ERP: 3 kW; HAAT: 300 ft.
BPH–801003AJ (new), Ponce, Puerto Rico, Marsona Broadcasting Corporation; REQ: 101.1 MHz; Channel No. 266B; ERP: 50 kW; HAAT: 90 ft.
BPH–801027AI (new), San Mateo, California, San Mateo Broadcasting Co., Inc.; REQ: 107.7 MHz; Channel No. 299B; ERP: 6.2 kW; HAAT: 1160 ft. (Mutually Exclusive with renewal of KSOL.)
BPH–801103AL (new), San Mateo, California, Afro-American Comm., a Calif Corp.; REQ: 107.7 MHz; Channel No. 299B; ERP: 6.17 kW; HAAT: 1162 ft. (Mutually exclusive with renewal of KSOL.)

[FR Doc. 81–1622 Filed 1–15–81; 8:45 am]
BILLING CODE 6712–01–M

FEDERAL RESERVE SYSTEM

American Holding Co.; Formation of Bank Holding Company

American Holding Co., Glencoe, Illinois, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 80 percent of the voting shares of Bank of Highland Park, Highland Park, Illinois. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Chicago. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 9, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 9, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81–1601 Filed 1–15–81; 8:45 am]
BILLING CODE 6210–01–M

Arapahoe Financial Corp., Formation of Bank Holding Company

Arapahoe Financial Corp., Arapahoe, Nebraska, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 100 percent of the voting shares of Citizens State Bank, Arapahoe, Nebraska. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Kansas City. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any commeat on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presetned at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81–1602 Filed 1–15–81; 8:45 am]
BILLING CODE 6210–01–M

BancMidwest Corporation; Formation of Bank Holding Company

BancMidwest Corporation, St. Paul, Minnesota, has applied for the Board's approval under 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 82.7 percent of the voting shares of Goodhue State Bank, Goodhue, Minnesota, 64.4 percent of the voting shares of Chisago County State Bank, Center City, Minnesota, and 72.3 percent of the voting shares of White Rock State Bank, White Rock, Minnesota. The factors that are considered in acting on the application are set forth in 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Minneapolis. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81–1603 Filed 1–15–81; 8:45 am]
BILLING CODE 6210–01–M

Bank Holding Companies; Porposed de Novo Nonbank Activities

The bank holding companies listed in this notice have applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and section 225.4(b)(1) of the Board's Regulation Y (12 CFR 225.4(b)(1)), for permission to engage *de novo* (or continue to engage in an activity earlier commenced *de novo*), directly or indirectly, solely in the activities indicated, which have been determined by the Board of Governors to be closely related to banking.

With respect to each application, interested persons may express their views on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreasd or unfair competition, conflicts of interest, or unsound banking practices." Any comment on an application that requests a hearing must include a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of that proposal.

Each application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank indicated for that application. Comments and requests for hearings should identify clearly the specific application to which they relate, and should be submitted in writing and, except as noted, received by the appropriate Federal Reserve Bank not later than February 11, 1981.

A. *Federal Reserve Bank of New York* (A. Marshall Puckett, Vice President) 33 Liberty Street, New York, New York 10045:

CITICORP, New York, New York (finance company activities; Georgia, Virginia, North Carolina, South Carolina, Tennessee, Alabama, Mississippi, and Florida): to engage through a *de novo* office of its subsidiary Citicorp Private Capital, Inc., in finance company activities, including the making or acquiring of loans and other extensions of credit (including loans secured by real or personal property) with primary emphasis on loans to business enterprises and large loans to individuals. These activities will be conducted from an office in Atlanta, Georgia, serving the eight states listed above. Comments on this application must be received by February 4, 1981.

B. *Federal Reserve Bank of San Franscisco* (Harry W. Green, Vice President) 400 Sansome Street, San Francisco, California 94120:

SECURITY PACIFIC CORPORATION, Los Angeles, California (Mortgage banking activities; Texas): to engage through its subsidiary, Security Pacific Mortgage Corporation, in the origination and acquisition of mortgage loans, including development and construction loans on multi-family and commercial properties for Security Pacific Mortgage Corporation's own account or for sale to others, and the servicing of such loans for others. These activities would be conducted from an office in Dallas, Texas, serving the State of Texas.

C. *Other Federal Reserve Banks:* None.

Board of Governors of the Federal Reserve System, January 12, 1981

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1606 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Bank Holding Companies; Proposed de Novo Nonbank Activities

The bank holding company listed in this notice has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843 (c)(8)) and section 225.4(b)(1)) of the Board's Regulation Y (12 CFR § 225.4(b)(1), for permission to engage *de novo* (or continue to engage in an activity earlier commenced *de novo*), directly or indirectly, soley in the activities indicated, which have been determined by the Board of Governors to be closely related to banking.

With respect to this application, interested persons may express their views on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." Any comment on the application that requests a hearing must include a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of that proposal.

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank indicated for the application. Comments and requests for hearings should identify clearly the specific application to which they relate, and should be submitted in writting and received by the appropriate Federal Reserve Bank not later than February 8, 1981.

A. *Federal Reserve Bank of San Francisco* (Harry W. Green, Vice President), 400 Sansome Street, San Francisco, California 94120:

Security Pacific Corporation, Los Angeles, California; (financing, servicing, industrial loan, and credit-related insurance activities; California): to engage, through its subsidiary, Security Pacific Finance Money Center Inc., in financing and industrial loan corporation activities, including making, acquiring and servicing loans and other extensions of credit; in selling and issuing investment certificates; and in acting as agent for the sale of credit-related life, credit-related accident and health, and credit-related property insurance, all as authorized by California law. These activities would be conducted from an office in the city of Escondido, California, serving the state of California.

B. *Other Federal Reserve Banks:* None.

Board of Governors of the Federal Reserve System, January 9, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1607 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Callaway Security Banks, Inc.; Formation of Bank Holding Company

Callaway Security Banks, Inc., Fulton, Missouri, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 80 percent or more of the voting shares of The Callaway Bank, Fulton, Missouri; and 80 percent or more of the voting shares of The Security Bank of Auxvasse, Auxvasse, Missouri. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of St. Louis. Any person wishing to comment on the application should submit views in writing to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551 to be received no later than February 9, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 9, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1604 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Central and Southern Holding Co; Formation of Bank Holding Company

Central and Southern Holding Company, Milledgeville, Georgia, has applied for the Board's approval under Section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 100 percent of the voting shares of Citizens and Southern Bank of Milledgeville, Milledgeville, Georgia. The factors that are considered in acting on the application are set forth in Section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Atlanta. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1605 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

First Arkansas Bancshares, Inc., Formation of Bank Holding Company

First Arkansas Bancshares, Inc., Jacksonville, Arkansas, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 100 percent of the voting shares (less directors' qualifying shares) of First Jacksonville Bank, Jacksonville, Arkansas. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. section 1842(c)).

The application may be inspected at the office of the Board of Governors or at the Federal Reserve Bank of St. Louis. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 1, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1606 Filed 1-15-81; 8:45 a.m.]

BILLING CODE 6210-01-M

First State Bancorporation; Formation of Bank Holding Company

First State Bancorporation, Tiptonville, Tennessee, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 80 percent or more of the voting shares of First State Bank and Trust Company, Tiptonville, Tennessee. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of St. Louis. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 9, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1609 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Geneseo Bancshares, Inc.; Formation of Bank Holding Company

Geneseo Bancshares, Inc., Geneseo, Kansas, has applied for the Board's approval under § 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 80 percent or more of the voting shares of The Citizens State Bank, Geneseo, Kansas. The factors that are considered in acting on the application are set forth in § 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Kansas City. Any person wishing to comment on the application should sumit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1610 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Lakin Bancshares, Inc.; Formation of Bank Holding Company

January 12, 1981.

Lakin Bancshares, Inc., Lakin, Kansas, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 80 percent or more of the voting shares of The Kearney County Bank, Lakin, Kansas. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Kansas City. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 9, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 9, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1611 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Northwest Pennsylvania Corp.; Formation of Bank Holding Company

Northwest Pennsylvania Corp., Oil City, Pennsylvania, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 100 percent of the voting shares of Northwest Pennsylvania Bank & Trust Company, Oil City, Pennsylvania. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Cleveland. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1612 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

Peoples Bancshares, Inc.; Formation of Bank Holding Company

Peoples Bancshares, Inc., Colorado Springs, Colorado, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank

holding company by acquiring 87.94 percent of the voting shares of Peoples Bank of Westville, Westville, Oklahoma. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Kansas City. Any person wishing to comment on the application should submit views in writing to the Reserve Bank, to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1613 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

First Bank Holding Company of Batesville; Formation of Bank Holding Company

First Bank Holding Company of Batesville, Batesville, Arkansas, has applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1)) to become a bank holding company by acquiring 82.9 percent or more of the voting shares of First National Bank, Batesville, Arkansas. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of St. Louis. Any person wishing to comment on the application should submit views in writing to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551 to be received no later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1657 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

United Texas Financial Corp.; Acquisition of Bank

United Texas Financial Corporation, Wichita Falls, Texas, has applied for the Board's approval under section 3(a)(3) of the Bank Holding company Act (12 U.S.C. 1842(a)(3)) to acquire 76.9 percent or more of the voting shares of First State Bank in Archer City, Archer City, Texas. The factors that are considered in acting on the application are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of Dallas. Any person wishing to comment on the application should submit views in writing to the Reserve Bank to be received not later than February 11, 1981. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Board of Governors of the Federal Reserve System, January 12, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81-1659 Filed 1-15-81; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

Commercial Practices; Early Termination of the Waiting Period of the Premerger Notification Rules

AGENCY: Federal Trade Commission.

ACTION: Granting of request for early termination of the waiting period of the premerger notification rules.

SUMMARY: Baldwin-United Corporation is granted early termination of the waiting period provided by law and the premerger notification rules with respect to the proposed acquisition of all voting securities of Mt. Hood Stages, Inc. The grant was made by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice in response to a request for early termination submitted by both parties. Neither agency intends to take any action with respect to this acquisition during the waiting period.

EFFECTIVE DATE: December 30, 1980.

FOR FURTHER INFORMATION CONTACT: Roberta Baruch, Senior Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580 (202) 523-3894.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Commission and Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-1652 Filed 1-15-81; 8:45 am]

BILLING CODE 6750-01-M

Commercial Practices; Early Termination of the Waiting Period of the Premerger Notification Rules

AGENCY: Federal Trade Commission.

ACTION: Granting of request for early termination of the waiting period of the premerger notification rules.

SUMMARY: Midland Investment Company is granted early termination of the waiting period provided by law and the premerger notification rules with respect to the proposed acquisition of certain voting securities of AMP Inc. The grant was made by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice in response to a request for early termination submitted by both parties. Neither agency intends to take any action with respect to this acquisition during the waiting period.

EFFECTIVE DATE: December 31, 1980.

FOR FURTHER INFORMATION CONTACT: Roberta Baruch, Senior Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580 (202) 523-3894.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give

the Commission and Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A (b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-1653 Filed 1-15-81; 8:45 am]

BILLING CODE 6750-01-M

Commercial Practices; Early Termination of the Waiting Period of the Premerger Notification Rules

AGENCY: Federal Trade Commission.

ACTION: Granting of request for early termination of the waiting period of the premerger notification rules.

SUMMARY: Tamco Enterprises, Inc. is granted early termination of the waiting period provided by law and the premerger notification rules with respect to the proposed acquisition of certain voting securities of Kennecott Corp. The grant was made by the Federal Trade Commission and the Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice in response to a request for early termination submitted by Tamco. Neither agency intends to take any action with respect to this acquisition during the waiting period.

EFFECTIVE DATE: December 31, 1980.

FOR FURTHER INFORMATION CONTACT: Roberta Baruch, Senior Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580 (202) 523-3894.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Commission and Assistant Attorney General Advance notice and to wait designated periods before consummation of such plans. Section 7A (b) (2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register.**

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-1654 Filed 1-15-81; 8:45 am]

BILLING CODE 6750-01-M

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FPR 37]

Federal Procurement; Supplement 10

December 29, 1980.

TO: Heads of Federal agencies.

SUBJECT: Companies not in compliance with the Voluntary Wage and Price Standards.

1. *Purpose.* This supplement provides a complete relisting of all companies that have been determined to be, and are now, in noncompliance with the Voluntary Wage and Price Standards formulated under Executive Order 12092.

2. *Expiration date.* This bulletin contains information of a continuing nature and will remain in effect until canceled.

3. *Substance.* Attachment A is the November 21, 1980, letter from the Administrator, Office of Federal Procurement Policy, to GSA and DOD. The letter includes the list of companies that are in noncompliance with the Voluntary Wage and Price Standards. The list supersedes the list previously published in GSA Bulletin FPR 37, Supplement 9.

4. *Cancellation.* This bulletin cancels GSA Bulletin FPR 37, Supplement 9, dated November 20, 1980.

Gerald McBride,

Assistant Administrator for Acquisition Policy.

GSA Bulletin FPR 37—Supplement 10—Attachment A

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Washington, D.C. 20503

November 21, 1980.

Memorandum to: The Secretary of Defense, The Administrator of General Services.

From: Karen Hastie Williams, Administrator, Office of Federal Procurement Policy.

Subject: Companies not in compliance with the Voluntay Wage and Price Standards.

The Council on Wage and Price Stability has determined that the following companies are not in compliance with the Voluntary Wage and Price Standards formulated pursuant to Executive Order 12092 (43 FR 51375). The list is current as of November 12, 1980.

Company and Original Date Listed

Cement Division compliance unit of Ideal Basic Industries, Inc., P.O. Box 8789, Denver, Colorado 80201, DUNS Number 00-706-1385—June 15, 1979.

Northwestern Steel and Wire Co., 121 Wallace Street, Sterling, Illinois 61081, DUNS Number 00-526-3157—July 24, 1979.

Mason Contractors of DuPage County, P.O. Box 129, Mount Prospect, Illinois 60056, DUNS Number 99-106-2472—July 24, 1979.

American Hoechst Corporation, Route 202-206 North, Somerville, New Jersey 08876, DUNS Number 04-578-7991—October 23, 1979.

SCOA Industries, Inc. (excluding foreign subsidiaries), 155 East Broad Street, Columbus, Ohio 43215, DUNS Number 00-790-2208—October 23, 1979.

National Electrical Contractors Association (Oregon-Columbia Chapter), 201 S.W. Arthur Street, Portland, Oregon 97201, DUNS Number 99-106-2480—October 23, 1979.

The Eureka Company, 1201 East Bell Street, Bloomington, Illinois 61701, DUNS Number 00-116-3823—November 27, 1979.

Portland Association of Plumbing Heating and Cooling Contractors (two noncomplying agreements), 612 S.W. Idaho, Portland, Oregon 97201, DUNS Number 06-509-2300—November 27, 1979.

Sheetmetal Association, Inc., c/o 3434 S.W. Water Avenue, Portland, Oregon 97201, DUNS Number 99-106-2498—November 27, 1979.

San Diego Contracting Lathers Association, 7855 Ostrow Street, San Diego, California 92111, DUNS Number 99-106-2506—November 27, 1979.

"All other" compliance unit of Gifford-Hill & Company, Inc. (which includes all products exclusive of transportation, irrigation and metal building products), 8435 Stimmons Freeway, P.O. Box 47127, Dallas, Texas 75247, DUNS Number 00-792-6496—December 27, 1979.

Boston Distributors, a compliance unit of Cook United, Inc., 16501 Rockside Road, Cleveland, Ohio 44137, DUNS Number 09-449-7245—January 21, 1980.

National Gypsum Company, 4100 First International Building, Dallas, Texas 75270, DUNS Number 00-138-2431—January 21, 1980.

Crown Central Petroleum Corp., One North Charles, P.O. Box 1168, Baltimore, Maryland 21203, DUNS Number 00-306-2401—March 25, 1980.

Gust K. Newberg Company & Assoc. (out of compliance only in Will County and vicinity, Illinois), 2040 North Ashland Avenue, Chicago, Illinois 60614, DUNS Number 00-693-1869—March 25, 1980.

Mid-America Regional Bargaining Association, 228 North LaSalle Street, Chicago, Illinois 60601, DUNS Number 99-106-2514—March 25, 1980.

Contractors Association of Will and Grundy Counties, 254½ Rusy Street, Joliet, Illinois 60435, DUNS Number 99-106-2522—March 25, 1980.

Residential Construction Employers Council, 1010 Jorie Boulevard, Suite 112, Oak Brook, Illinois 60521, DUNS Number 99-106-2530—March 25, 1980.

Koch Fuels, Inc., a compliance unit of Koch Refining Company, P.O. Box 31, Gloucester City, N.J. 08030, DUNS Number 07-057-9404—April 2, 1980.

Church's Fried Chicken, Inc., P.O. Box BH001, San Antonio, Texas 78284, DUNS Number 02-701-7417—April 2, 1980.

Monolith Portland Cement Co., P.O. Box 3303 Terminal Annex, Suite 201, Glendale, California 91202, DUNS Number 00-825-5580—April 18, 1980.

Dundee Cement Company, P.O. Box 122, Dundee, Michigan 48131, DUNS Number 00-503-8500—May 2, 1980.
Santee Portland Cement Co., S.C. Highway No. 53, Holly Hill, South Carolina, DUNS Number 00-336-8891—May 2, 1980.
Hyatt Hotels compliance unit of Hyatt Corporation (which includes all hotels owned or managed by the Hyatt Corporation), 9701 W. Higgins Road, Rosemont, Illinois 60018, DUNS Number 04-738-6677—May 20, 1980.
Air Conditioning and Refrigeration Contractors Association, 870 Market Street, San Francisco, California 94102, DUNS Number 99-106-2548—May 30, 1980.
Industrial Contractors (UMIC, Inc.), P.O. Box 1005, Tiburon, California 94920, DUNS Number 99-106-2555—May 30, 1980.
Plumbing Heating Piping Employers Council, 36 Tiburon Blvd., Mill Valley, California 94941, DUNS Number 99-106-2563—May 30, 1980.
Residential Plumbing and Mechanical Contractors of North California, 1545 B Palos Verdes Mall, Walnut Creek, California 94596, DUNS Number 99-106-2571—May 30, 1980.
Santa Clara Valley Contractors Association, 400 Reed Street, Santa Clara, California 95050, DUNS Number 99-106-2589—May 30, 1980.
Burlington Northern Air Freight, Inc., a compliance unit of Burlington Northern, Inc., 4350 Von Karman Avenue, New Port Beach, California 92660, DUNS Number 05-802-0496—July 2, 1980.
Hotels Division and Hotel-Casinos Division, compliance units of Hilton Hotels Corporation, 9880 Wilshire Blvd., Beverly Hills, California 90210, DUNS Number 00-693-0531 (limited to Hotels Division and Hotel-Casinos Division)—July 10, 1980.
Murphy Oil, Domestic Marketing and Refining Division, a compliance unit of Murphy Oil Corporation (excluding foreign subsidiaries), 200 Jefferson Avenue, El Dorado, Arkansas 71730, DUNS Number 00-805-3712—July 15, 1980.
Harris-Teeter Supermarkets, Inc., a compliance unit of Ruddick Corporation, 4017 Chesapeake Drive, P.O. Box 33129, Charlotte, N.C. 28233, DUNS Number 99-106-9287—August 13, 1980.
Circle K Corporation, 4500 South 40th Street, Phoenix, Arizona, DUNS Number 00-894-8143—August 13, 1980.
Louisville Cement Company, 501 South Second Street, Louisville, Kentucky 40201, DUNS Number 00-636-6678—September 17, 1980.
Brown-Forman Distillers Corporation, 850 Dixie Highway, Louisville, Kentucky 40201, DUNS Number 00-637-9812—September 17, 1980.
Dairymen's Creamery Association, Inc., 520 Albany, Caldwell, Idaho 83605, DUNS Number 04-526-5865—October 15, 1980.
Agricultural Chemicals Group, compliance unit of W. R. Grace and Company, 100 North Main Street, Memphis, Tennessee 38103, DUNS Number 04-487-7918—October 15, 1980.
American Petrofina, Inc., 8350 North Central Expressway, Dallas, Texas 75221, DUNS Number 00-132-9077 (excluding crude oil exploration and development)—October 15, 1980.
Glen-Gery Corporation, 227 North 5th Street, Reading, Pa. 19603, DUNS Number 0-235-5857—November 12, 1980.
Supermarkets General Corporation, 301 Blair Road, Woodbridge, N.J. 07095, DUNS Number 00-697-4950—November 12, 1980.
Hollingsworth & Vose Company, 112 Washington Street, East Walpole, Massachusetts, DUNS Number 00-100-6378—November 12, 1980.
Deltic Farm & Timber Company Inc., a compliance unit of Murphy Oil Corporation, 200 Jefferson Avenue, El Dorado, Arkansas 71730, DUNS Number 00-690-2878—November 12, 1980.
Eastern Coal & Coke Company, a compliance unit of Westmoreland Coal Company, P.O. Box 63, Banner, Kentucky 41603, DUNS Number 99-123-9724—November 12, 1980.
Howell Corporation, 800 Houston Natural Gas Bldg., Houston, Texas 77002, DUNS Number 00-811-8671—November 12, 1980.

This supersedes the previous list promulgated by OFPP memorandum of October 29, 1980. Changes to that list include the addition of six companies. There are no deletions.

Pursuant to the terms of Office of Federal Procurement Policy Letter 78-6 dated December 27, 1978, I request that you publish this information in a Defense Acquisition Circular and Federal Procurement Regulations Bulletin.

[FR Doc. 81-1627 Filed 1-15-81; 8:45 am]
BILLING CODE 6820-61-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

National Advisory Council on Alcohol Abuse and Alcoholism; Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. Appendix I), announcement is made of the following national advisory body scheduled to assemble during the month of February 1981.

National Advisory Council on Alcohol Abuse and Alcoholism, February 2–3, 9:30 a.m., Conference Room 10, Building 31C, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20205. Open—February 2. Closed February 3. Contact: Mr. James Vaughan, Room 16C-06, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-3887.

Purpose: The Council advises the Secretary of Health and Human Services regarding policy direction and program issues of national significance in the area of alcohol abuse and alcoholism. The Council reviews all grant applications submitted, evaluates these applications in terms of scientific merit and coherence with Department policies, and makes recommendations to the Secretary with respect to approval and amount of award.

Agenda: February 2 will be devoted to general business of the Council and a discussion of legislation, budget, current program issues and other subjects related to Institute programs.

February 3, the Council will conduct a final review of grant applications for Federal assistance and this session will not be open to the public in accordance with the determination by the Acting Administrator, Alcohol, Drug Abuse, and Mental Health Administration pursuant to the provisions set forth in Section 552b(c)(6), Title 5 U.S. Code and Section 10(d) of Public Law 92-463 (5 U.S.C. Appendix I).

Substantive program information may be obtained from the contact person listed above. The NIAAA Committee Management Office will furnish upon request summaries of the meeting and a roster of Committee members. Contact Ms. Helen Garrett, Room 16C-21, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-2860.

Dated: January 12, 1981.

Elizabeth A. Connolly,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 81-1552 Filed 1-15-81; 8:45 am]
BILLING CODE 4110-88-M

Rape Prevention and Control Advisory Committee; Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. Appendix I), announcement is made of the following National advisory body scheduled to assemble during the month of February 1981.

Rape Prevention and Control Advisory Committee, February 5–6, 1981; 9:30 a.m.—open meeting, Conference Room K, Parklawn Building, Rockville, Maryland 20857. Contact: Mary Lystad, Ph.D., Executive Secretary, Room 15-99, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-1910.

Purpose: The Rape Prevention and Control Advisory Committee advises the Secretary, Department of Health and Human Services, the Administrator, Alcohol, Drug Abuse, and Mental Health Administration, and the Director, National Institute of Mental Health, through the National Center for the Prevention and Control of Rape, on matters regarding the needs and concerns associated with rape in the United States and makes

recommendations pertaining to activities to be undertaken by the Department to address the problems of rape.

Agenda: The entire meeting will be open to the public. The Advisory Committee will provide input to Title VI, Rape Prevention and Control, of the Mental Health Systems Act.

Substantive information may be obtained from the contact person listed above. Ms. Debbie Clawson, Assistant to the Executive Secretary, Rape Prevention and Control Advisory Committee, Room 15–99, 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–1910, will furnish upon request summaries of the meeting and rosters of the committee members.

Dated: January 12, 1981.

Elizabeth A. Connolly,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 81–1553 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–88–M

Treatment and Rehabilitation Work Group; Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. Appendix I), announcement is made of the following national advisory body scheduled to assemble during the month of February 1981.

The Treatment and Rehabilitation Work Group of the Interagency Committee on Federal Activities for Alcohol Abuse and Alcoholism, February 3; 2:00 p.m.—open. Conference Room A, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Contact: Mr. David Clough, Room 11–19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–2070.

Purpose: The Treatment and Rehabilitation Work Group evaluates all Federal efforts in the areas of alcohol abuse and alcoholism treatment and rehabilitation; provides for the communication and exchange of information necessary; and seeks to coordinate and enhance these programs and activities. Any reports or recommendations are submitted to the Interagency Committee on Federal Activities for Alcohol Abuse and Alcoholism.

Agenda: Tentative agenda items include updated reports from work group members, a followup report on the Treatment Alternatives to Street Crime (TASC) program, and a report on criminal justice/alcoholism treatment issues.

Substantive program information may be obtained form the contact person listed above. The NIAAA Committee Management Office will furnish summaries of the meeting and a roster of Committee members upon request. Contact Ms. Helen Garrett, Room 16C–21, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443–2860.

Dated: January 12, 1981.

Elizabeth A. Connolly,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 81–1554 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–88–M

Centers for Disease Control

Control Technology Assessment of Chemical Process Batch Unit Operations; Open Meeting; Cancellation

The notice of a meeting on the Control Technology Assessment of Chemical Process Batch Unit Operations, to be held January 22, 1981, was published in the **Federal Register** (46 FR 1030) on Monday, January 5, 1981. This open meeting is cancelled until further notice.

Dated: January 12, 1981.

William H. Foege,

Director, Centers for Disease Control.

[FR Doc. 81–1656 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–87–M

Food and Drug Administration

Consumer Participation; Open Meeting

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming consumer exchange meeting to be chaired by Federick R. Carlson, District Director, Boston District Office, Boston, MA.

DATE: The meeting will be held at 10 a.m., Thursday, January 29, 1981.

ADDRESS: The meeting will be held at the Food and Drug Administration Bldg., 2d Floor Conference Room, 585 Commercial St., Boston, MA 02109.

FOR FURTHER INFORMATION CONTACT: Yolan L. Harsanyi, Consumer Affairs Officer, Food and Drug Administration, 585 Commercial St., Boston, MA 02109, 617–223–5857.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's Boston District Office, and to contribute to the agency's policymaking decisions on vital issues.

Dated: January 12, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–1556 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–03–M

Consumer Participation; Open Meeting

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming consumer exchange meeting to be chaired by Loren Y. Johnson, District Director, Philadelphia District Office, Philadelphia, PA.

DATE: The meeting will be held at 9:30 a.m., Wednesday, February 25, 1981.

ADDRESS: The meeting will be held at the Federal Bldg., Rm. 3306 (3d Floor), 600 Arch St., Philadelphia, PA 19106.

FOR FURTHER INFORMATION CONTACT: Bob Lockett, Consumer Affairs Officer, Food and Drug Administration, U.S. Customhouse, Rm. 900, 2d and Chestnut Sts., Philadelphia, PA 19106, 215–597–0837.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's Philadelphia District Office, and to contribute to the agency's policymaking decisions on vital issues.

Dated: January 12, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–1557 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–03–M

Ophthalmic Device Section of the Ophthalmic; Ear, Nose, and Throat; and Dental Devices Panel; Meeting

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). This notice also sets forth a summary of the procedures governing committee meetings and methods by which interested persons may participate in open public hearings conducted by the committees and is issued under section 10(a) (1) and (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat.

770–776 (5 U.S.C. App. I)), and FDA regulations (21 CFR Part 14) relating to advisory committees. The following advisory committee meeting is announced:

Ophthalmic Device Section of the Ophthalmic; Ear, Nose, and Throat; and Dental Devices Panel

Date, time, and place: February 5 and 6, 9 a.m., Holiday Inn, 8777 Georgia Ave., Silver Spring, MD.

Type of meeting and contact person: Open public hearing, February 5, 9 a.m. to 10 a.m., open committee discussion, February 5, 10 a.m. to 5 p.m.; open public hearing, February 6, 9 a.m. to 10 a.m., open committee discussion, February 6, 10 a.m. to 5 p.m.; Max W. Talbott, Bureau of Medical Devices (HFK–460), Food and Drug Administration, 87557 Georgia Ave., Silver Spring, MD 20910, 301–427–7538.

General function of the Committee: The Committee reviews and evaluates available data on the safety and effectiveness of devices currently in use and makes recommendations for their regulation.

Agenda—Open public hearing: Interested persons are encouraged to present information pertinent to intraocular lenses and the intraocular lens clinical investigation (February 5) and on contact lenses and contact lens products (February 6). Those desiring to make formal presentations should notify the contact person by January 22, 1981, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, references to any data to be relied on, and an indication of the approximate time required to make their comments.

Open committee discussion. The Section will conduct reviews of premarket approval applications of intrraocular lenses and will discuss other statistical/epidemiological questions pertaining to intraocular lenses (February 5) and will conduct reviews of premarket approval applications for contact lens products (February 6).

Applications for reimbursement. Must be received by January 26, 1981.

Board of Tea Experts

Date, time, and place: February 9, 10 a.m., Rm. 700, 850 Third Ave., Brooklyn, NY.

Type of meeting and contact person: Open public hearing, 10 a.m. to 11 a.m., open committee discussion, 11 a.m. to 4:30 p.m.; Robert H. Dick, Food and Drug Administration, 850 Third Ave., Brooklyn, NY, 11232, 212–965–5739.

General function of the Committee: The Board advises on establishment of uniform standards of purity, quality, and fitness for consumption of all teas imported into the United States pursuant to 21 U.S.C. 42.

Agenda—Open public hearing: Any interested persons may present data, information, or views, orally or in writing, on issues pending before the Board.

Open committee discussion: Discussion and selection of tea standards.

Applications for reimbursement: Must be received by January 28, 1981.

FDA public advisory committee meetings may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. There are no closed portions for the meetings announced in this notice. The dates and times reserved for the open portions of each committee meeting are listed above.

The open public hearing portion or each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairman determines will facilitate the committee's work.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairman's discretion.

Persons interested in specific agenda items to be discussed in open session may ascertain from the contact person the approximate time of discussion.

A list of committee members and summary minutes of meetings may be requested from the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday. The FDA regulations relating to public advisory committees may be found in 21 CFR Part 14.

Applications for reimbursement for participation in the meeting listed above should be sent to the Office of Consumer Affairs (HFE–88), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, rather than to the Dockets Management Branch as prescribed in § 10.210 of the regulations (21 CFR 10.210). If you wish to submit an application or wish more information regarding the reimbursement program, please call 301–443–3170.

FDA has established expedited procedures for review of any application for reimbursement for participation in the meetings announded in this notice. The Office of Consumer Affairs, FDA, will file any application for reimbursement for participation in the meetings announced in this notice in the docket for this notice.

Dated: January 9, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–1558 Filed 1–15–81; 8:45 am]

BILLING CODE 4110–03–M

[Docket No. 75N–0184; DESI 597, 3265, 10837, and 9489]

Certain Anticholinergics/ Antispasmodics in Combination With a Sedative, and Single-Entity Antispasmodics, in Conventional Dosage Form; Drug Efficacy Study Implementation; Notice of Opportunity for Hearing

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: This notice reclassifies certain anticholinergics or antispasmodics in combination with a sedative, and single-entity antispasmodics in conventional dosage form to lacking substantial evidence of effectiveness, proposes to withdraw approval of the new drug applications, and offers an opportunity for a hearing on the proposal.

DATES: Any request for hearing must be submitted on or before February 17, 1981. All data and information relied upon in support of any such request and any other comments must be submitted on or before March 17, 1981.

ADDRESSES: Communications in response to this notice should be identified with the Docket No. 75N–0184 and the reference number DESI 597, 3265, 10837, or 9489, as appropriate, and directed to the attention of the appropriate office named below.

Requests for hearing, supporting data, and other comments: Dockets Management Branch (HFA–305), Rm. 4–62, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

Requests for opinion of the applicability of this notice to a specific product: Division of Drug Labeling Compliance (HFD–310), Bureau of Drugs,

Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Suzanne O'Shea, Bureau of Drugs (HFD–32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3650.

SUPPLEMENTARY INFORMATION: In notices published in the **Federal Register** of June 22, 1971 (36 FR 11875) (DESI 10837), July 27, 1972 (37 FR 15026) (DESI 597), September 18, 1973 (38 FR 26138) (DESI 9489), and November 11, 1975 (40 FR 52649) (DESI 3265), the Food and Drug Administration (FDA) classified anticholinergic or antispasmodic drugs in combination with a sedative, and antispasmodic drugs alone, as possibly effective for various gastrointestinal diseases. The indications lacking substantial evidence of effectiveness were specifically named in the notices. All other indications were classified as possibly effective. The possibly effective indications are set forth below:

DESI 10837

1. Tridihexethyl chloride and meprobamate (NDA 11–043 Milpath-200, Milpath-400, and NDA 10–837 Pathibamate-200 and Pathibamate-400): As adjunctive therapy in peptic ulcer and in the irratable bowel syndrome; functional diarrhea; drug induced diarrhea; ulcerative colitis; urinary bladder spasm; and urethral spasm.

DESI 597

1. Mepenzolate bromide and phenobarbital (NDA 10–679 Cantil with Phenobarbital Tablets): Motility disorders of the lower GI tract; acute enterocolitis; mild chronic ulcerative colitis; rectospasm; diverticulitis; post-gastrectomy diarrhea; diarrhea associated with diverticulitis.

2. Oxyphencyclimine hydrochloride and phenobarbital (NDA 13–515 Daricon PB): Peptic ulcers; hiatal hernia; functional bowel syndrome; chronic ulcerative colitis; bladder spasm with or without infection; urethral spasm.

3. Propantheline bromide and phenobarbital (NDA 9–014 Pro-Banthine with Phenobarbital Tablets): peptic ulcer; urinary bladder spasm; functional gastrointestinal disturbances; acute and chronic pancreatitis; illeoanal anastomosis; hyperhidrosis; ureteral spasm; infantile colic; useful ileostomies.

4. Glycopyrrolate and phenobarbital (NDA 12–950 Robinul PH Tablets and Robinul PH Forte): As adjunctive therapy for gastric and duodenal ulcer; esophagitis; hiatal hernia; spastic and irritable colon; functional bowel distress; splenic flexure syndrome; ileocolitis; diverticulitis; some neurogenic disturbances; acute enteritis; diarrhea; and intestinal viral infections.

5. Piperidolate hydrochloride and phenobarbital (NDA 8–907 Dactil with Phenobarbital): functional gastric disorders; post-gastrectomy syndrome.

6. Dicyclomine hydrochloride and phenobarbital (NDA 7–409 Bentyl with Phenobarbital): symptomatic control of functional gastrointestinal disorders; chronic irritable bowel; spastic constipation; mucous colitis; spastic colitis; biliary dyskenesia; gastrointestinal spasm secondary to organic disease.

DESI 9489

1. Tridihexethyl cholride and phenobarbital (NDA 9–489 Pathilon with Phenobarbital): peptic ulcer; gastric hyperacidity; gastric hypermotility; spastic and irritable colon; functional diarrhea; pylorospasm; gastritis where symptoms are due to hyperacidity.

DESI 3265

1. Piperidolate hydrochloride (NDA 8–907 Dactil Tablets): Irritable bowel syndrome and acute enterocolitis.

In a notice published in the **Federal Register** of November 11, 1975 (40 FR 52644) anticholinergic/sedative or antispasmodic/sedative combinations and antispasmodics alone were temporarily exempted from the time limits established for implementing certain phases of the Drug Efficacy Study. In order to qualify for the exemption manufacturers of anticholinergic/sedative combinations were required to undertake studies of the products as adjunctive therapy in the treatment of peptic ulcer, or in the treatment of the irritable bowel syndrome or acute enterocolitis. Manufacturers of antispasmodic/sedative combinations or antispasmodics alone were required to perform studies of their products in treating the irritable bowel syndrome or acute enterocolitis. The notice set forth a timetable for submitting protocols and for starting, reporting on, and completing the studies.

In a notice published in the **Federal Register** of June 20, 1978 (43 FR 26490), FDA extended the deadline for completion of the studies for 1 year. The notice also stated that abbreviated new drug applications for identical products would be conditionally approved if certain conditions were met. Among other things, it was required that the manufacturers of conditionally approved products conduct clinical studies. However, no study would be necessary if another manufacturer was conducting a study of a drug product containing the same ingredients to which the same efficacy conclusions would apply. The conditionally approved products have the same legal status as products initially covered by the exemption. The notices setting forth the exemption also apply to certain related drugs that are not the subject of an approved new drug application or a conditionally approved abbreviated new drug application.

No data were submitted to support the indications found by FDA to lack substantial evidence of effectiveness. The data submitted to comply with the exemption have been reviewed. Several studies require detailed analysis and will be the subject of a future **Federal Register** notice. The drug products affected by those studies are not listed above. However, many of the studies were seriously incomplete, and did not show that each component of the combination products makes a significant contribution to the effectiveness of the product. Analyses of these studies follow.

1. Studies were completed which investigated the effectiveness of Bentyl with Phenobarbital Tablets (Merrell-National Laboratories), Dactil with Phenobarbital Tablets (Merrell-National Laboratories), and Pro-Banthine with Phenobarbital Tablets (G. D. Searle & Co.) in treating the irritable bowel syndrome. However, none of the studies showed that each of the components makes a significant contribution to the effectiveness of the product. 21 CFR 300.50(a). In most cases, there was a trend toward improvement of the conditions regardless of the treatment. The sponsors acknowledge the lack of a showing of the effectiveness of their products.

2. Pfizer submitted the results of a completed double-blind, placebo controlled study on the effectiveness of Daricon PB Tablets as adjunctive therapy in duodenal ulcer. The patients took antacids concomitantly, after meals and before bed as needed.

The study does not show that each component makes a significant contribution to the effectiveness of Daricon PB. 21 CFR 300.50(a). The patients were evaluated at the final global rating as worse or unchanged, improved, or symptom free. In the patient and investigator rating there is very little difference in the proportions of "improved" and "symptom free" patients. In addition, when the "improved" and "symptom free" groups are combined, there is little difference between any of the treatment groups.

The sponsor claims that patients receiving Daricon PB consumed the least amount of antacids during the study except during the fourth week when

placebo patients consumed the least antacids. Placebo patients consumed less antacids than phenobarbital and plain Daricon patients, except for the fourth week when the placebo patients consumed more than phenobarbital patients. Throughout the study Daricon patients consumed the most antacids.

Pfizer claims that the Daricon PB group had the lowest number of symptoms per patient per week for four of seven symptoms. However, the sponsor also stated that "* * * the small patient population large within-group variation prevented statistical significance."

3. Robins submitted a status report on a double-blind, parallel investigation of Robinul PH in treating functional upper and lower gastrointestinal disorders. Robins claims that the data suggest that Robinul PH is helpful in alleviating symptoms and that the contribution of each component is evident.

The study is not adequate and well-controlled. 21 CFR 314.111(a)(5). The patients receiving Robinul PH had the greatest proportion of liquid or soft stools, and placebo patients had the most variable stools. Thus, it is not clear that the subjects were assigned to test groups in a way that minimizes bias. 21 CFR 314.111(a)(5)(*a*)(*2*)(*ii*). The test and control groups are not comparable because the Robinul PH used in the study contains 1.10 milligrams of glycopyrrolate per tablet, but the control group was given only 1.0 milligram of glycopyrrolate per tablet. In addition, the sponsor does not specify the patients who took concomitant drugs or those who had concomitant diseases, nor is there any explanation of the difference between "evaluable patients" and "patients completing the study." 21 CFR 314.111(a)(5)(ii)(*a*)(*2*)(*iii*).

Robins claims that Robinul PH is superior in normalizing stools after the first week. However, the patient diaries do not evaluate bowel habits. It is not clear, therefore, that adequate steps were taken to minimize bias in measuring responses. 21 CFR 314.111(a)(5)(ii)(*a*)(*3*).

In addition, the contribution of each component to the combination has not been demonstrated. 21 CFR 300.50(a). Although Robins claims that Robinul PH is superior in stool normalization, the physicians rating charts indicate that all drugs were equally effective. Robins claims that Robinul PH is effective treatment for night pain. However, Robinul (glycopyrrolate) alone and phenobarbital alone are as effective as Robinul PH in the treatment of night pain after the second week. For day pain, Robinul is as effective as Robinul PH. For duration of pain, there is little difference Robinul and Robinul PH. All treatments were shown to be equally effective in the global evaluation. The sponsor claims that the study demonstrates the clinical superiority of Robinul PH, but acknowledges that no statistical superiority has been shown.

No study was submitted for Robinul PH Forte.

4. Reed and Carnrick submitted data from a partially completed study of the effectiveness of Sidonna Tablets in treating the irritable bowel syndrome. The sponsor was able to study less than half the intended number of cases, but the specific number is not defined. The study is not adequate and well-controlled, nor do the results of the study demonstrate that each component makes a significant contribution to the combination product. 21 CFR 314.111(a)(5); 300.50(a).

The study's protocol was not submitted for review as required by the November 11, 1975 notice. The dose is not given for any of the test drugs used. Thus, it is not clear that the test drugs were standardized as required by 21 CFR 314.111(a)(5)(ii)(*b*). Several patients should not have been admitted to the study: those with depression, character disorders, migraines, diverticulosis, and those receiving antidiarrheal drugs, ampicillin, and Bentyl. 21 CFR 314.111(a)(5)(ii)(*a*)(*2*)(*iii*). The sponsor analyzed only the physicians' ratings because this rating was based in part on the patients' daily logs. The patients' daily logs should have been analyzed separately from the physicians' rating in order to minimize bias. 21 CFR 314.111(a)(5)(ii)(*a*)(*3*).

The sponsor found no statistical evidence of the superiority of Sidonna. The sponsor found no significant difference among treatment groups in abdominal pain, abdominal distention, and borborygmi. Sidonna and placebo were equally effective in treating mucus in stool. Significant differences exist at 2 weeks, but not at 4 weeks, in alleviation of diarrhea. However, the greatest improvement was in the simethicone and placebo groups and poorest in the Sidonna group. In the global assessment, there were no significant differences among the treatment groups at 2 weeks or 4 weeks. The highest percentage of improved patients occurred in the placebo group. Thus it has not been shown that each component makes a significant contribution to the combination product. 21 CFR 300.50(a).

5. Data submitted for six irritable bowel syndrome studies are seriously incomplete. The data obtained from these studies are inadequate to draw any conclusions on the effectiveness of the product. Merrell-National terminated a study of Dactil Tablets because only one patient entered the study. Only 19 patients completed the study of Endo Laboratories' Valpin 50 PB tablets. Lederle Laboratories studied only 22 patients in investigating Pathilon with Phenobarbital Tablets. Twenty-three patients completed Merrell-National's study of Cantil with Phenobarbital Tablets. In a joint study of Lederle's Pathibamate 200 and Wallace's Milpath 200, approximately 60 patients were analyzable. In a joint study of Lederle's Pathibamate-400 and Wallace's Milpath-400, 129 patients met protocol requirements and completed the study. The sponsors had planned on studying 500 patients. All sponsors acknowledge that the data submitted are insufficient to draw any conclusions on the effectiveness of their products.

Most of the above sponsors have requested additional time to study additional patients, as did Beecham Laboratories for Daricon PB Tablets, Robins for Robinul PH Tablets, Merrell-National for Bentyl with Phenobarbital, and Reed and Carnrick for Sidonna Tablets. The deadline for completion of studies has already been extended for 1 year. The Director of the Bureau of Drugs believes that adequate time has been allowed to investigate the effectiveness of these products. Therefore, requests for additional time in which to submit data are denied.

6. In addition to the incomplete study on irritable bowel syndrome (above), Merrell-National submitted a statement, "The Rationale for Cantil with PB in Peptic Ulcer." It claims that Cantil is currently effective for peptic ulcer, that the management of peptic ulcer is often complicated by anxiety, and that phenobarbital is an effective anti-anxiety, sedative agent. Therefore, Merrell-National asserts that Cantil with PB should be allowed to remain on the market for the treatment of peptic ulcer. No data were submitted on any studies for the use of Cantil with PB Tablets in peptic ulcer. Substantial evidence of effectiveness must be demonstrated by adequate and well-controlled clinical investigations. 21 U.S.C. 355; 21 CFR 314.111(a)(5). Clearly, this submission does not meet the statutory standard.

7. Roche Laboratories did not submit data from a clinical study in support of Librax. Instead, it submitted data from an ongoing study of the prevalence of emotional factors in association with certain gastrointestinal disorders. To date, 312 patients have been studied. Roche claims that patients with gastrointestinal disorders show higher emotional stress than other types of

patients, or persons with no medical disorders.

Roche also submitted the results of a medical marketing summary undertaken in August and September 1974 in which physicians were asked to indicate their preference concerning the use of anticholinergic/sedative drugs in various diseases. It also submitted the results of pharmacology studies in mice, from which it claims that both the tranquilizer and anticholinergic components are effective in protecting against stress-induced gastric mucosal erosion.

Clearly, none of these submissions fulfill the requirement that substantial evidence of effectiveness be shown by adequate and well-controlled studies. 21 U.S.C. 355; 21 CFR 314.111(a)(5). Moreover, because the study of emotional factors in gastrointestinal disorders is incomplete, the amount of reliance appropriately placed on that study is in question. The Director has already granted one time extension for the study of these drugs. Because adequate time has already been provided, no further extension is warranted.

No person has yet provided data that would support upgrading any of these products to effective. In addition, the Director believes that the time allowed for investigating the effectiveness of these products has been adequate for the design and conduct of acceptable studies. Accordingly, the temporary exemption granted by the November 11, 1975 and June 20, 1978 notices, as they pertain to these drugs, is revoked in a notice appearing elsewhere in this issue of the **Federal Register**.

Notice of Opportunity for Hearing

On the basis of all of the data and information available to him, the Director of the Bureau of Drugs is unaware of any adequate and well-controlled clinical investigation, conducted by experts qualified by scientific training and experience, meeting the requirements of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) and 21 CFR 314.111(a)(5) and, for combination products, 21 CFR 300.50, demonstrating the effectiveness of the drugs.

Therefore, notice is given to the holders of the following new drug applications and conditionally approved abbreviated new drug applications, to manufacturers of the following related products, and to all other interested persons that the Director of the Bureau of Drugs proposes to issue an order under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)), withdrawing approval of the new drug applications and all amendments and supplements thereto on the ground that new information before him with respect to the drug products, evaluated together with the evidence available to him when the applications were approved, shows there is a lack of substantial evidence that the drug products will have the effect they purport or are represented to have under the conditions of use prescribed, recommended, or suggested in the labeling.

DESI 597

1. NDA 7-409; Bentyl with Phenobarbital Capsules containing dicyclomine hydrochloride 10 milligrams and phenobarbital 15 milligrams, Merrell-National Laboratories, Division of Richardson-Merrel, Inc., 110 E. Amity Rd., Cincinnati, OH 45215.

2. NDA 8-907; Dactil with Phenobarbital tablets containing piperidolate hydrochloride 50 milligrams and phenobarbital 16 milligrams; Merrell-National Laboratories.

3. NDA 12-950; Robinul PH Tablets and Robinul PH Forte containing glycopyrrolate 1 milligram and phenobarbital 16 milligrams, and glycopyrrolate 2 milligrams and phenobarbital 16 milligrams; A. H. Robins Co., 1407 Cummings Dr., Richmond, VA 23220.

4. NDA 10-679; Cantil with Phenobarbital Tablets containing mepenzolate bromide 25 milligrams and phenobarbital 16 milligrams; Merrell-National Laboratories.

5. NDA 13-515; Daricon PB Tablets containing oxyphencyclimine hydrochloride 5 milligrams and phenobarbital 15 milligrams; Pfizer Laboratories, Division of Pfizer, Inc., 235 E. 42d St., New York, NY 10017.

6. NDA 9-014; Pro-Banthine with Phenobarbital Tablets containing propantheline bromide 15 milligrams and phenobarbital 15 milligrams; G. D. Searle & Co., P.O. Box 5110, Chicago, IL 60680.

DESI 3285

1. NDA 8-907; Dactil Tablets containing piperidolate hydrochloride 50 milligrams; Merrell-National Laboratories.

DESI 9489

1. NDA 9-489; Pathilon with Phenobarbital Tablets containing tridihexethyl chloride 25 milligrams and phenobarbital 15 milligrams; Lederle Laboratories Division, American Cyanimid Co., Pearl River, NY 10965.

DESI 10837

1. NDA 10-837; Pathibamate-200 Tablets and Pathibamate-400 Tablets containing tridihexethyl chloride 25 milligrams and meprobamate 200, and tridihexethyl chloride 25 milligrams and meprobamate 400 milligrams; Lederle Laboratories.

2. NDA 11-043; Milpath-200 Tablets and Milpath-400 Tablets containing tridihexethyl chloride 25 milligrams and meprobamate 200, and tridihexethyl chloride 25 milligrams and meprobamate 400 milligrams; Wallace Laboratories, Division of Carter-Wallace, Inc., Half-Acre Rd., Cranberry, NJ 08512.

The following products, not reviewed by NAS/NRC, were subject to the exemption notices of November 11, 1975, and June 20, 1978: 1. NDA 12-750; Librax Capsules containing clidinium bromide 2.5 milligrams and chlordiazepoxide 5 milligrams; Roche Laboratories, Division of Hoffman-LaRoche, Inc., Nutley, NJ 07110.

2. NDA 13-430; Valpin 50 PB Tablets and Valpin PB Tablets containing anisotropine methylbromide 50 milligrams and phenobarbital 15 milligrams, and anisotropine methylbromide 15 milligrams and phenobarbital 15 milligrams; Endo Laboratories, 1000 Stewart Ave., Garden City, NY 11530.

3. ANDA 86-281; Meprobamate with Tridihexethyl Chloride Tablets containing 200 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Chelsea Laboratories, Inc., 428 Doughty Blvd., Inwood, NY 11696.

4. ANDA 86-526; Meprobamate with Tridihexethyl Chloride Tablets containing 400 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Chelsea Laboratories, Inc.

5. ANDA 86-791; T.C.M. 200 Tablets containing 200 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Zenith Laboratories, Inc., 140 Legrand Ave., Northvale, NJ 07647.

6. ANDA 86-792; T.C.M. 400 Tablets containing 400 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Zenith Laboratories, Inc.

The following products are not the subject of an approved new drug application. The NDA number listed is for identification purposes and is the NDA number of the manufacturer's original product to which the product listed below is related.

1. NDA 9-014; Probital Tablets containing propantheline bromide 7.5 milligrams, and phenobarbital 15 milligrams; G. D. Searle & Co.

2. Ref. No. 90-006 (No NDA); Sidonna Tablets containing simethicone 25 milligrams, butabarbital sodium 16

milligrams, hyoscyamine sulfate 0.1037 milligram, scopolamine hydrobromide 0.0065 milligram and atropine sulfate 0.0194 milligram; Reed and Carnrick, 30 Boright Ave., Kenilworth, NJ 07033.

In addition to the holders of the new drug applications specifically named above, this notice of opportunity for hearing applies to all persons who manufacture or distribute a drug product not the subject of an approved new drug application, that is listed above or that is identical, related, or similar to a drug product named above, as defined in 21 CFR 310.6 It is the responsibility of every drug manufacturer or distributor to review this notice of opportunity for hearing to determine whether it covers any drug products that the person manufactures or distributes. An opinion of the applicability of this notice to a specific drug product may be obtained by writing to the Division of Drug Labeling Compliance (address given above).

In addition to the grounds for the proposed withdrawal of approval stated above, this notice of opportunity for hearing encompasses all issues relating to the legal status of the drug products subject to it (including identical, related, or similar drug products as defined in 21 CFR 310.6) e.g., any contention that a product is not a new drug because it is generally recognized as safe and effective within the meaning of section 201(p) of the act or because it is exempt from part or all of the new drug provisions of the act under the exemption for products marketed before June 25, 1938, contained in section 201(p) of the act, or under section 107(c) of the Drug Amendments of 1962 or for any other reason.

In accordance with section 505 of the act (21 U.S.C. 355) and the regulations promulgated thereunder (21 CFR Parts 310, 314), the applicants and all other persons subject to this notice under 21 CFR 310.6 are hereby given an opportunity for a hearing to show why approval of the new drug application(s) should not be withdrawn and an opportunity to raise, for administrative determination, all issues relating to the legal status of a drug product named above and of all identical, related or similar drug products.

An applicant or any other person subject to this notice under 21 CFR 310.6 who decides to seek a hearing, shall file (1) on or before February 17, 1981, a written notice of appearance and request for hearing, and (2) on or before March 17, 1981, the data, information, and analyses relied on to justify a hearing, as specified in 21 CFR 314.200. Any other interested person may also submit comments on this notice. The procedures and requirments governing this notice of opportunity for hearing, a notice of appearance and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and a grant or denial of hearing, are contained in 21 CFR 314.200.

The failure of an applicant or any other persons subject to this notice under 21 CFR 310.6 to file time written appearance and request for hearing as required by 21 CFR 314.200 constitutes an election by the person not to make use of the opportunity for a hearing concerning the action proposed with respect to the product and consititues a waiver of any contentions concerning the legal status of any such drug product. Any such drug product may not thereafter lawfully be marketed, and the Food and Drug Administration will initiate appropriate regulatory action to remove such drug products from the market. Any new drug product marketed without an approved NDA is subject to regulatory action at any time.

A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of data, information, and factual analyses in the request for the hearing that there is no genuine and substantial issue of fact which precludes the withdrawal of approval of the application, or when a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who requests the hearing, making findings and conclusions, denying a hearing.

All submissions under this notice must be filed in quintuplicate. Such submissions except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

(Sec. 505, 52 Stat. 1052–1053, as amended (21 U.S.C. 355)), and under the authority delegated to the Director of the Bureau of Drugs (21 CFR 5.82)

Dated: December 24, 1980.

J. Richard Crout,

Director, Bureau of Drugs.

[FR Doc. 81-1284 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

[Docket No. 75N-0184; DESI Nos. 597, 3265, 9489 and 10837]

Certain Anticholinergics or Antispasmodics in Combination With a Sedative, and Single-Entity Antispasmodics, in Conventional Dosage Form; Drug Efficacy Study Implementation; Revocation of Exemption

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: This notice revokes the temporary exemption for continued marketing of certain anticholinergics or antispasmodics in combination with a sedative, or single-entity antispasmodics. Under the exemption, the drugs have been allowed to remain on the market for continued study beyond the time limit scheduled for implementation of the Drug Efficacy Study.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Suzanne O'Shea, Bureau of Drugs (HFD-32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3650.

SUPPLEMENTARY INFORMATION: In notices published in the **Federal Register** of June 22, 1971 (36 FR 11875) (DESI 10837), July 27, 1972 (37 FR 15026) (DESI 597), September 18, 1973 (38 FR 26138) (DESI 9489), and November 11, 1975 (40 FR 52649) (DESI 3265), the Food and Drug Administration (FDA) classified anticholinergic or antispasmodic drugs in combination with a sedative, and antispasmodic drugs alone, as possibly effective for various gastrointestinal diseases. In a notice published in the **Federal Register** of November 11, 1975 (40 FR 52644), conventional dosage forms of these products were permitted to remain in the market pending completion of clinical studies testing their effectiveness in treating gastrointestinal disease. That notice established a timetable for submission of protocols, for beginning studies, and for completion of the studies. In a notice published in the **Federal Register** of June 20, 1978 (43 FR 26490), the deadline for completion of the studies was extended for 1 year. The June 20, 1978 notice required abbreviated new drug applications for duplicative products covered by the exemption and stated that conditionally approved abbreviated new drug applications have the same legal status as "deemed approved" applications reviewed in the Drug Efficacy Study.

The data received for several completed studies are undergoing detailed FDA analysis. The drugs used

in these studies will be the subject of a future Federal Register notice. However, data submitted in support of the drug products listed below are seriously incomplete and, for the combination products, do not show that each component of the combination product makes a significant contribution to its effectiveness. Many sponsors have requested time extensions beyond the final submission deadlines. FDA believes that adequate time has been allowed to investigate the effectiveness of these products, and that no further time extension is warranted.

In a notice published elsewhere in this issue of the Federal Register, the Director of the Bureau of Drugs reclassifies the possibly effective indications to lacking substantial evidence of effectiveness and offers an opportunity for a hearing. Because the time period for final reports has elapsed, these drug products are no longer in compliance with the requirements of the temporary exemption. Therefore, the temporary exemption granted in the November 11, 1975 and June 20, 1978 notices is hereby revoked for the following products in the Drug Efficacy Study or otherwise covered by the exemption, and all identical, similar, and related products not the subject of an approved or conditionally approved new drug application.

DESI 597

1. NDA 7–409; Bentyl with Phenobarbital Capsules containing dicyclamine hydrochloride 10 milligrams and phenobarbital 15 milligrams, Merrell-National Laboratories, Division of Richardson-Merrell, Inc., 110 E. Amity Rd., Cincinnati, OH 45215.

2. NDA 8–907; Dactil with Phenobarbital Tablets containing piperidolate hydrochloride 50 milligrams and phenobarbital 16 milligrams; Merrell-National Laboratories.

3. NDA 12–950; Robinul PH Tablets and Robinul PH Forte containing glycopyrrolate 1 milligram and phenobarbital 16 milligrams, and glycopyrrolate 2 milligrams and phenobarbital 16 milligrams; A. H. Robins Co., 1407 Cummings Dr., Richmond, VA 23220.

4. NDA 10–679; Cantil with Phenobarbital Tablets containing mepenzolate bromide 25 milligrams and phenobarbital 16 milligrams; Merrell-National Laboratories.

5. NDA 13–515; Daricon PB Tablets containing oxyphencyclimine hydrochloride 5 milligrams and phenobarbital 15 milligrams; Pfizer Laboratories, Division of Pfizer, Inc., 235 E. 42d St., New York, NY 10017.

6. NDA 9–014; Pro-Banthine with Phenobarbital Tablets containing propantheline bromide 15 milligrams and phenobarbital 15 milligrams; G. D. Searle & Co., P.O. Box 5110, Chicago, IL 60680.

DESI 3265

1. NDA 8–907; Dactil Tablets containing piperidolate hydrochloride 50 milligrams; Lakeside Laboratories.

DESI 9489

1. NDA 9–489; Pathilon with Phenobarbital Tablets containing tridihexethyl chloride 25 milligrams and phenobarbital 15 milligrams; Lederle Laboratories, Division American Cyanimid Co., Pearl River, NY 10965.

DESI 10837

1. NDA 10–837; Pathibamate—200 Tablets and Pathibamate—400 Tablets containing tridihexethyl chloride 25 milligrams and meprobamate 200 and 400 milligrams; Lederle Laboratories.

2. NDA 11–043; Milpath—200 Tablets and Milpath—400 Tablets containing tridihexethyl chloride 25 milligrams and meprobamate 200 and 400 milligrams; Wallace Laboratories, Division of Carter-Wallace, Inc., Half-Acre Rd., Cranberry, NJ 08512.

The following products were not reviewed by NAS/NRC: 1. NDA 12–750; Librax Capsules containing clidinium bromide 2.5 milligrams and chlordiazepoxide 5 milligrams; Roche Laboratories, Division of Hoffman-LaRoche, Inc., Nutley, NJ 07110.

2. NDA 13–430; Valpin 50 PB Tablets and Valpin PB Tablets containing anisotropine methylbromide 50 milligrams and phenobarbital 15 milligrams, and anisotropine methylbromide 15 milligrams and phenobarbital 15 milligrams; Endo Laboratories, 1000 Stewart Ave., Garden City, NY 11530.

3. ANDA 86–281; Meprobamate with Tridihexethyl Chloride Tablets containing 200 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Chelsea Laboratories, Inc., 428 Doughty Blvd., Inwood, NY 11696.

4. ANDA 86–526; Meprobamate with Tridihexethyl Chloride Tablets containing 400 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Chelsea Laboratories, Inc.

5. ANDA 86–791; T.C.M. 200 Tablets containing 200 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Zenith Laboratories, Inc., 140 Legrand Ave., Northvale, NJ 07647.

6. ANDA 86–792; T.C.M. 400 Tablets containing 400 milligrams meprobamate and 25 milligrams tridihexethyl chloride; Zenith Laboratories, Inc.

The following products are not the subject of an approved new drug application. The NDA number listed is for identification purposes and is the NDA number of the manufacturer's original product to which the product listed below is related.

1. NDA 9–014; Probital Tablets containing propantheline bromide 7.5 milligrams and phenobarbital 15 milligrams; G. D. Searle & Co.

2. Ref. No. 90–006 (No NDA); Sidonna Tablets containing simethicone 25 milligrams, butabarbital sodium 16 milligrams, hyoscyamine sulfate 0.1037 milligram, scopolamine hydrobromide 0.0065 milligram, and atropine sulfate 0.0194 milligram; Reed and Carnrick, 30 Boright Ave., Kenilworth, NJ 07033.

((Secs. 502, 505, 52 Stat. 1050–1053 as amended (21 U.S.C. 352, 355)) and under authority delegated to the Director of the Bureau of Drugs (21 CFR 5.70)).

Dated: December 24, 1980.

J. Richard Crout,

Director, Bureau of Drugs.

[FR Doc. 81-1287 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

[Docket No. 80F-0499]

Ciba-Geigy Corp.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Ciba-Geigy Corp. has filed a petition proposing that the food additive regulations be amended to provide for the use of 1,2-bis(3,5,di-*tert*-butyl-4-hydroxyhydrocinnamoyl) hydrazine as a component of adhesives in articles intended for food-contact use.

FOR FURTHER INFORMATION CONTACT: Julius Smith, Bureau of Foods (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348)), notice is given that a petition (FAP OB3487) has been filed by Ciba-Geigy Corp., Ardsley, NY 10502, proposing that § 175.105 *Adhesives* (21 CFR 175.105) be amended to provide for the safe use of 1,2-bis(3,5-di-*tert*-butyl-4-hydroxyhydrocinnamoyl)hydrazine as a component of adhesives in articles intended for food-contact use.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not

required. The agency's finding of no significant impact and its environmental assessment may be seen in the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 24, 1980.

Sanford A. Miller,

Director, Bureau of Foods.

[FR Doc. 81-1289 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

[Docket No. 80F-0482]

General Foods Corp.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration announces that the General Foods Corp. has filed a petition proposing that the food additive regulations be amended to provide for the safe use of ethyl acetate as a solvent for the decaffeination of coffee.

FOR FURTHER INFORMATION CONTACT: Richard C. Kraska, Bureau of Foods (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5), 72 Stat. 1786 (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 8A3353) has been filed by the General Foods Corp., White Plains, NY 10625, proposing that Part 173—Secondary Direct Food Additives Permitted in Food for Human Consumption (21 CFR Part 173) be amended to provide for the safe use of ethyl acetate as a solvent for the decaffeination of coffee.

The environmental impact analysis report and other relevant material have been reviewed, and it has been determined that the proposed use of the additive will not have a significant environemental impact. Copies of the environmental analysis report and the environmental assessment report may be seen in the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 29, 1980.

Sanford A. Miller,

Director, Bureau of Foods.

[FR Doc. 81-1290 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

[Docket No. 80N-0453; DESI 6550]

Methoxyphenamine Hydrochloride; Withdrawal of Approval of New Drug Application

AGENCY: Food and Drug Administration (FDA).

ACTION: Notice.

SUMMARY: This notice withdraws approval of those parts of a new drug application (NDA 6–550) pertaining to Orthoxine Hydrochloride Tablets and Syrup, each containing methoxyphenamine hydrochloride. The basis of the withdrawal is the lack of substantial evidence that the drug products are effective. The drug products have been used in treating bronchial asthma and certain allegic conditions.

EFFECTIVE DATE: January 26, 1981.

ADDRESS: Requests for an opinion of the applicability of this notice to a specific product should be identified with the reference number DESI 6550 and directed to the Division of Drug Labeling Compliance (HFD–310), Bureau of Drugs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Herbert Gerstenzang, Bureau of Drugs (HFD–32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3650.

SUPPLEMENTARY INFORMATION: In notice of opportunity for hearing published in the **Federal Register** of August 21, 1973 (38 FR 22501), (Docket No. FDC–D–650 (now Docket No. 80N–0453)), the Food and Drug Administration proposed to issue an order withdrawing approval of pertinent parts of the following new drug application on the ground that there is a lack of substantial evidence that the drug products are effective for their labeled indications.

NDA 6–550; those parts of the NDA pertaining to Orthoxine Hydrochloride Tablets and Syrup, containing methoxyphenamine hydrochloride; The Upjohn Co., 7171 Portage Rd., Kalamazoo, MI 49002.

Neither the holder of the application nor any other person filed a written appearance of election as provided by the notice. The failure to file such an appearance constitutes election by such persons not to avail themselves of the opportunity for a hearing.

Any drug product that is identical, related, or similar to a drug product named above and is not the subject of an approved new drug application is covered by the new drug application reviewed and is subject to this notice (21 CFR 310.6). Any person who wishes to determine whether a specific product is covered by this notice should write to the Division of Drug Labeling Compliance (address given above).

The Director of the Bureau of Drugs, under the Federal Food, Drug, and Cosmetic Act (sec. 505, 52 Stat. 1052–1053, as amended (21 U.S.C. 355)), and under authority delegated to him (21 CFR 5.82), finds that, on the basis of new information before him with respect to the drug products, evaluated together with the evidence available to him when the application was approved, there is a lack of substantial evidence that the drug products will have the effect they purport or are represented to have under the conditions of use prescribed, recommended, or suggested in the labeling.

Therefore, pursuant to the foregoing finding, approval of those parts of NDA 6–550 providing for the drug products named above and all amendments and supplements thereto is withdrawn effective January 26, 1981.

Shipment in interstate commerce of the above products or of any identical, related, or similar product that is not the subject of an approved new drug application will then be unlawful.

Dated: December 24, 1980.

J. Richard Crout,

Director, Bureau of Drugs.

[FR Doc. 81-1288 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-03-M

Health Care Financing Administration

Medicare Program; Reimbursement for Costs Incurred in Relation to Union Activities

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final Notice.

SUMMARY: This notice sets forth HCFA's response to its previous notice published in the **Federal Register** on October 21, 1980. That notice restated HCFA's policy with respect to the allowability of provider costs incurred in certain union activities and requested public comment on our policy.

As a result of our reexamination of this policy, following that publication, we have decided to retain the policy but to provide further clarification and examples in the *Provider Reimbursement Manual.*

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: William Goeller, 301–597–1802.

SUPPLEMENTARY INFORMATION:

Background

The Medicare provisions of the Social Security Act specify that health care providers participating in the Medicare program will be reimbursed for the reasonable cost of furnishing covered services to Medicare beneficiaries. The statute further provides that determinations of "reasonable cost" will be made in accordance with Medicare regulations, which establish the methods of calculating costs and the items to be included in the calculations (42 U.S.C. 1396x(v)(1)(A)).

One of the provisions of these regulations is the general requirement that the determination of reasonable cost must be based on costs related to the delivery of health care to Medicare beneficiaries (42 CFR 405.451). HCFA has interpreted this provision to preclude reimbursement for costs incurred by providers for the purpose of persuading their employees not to form a collective bargaining unit or not to join a trade union. HCFA believes that such costs are clearly unrelated to patient care, and therefore, are not allowable under the statute and regulations. However, HCFA also believes that the costs incured to carry out the providers' obligation under a collective bargaining agreement are directly related to its delivery of appropriate health care and therefore are reimbursable under Medicare. This policy statement is currently contained in the *Provider Reimbursement Manual*, section 2180, and represents HCFA's longstanding interpretation of the requirements contained in the statute and regulations.

We believe the situations above represent two widely separate points of a spectrum of activities related to union activities and personnel management. In recent months, a number of questions arose on the application of our general policy to factual situations on the spectrum between these two points. As a result, we decided to seek the viewpoints and suggestions of interested members of the public regarding these and other situations. Moreover, we have been requested by providers and hospital associations to review our policy statement further. Accordingly, we published a Notice of Policy Interpretation in the **Federal Register** (45 FR 69561) on October 21, 1980, setting forth our interpretation and requesting comments to see whether changes or further development of existing policies are approprate.

Summary of Comments

The following are the major comments received from numerous hospitals and health facilities, as well as related provider and trade associations, in response to this notice.

1. Several commentors indicated that this policy precludes management's right and responsibility to communicate pertinent facts to employees so that informed choices can be made regarding unionization and cited that the present interpretation constitutes unreasonable interference with a provider's right to conduct business in accordance with its best business judgment. Many providers further stated that since they are not familiar with the details of labor law they often have to obtain advice and assistance from attorneys and consultants.

It was never the intent of this policy to interfere with a provider's prerogative to keep employees informed of issues and to keep the lines of communication open between an employer and the employees. A legitimate expression of facts and opinions involving both sides of an issue is not precluded by this policy. We recognize that consultants and/or attorneys retained by a provider may be needed at times to familiarize supervisors and employees with labor law. Costs incurred for such activities are usually considered allowable costs. On the other hand, activities by a consultant that are designed to persuade or influence employees not to join a union are not related to patient care and are, therefore, not included in the determination of allowable cost.

2. A number of providers argued that, in order to fully inform employees and maintain a smooth functioning environment, the costs of persuading employees not to join a union are related to patient care. These providers indicated that such activity eliminates potential discord between the employer and employees which may have an adverse effect on the facility environment and its ability to insure quality care to patients. Many providers stated that the similarities between collective bargaining and activities to persuade employees not to unionize are such that both situations are parallel in nature and are logically related to patient care.

Although arguments could be made on both sides of this question as to whether such provider costs do or do not contribute to a more effective working environment, the allowability under Medicare of costs incurred to persuade or influence employees on unionization hinges on whether such expenses are related to the health care of patients. We believe a clear distinction can be drawn between the costs incurred to persuade employees not to unionize and the collective bargaining process. Provider negotiations with provider employees with respect to wages, benefits and conditions of employment are clearly necessary to delivery of patient care whether conducted through individual or collective bargaining. The same is not true for activities designed to influence employees with respect to whether or not to conduct their negotiations with the provider on an individual or a collective basis, since either basis can be and is used in the provision of patient care.

3. Several comments indicated that our policy with regard to costs related to union activities is contrary to cost containment efforts since it precludes providers from obtaining services and supplies as cheaply as can be prudently purchased and, therefore, may result in an increase in expenses for operating a facility. They indicated that costs incurred in persuading employees not to form collective bargaining units will save patients and third party payers much more than what is spent to avoid unionization. Providers stated the Medicare's unwillingness to recognize these items as allowable expenses will result in shifting the costs of informing their employees entirely to the private sector and result in raising overall health care costs.

The argument that persuading employees not to join unions would be cost effective seems to rest on a belief that employees are less effective in bargaining for wages, benefits and conditions when they bargain individually than they are when they bargain collectively. While providers are expected to bargain effectively so that they pay no more than the going rate for any goods or services they purchase, we do not believe that this obligation would convert costs incurred to influence suppliers of goods and services on their method of organizing to costs related to patient care.

The fact that providers may impose costs unrelated to patient care on other payers is not relevant to the allowability of such costs under the Medicare law.

4. Several commenters suggested that our present policy violates neutrality and unfairly discriminates against providers who want to remain nonunionized.

It is not our intent, nor do we have the authority, to interfere with a provider's operating and management dcisions. In promulgating this policy, we do not intend to deny or diminish the rights of provider management to foster employer-employee relationships that

may or may not be pro-union. Our policy is intended to insure that only costs related to patient care are reimbursed under the Medicare program.

5. A number of commenters state that, since the IRS specifically recognizes the cost of persuasion of employees as a legitimate business expense, only those costs which are in direct violation of the NLRA should be denied for reimbursement.

The Internal Revenue code differs in nature and purpose from the Medicare law. Treatment of costs unrelated to patient care under the Code is irrelevant to the allowability of such costs under the Medicare law.

6. Several commenters indicated that the inclusion of section 2186 of the Medicare *Provider Reimbursement Manual* constituted a major change in reimbursement policy and that it was not promulgated in accordance with the Administrative Procedure Act (APA).

We believe the manual revision to be an interpretation and clarification of Medicare policy already stipulated in 42 CFR 405.451. That section indicates that only reasonable and necessary costs related to patient care activities are reimbursable. Therefore, we do not agree that the revision has been inappropriately implemented or that it represents a new policy being retroactively applied.

7. While in agreement with the present policy, various commenters suggested that it be expanded to include reasonable limits on costs related to collective bargaining activities. These commenters believed that the present policy may have the effect of encouraging employers to prolong union negotiations which, in turn, may force employees and their trade associations into arbitration which can be costly and time-consuming.

As with all allowable costs, costs incurred by a provider for collective bargaining and related activities are recognizable and allowable for the purpose of Medicare reimbursement only to the extent that they are reasonable and necessary. We believe that providers in the health care industry are concerned with providing quality care and would not jeopardize patient care by unnecessarily prolonging labor disputes with employees. Accordingly we do not plan to set specific limitations on those costs incurred by providers as a result of the collective bargaining process.

In addition to these comments, a number of responses indicated agreement with the policy contained in the notice published on October 21.

Clarification of Present Policy

The thrust of this policy has not been to preclude providers from seeking legal advice and consultation on union activity matters. Rather, our intent has been to preclude from reimbursement only the costs of activities (such as persuading employees not to form a union) which are not necessary to the provision of patient care.

Based on our analysis and review of the comments received, we believe there is a need to further clarify this policy in the *Provider Reimbursement Manual*. As a result we are planning to clarify and list those consultant activities and general expenses which are related to patient care but not specifically noted as allowable or unallowable in the Manual. The Manual issuance will be communicated through regular channels to Medicare contractors, providers and other interested parties.

(Sec. 1102, 1861(v)(1), 1866(a), and 1871 of the Social Security Act; 42 U.S.C. 1302, 1395f(b), 1395x(v)(1), 1395cc(a), and 1395hh)

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare—Hospital Insurance)

Dated: January 9, 1981.

Howard Newman,

Administrator, Health Care Financing Administration.

Approved: January 12, 1981.

Patricia Roberts Harris,

Secretary.

[FR Doc. 81-1566 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-35-M

National Professional Standards Review Council; Request for Nomination of Members

The terms of four members of the National Professional Standards Review Council will expire as of June 30, 1981. Additionally legislative amendments signed into law on December 5, 1980 (Pub. L. 96-499) expand Council membership. The purpose of this notice is to solicit suggestions for qualified individuals to fill the impending vacancies and new positions.

The National Professional Standards Review Council was established under Section 1163 of the Social Security Act (42 U.S.C. 1320c-12). The recent amendments now require that the Council be composed of eleven physicians, one doctor of dental surgery or of dental medicine, one registered professional nurse, and one other nonphysician health professional.

The physicians must be of recognized standing and distinction in the appraisal of medical practice. The dentist, nurse and one other nonphysician health practitioner should also be of recognized standing and distinction in their respective disciplines. A majority of the Council's physician members must be recommended by national organizations recognized by the Secretary as representing practicing physicians. The membership of the Council must include physicians recommended by consumer groups and other health care interests. Members are appointed for 3 years and are eligible for reappointment. All members of the Council may not otherwise be in the employ of the United States.

In order to achieve a balance of expertise on the Council, we are particularly interested in nominees experienced in the areas of health care financing, specialized medical review methodologies such as ancillary services review, preventive health and data analysis.

Send nominations and curriculum vitae by February 17, 1981, to: Cleo E. Hancock, Jr., Staff Director, National Professional Standards Review Council, Room 4520, North Building, 330 Independence Avenue, S.W., Washington, D.C. 20201, Telephone: (202) 245-6097.

Nominations must state that the nominee is aware of the nomination and is willing to serve as a member of the Council.

Thank you for your assistance and prompt attention.

Dated: January 12, 1981.

Howard N. Newman,

Administrator.

[FR Doc. 81-1569 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-35-M

Medicare Program; Schedule of Target Reimbursement Rates for Institutions Furnishing Home Dialysis Supplies, Equipment, and Support Services

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final Notice.

SUMMARY: This notice sets forth a schedule of rates for End-Stage Renal Disease (ESRD) program reimbursement for supplies, equipment, and support services furnished to patients who dialyze themselves at home. The schedule establishes the calendar year 1981 regionally adjusted rates per treatment for home hemodialysis and home peritoneal dialysis. These rates are the amounts to be paid to approved hospital-based and independent dialysis facilities that enter into an optional agreement with HCFA to accept target rate reimbursement for all home dialysis patients under their direct supervision.

EFFECTIVE DATES: The rates are applicable to home dialysis services furnished on or after January 1, 1981, through December 31, 1981.

FOR FURTHER INFORMATION CONTACT: Bernadette Schumaker (301) 597-1048.

SUPPLEMENTARY INFORMATION:

Background

The End-Stage Renal disease (ESRD) Program Amendments of 1978 (Pub. L. 95-292) added section 1881(b)(6) to the Social Security Act. This section requires HCFA to establish target reimbursement rates for home dialysis for patients under the direct supervision of hospital-based or independent renal dialysis facility. The rates must be established for each calendar year, and must be adjusted for regional variations. This is an optional reimbursement method only for facilities that make an agreement with HCFA to furnish all home dialysis supplies, equipment, and support services (including the services of qualified home dialysis aides) that are medically necessary for patients to dialyze at home. If facilities do not choose this option, they are paid according to the usual Medicare reimbursement principles. That is, hospital-based facilities are paid on a reasonable cost basis, using the lower of cost or charges, and independent facilities are paid reasonable charges on a fee for service basis.

Regulations governing these optional agreements between HCFA and facilities are found at 42 CFR 405.691. Regulations governing the target rate reimbursement method and applications are at 42 CFR 405.440. These regulations were published together as a final rule with comment period on October 19, 1979 (44 FR 60287). A notice setting forth schedules for target rates covering April through December, 1979 (44 FR 60412) and a notice covering calendar year 1980 was published March 5, 1980 (45 FR 14249).

Section 1881(b)(6) limits the maximum target rate to no more than 70 percent of the national average payment for in-facility maintenance dialysis services furnished by approved hospital-based and independent facilities during the preceding fiscal year, as adjusted for regional variations and before application of the deductible and coinsurance requirements. The rates must be used without recomputation throughout the calendar year for which they are established. Accordingly, there can be no administrative appeal if actual costs for covered services exceed the target reimbursement rate payments (see regulations at 42 CFR 405.440).

We do not have sufficient cost information on the new services required under this optional reimbursement method (e.g., providing home dialysis aides) to evaluate the impact of alternate target rates. Therefore, in order not to discourage the use of home dialysis, we have kept the 1981 target reimbursement rate per treatment at the maximum rate permitted under the statute, as we did in 1979 and 1980.

Comments and Response

As a result of the publication of the regulations and notices mentioned above, we have received a number of comments. We plan to make minor clarifying changes in the rules during fiscal year 1981, such as clarifying the retroactive period for the target rate reimbursement method and deleting erroneous references, to 42 CFR 405.438, in 42 CFR 405.691. When those changes are published we will summarize and respond to all the comments received on the rule. However, since some comments referred directly to the rates, we thought it appropriate to respond to them at this time. We believe this will improve understanding of the rates published in this schedule.

1. *Rates too low.* Three comments indicated that the rate was too low and would discourage facilities from furnishing anything other than what was absolutely required under the regulation. Some commenters felt that the rate was adequate this year, but did not contain any guarantees that it would keep pace with inflation in the future. One commenter suggested that the rate be set three years in advance so that facilities could better judge the long term financial implications.

The law establishing the target rate clearly states that the maximum rate payable is 70 percent of the national average payment for in-facility maintenance dialysis services furnished during the previous fiscal year, adjusted for regional variations. We have set the rate at this maximum and cannot increase it. Because the law requires us to set the target rate annually based on the most recent data available at that time, we cannot set the rate more than one year in advance.

2. *"Without equipment" rate inadequately explained.* In responding to the notice on October 19, 1979 (44 FR 60412), some commenters indicated a misunderstanding of when the "without equipment" rate applies, apparently believing that a facility under the target rate has an option of not furnishing home dialysis equipment to its home patients. The notice has been revised to clearly state that all facilities that have elected target rate reimbursement must furnish all necessary home dialysis equipment, either directly or under arrangements, to all of their home patients. The lower "without equipment" rate applies where the facility elects to furnish the home dialysis equipment under a separate 100 percent equipment cost reimbursement agreement, as provided in 42 CFR 405.438 and 405.690. In all other cases, the higher rate applies.

3. *Inadequate differential between "with equipment" rate and "without equipment" rate.* Some comments indicated that the differential between the higher "with equipment" rate, and the lower "without equipment" rate did not accurately reflect the true costs of furnishing home dialysis equipment. HCFA does not have substantial, highly reliable data on the costs of home dialysis generally, or the cost per treatment of home dialysis equipment specifically. Consequently, these rates could not be computed by analyzing and comparing component costs. Instead, they were calculated from the cost data for in-facility dialysis services, adjusted by 70 percent acording to the requirements in the law for the maximum payable rate. Furthermore, because the "with equipment" rate is set at the maximum, a larger differential between the two rates would require the "without equipment" rate to be set lower than it is. We do not believe that the best interest of the ESRD program and its beneficiaries would be served by lowering the "without equipment" rate at this time.

4. *Alternate method of rate calculation suggested.* One commenter challenged the validity of using a prior year's cost data to establish a future rate. The law requires that the target rate be no more than 70 percent of the national average payment, adjusted for regional variations, for in-facility maintenance dialysis services furnished during the preceding fiscal year. Because facilities cannot report this data timely enough to be used to calculate the target rate by December of the same year, data from the year before must be used and updated.

Although the commenter suggested another method to be used in calculating the target rate limits, it, too, was based upon the same prior year's data. The commenter suggested that another inflation index be used in place of the one we used, and that the adjustment factor of the annualized inflation rate raised to the three-fourths power not be used. Apparently it was unclear that the adjustment factor was to convert the inflation rate to a rate that we could use

with our historical data. The historical data we have is based on a calendar year, whereas the law prescribes that the target rate limit must be based on the previous fiscal year's data. (See *Development of average maintenance dialysis payment data*, below, for further explanation.

Because of lack of historical data, it is impossible to demonstrate that the commenter's suggested method is more valid than the present method for calculating the maximum limits. The commenter's method would result in a greater expense to the program. As the intent of the law is to create more economical methods of reimbursement, we have decided to calculate the target rates in the same way as in the past two years. However, we intend to evaluate our experience in future years, and we will publish any resulting changes in the methodology for public comment.

5. *Alternate method of determining boundaries for regional adjustment suggested.* One commenter suggested that a facility's target rate should follow its ESRD network boundary rather than its HHS regional boundary. (ESRD "networks" are groups of ESRD facilities within a specified geographic area.) The target rate was not adjusted according to ESRD network boundaries because many networks do not have enough dialysis treatments to provide a statistically valid method of weighting them against the treatments furnished in the rest of the country. Therefore, we decided to use HHS regional boundaries, as we do have adequate data for these geographic divisions.

Calculation of Target Rates—Calendar Year 1981

1. *Development of average maintenance dialysis payment data.* As indicated above, the 1981 target rates equal 70 percent of the national average payment, before application of the coinsurance and deductible requirements and adjusted for regional variations, for in-facility maintenance dialysis services furnished by hospital-based and independent renal dialysis facilities during the preceding fiscal year.

The basis for determining the national average payment is the Renal Disease Program Cost Analysis System maintained by the Office of End-Stage Renal Disease (OESRD), Office of Special Programs, HCFA. We developed average maintenance dialysis payments for in-facility hemodialysis from Facility Cost Questionnaire Profiles, maintained by OESRD for each HHS regional area, for the accounting periods ending in the calendar year 1979.

The Facility Cost Questionnaire Profile is a computerized summary of the average maintenance dialysis cost per treatment, broken down into the various components of cost per treatment (e.g., supplies, salaries) for facilities on a regional and national basis. The costs and other statistical information (e.g., number of treatments) are derived from the Renal Dialysis Facility Cost and Statistical Questionnaire (form HCFA-9734) which is submitted annually based on cost data from a facility's most recently completed fiscal year.

While reported costs are the basis for the program payments made to hospital-based facilities, payments to independent facilities are made on a reasonable charge basis. (See 42 CFR 405.541) Information developed by OESRD established that the average reasonable charge payment per dialysis equalled the screen amount. Therefore, in developing the average payments for independent facilities, the Medicare payment screen of $138 was used as the average maintenance dialysis payment for independent facilities in all regions ($150 per treatment, including routine laboratory services, less $12 for the physician's direct patient care services during dialysis).

In developing the average payments, we excluded the portion of the payment applicable to physicians' direct patient care services, because reimbursement for these services is not included in the target rates. Under this reimbursement method, we pay for these physicians' services separately.

Facilities electing target rate reimbursement are required to provide medically necessary dialysis equipment, including installation, maintenance, and repair. A facility may fulfill this requirement by arranging for equipment for its home dialysis patients under the provision for 100 percent reimbursement for home dialysis equipment established by section 1881(e) of the Social Security Act and implemented by 42 CFR 405.438. In this case the lower target rate (excluding equipment costs) applies. Alternatively, a facility may own, lease, or otherwise arrange for equipment to be provided to patients whose self-care home dialysis it is furnishing. Under these circumstances, the higher target rate (including equipment costs) applies.

Accordingly, we computed two sets of payment rates for home hemodialysis. The higher target rate, entitled "Including Equipment Costs," includes an amount for the costs of equipment installation, depreciation or rental, maintenance and repair. This rate applies to services to patients using dialysis equipment that is furnished by the facility, but not under the provisions for 100 percent reimbursement of equipment costs. The lower target rate, entitled "Excluding Equipment Costs," does not include payment for any of these equipment costs. It applies when the facility provides dialysis equipment under the 100 percent equipment cost reimbursement provision.

The Office of Financial and Actuarial Analysis, HCFA, used payment data developed by OESRD to calculate the projected fiscal year 1980 average maintenance dialysis payments for hospital-based and independent facilities.

The law requires that the maximum target rate be based on the adjusted national average payment for dialysis services in the previous *fiscal* year. In other words, this requires us to base the calendar year 1981 target rate maximum on payments made for the October 1, 1979 to September 30, 1980 fiscal year. Section 1881(b)(6) of the statute requires the Secretary to base the determination of the level of payment on "the most recent data available to the Secretary at the time". Dialysis facilities are not able to report FY 1980 data timely enough for us to use in determining this rate. Therefore, we have used data from calendar year 1979—the most recent available data—and have indexed it to a 1980 fiscal year by using an inflation factor.

In order to apply such a factor, we needed to determine the base period (or time period) that the available data represented. The ESRD reporting system could be used only to develop data for facility accounting periods *ending* in calendar year 1979. As these accounting periods had varied date spans, there was no obvious well-defined base period. In the absence of evidence to the contrary, for purposes of adjustment for inflation, we assumed that the data represented costs that were evenly distributed throughout a calendar year 1979 base period.

A. *Hospital-based facilities.* We derived the fiscal year 1980 average in-facility maintenance dialysis payments for hospital-based facilities by increasing the average dialysis payments for the 1979 base period data by a weighted increase factor adjusted for regional variations. These factors were derived as follows:

i. We calculated the full year national increase for each of the three major components of the average payment (i.e., salaries (excluding payment for physicians' direct patient care services), supplies, and overhead), using appropriate data from the "Employment and Earnings Series" and "Consumer Price Index—Urban Wage Earners and

Clerical Workers—Revised," both from the Bureau of Labor Statistics. We derived salary increases from the data on hourly earnings in finance, insurance, and real estate because they represent workers in physicians' offices in the economic index computations. We derived supply cost increases from the consumer price index (CPI) for medical commodities, and used the CPI for all items to represent increases in overhead.

ii. We multiplied the component increase factors by the corresponding national weights to produce a weighted full year national increase (1980 over 1979).

iii. We had to adjust annual inflation factors applicable to calendar year data in order to make them applicable to fiscal year data. We used a compounding formula reflecting three-fourths of the calendar year increase (raising the calendar year factor to the three-fourths power) to obtain the final adjusted weighted national increase factor.

iv. We multiplied this final national factor by regional adjustment factors to obtain the regional increase factors. The regional adjustment factors were derived from the ratios of regional "per capita" ESRD reimbursement to the national "per capita" ESRD reimbursement for all reported fiscal years ending in calendar year 1979 (the most recent year for which data were available).

v. These regional increase factors were then multiplied by the appropriate 1979 base period values for hospital-based facilities to obtain the projected fiscal year 1980 average in-facility maintenance dialysis payment to hospital-based facilities by region.

B. *Independent facilities.* Independent facilities are not reimbursed on a cost basis. They are paid reasonable charges on a fee for service basis, subject to a screen limit of $138 per treatment. The per treatment reimbursement for dialysis in independent facilities has remained constant over the period in question. Therefore, it was not necessary to apply regional increase factors to payment data for independent facilities.

2. *Establishing target reimbursement rates for home hemodialysis.* The following procedure was used to establish the 1981 home hemodialysis target reimbursement rates per treatment for each region:

A. We multiplied each regional fiscal year 1980 average in-facility dialysis payment to hospital-based facilities, calculated in 1A above, by the corresponding number of treatments provided in the 1979 base period by hospital-based facilities for each region.

B. We added to each value calculated in 2A above the appropriate fiscal year 1980 average in-facility dialysis payment to independent facilities times the number of in-facility treatments provided in the 1979 base period by independent facilities for each region.

C. We divided each resulting value from 2B above by the total number of in-facility treatments provided in the 1979 base period by both hospital-based and independent facilities. The resulting values are the projected fiscal year 1980 average in-facility maintenance dialysis payments weighted between hospital-based and independent facilities by region.

D. We multiplied the regional average payments calculated in 2C above by 70 percent to derive the target reimbursement rates per treatment for 1981, which equal the maximum rates permitted under the statute.

3. *Example: Hypothetical Calculation of the "With Equipment" Rate for Region "A".* (The following numbers are for illustrative purposes only.)

A. We derive a total national increase factor from appropriate data from the Bureau of Labor Statistics (BLS), weighted by the portion of the total national average payment that is assigned to each of three cost component categories. In this example we use representative percentages of 35 percent, 35 percent, and 30 percent for, respectively, supplies, overhead, and salaries (excluding payment for physicians' direct patient care services).

Cost component	BLS increase factors	Weighting	Result
Supplies	8.04	35	2.8
Overhead	13.40	35	4.7
Salaries	8.46	30	2.5
Total national increase factor = 10			.10

B. To index base period data from calendar year 1979 to fiscal year 1980, we apply a compounding formula to the national increase factor (raising it to the three-fourths power).

1.00 + 0.10 = 1.10

$(1.10)^{\frac{3}{4}} = 1.0741$ or, 7.41 percent

(final adjusted weighted national increase factor)

C. We calculate regional variation from the ratio:

Region "A" per capita ESRD reimbursement/National per capita ESRD reimbursement

If the regional per capita equals $141.75, and the national per capita equals $150, then:

$141.75 ÷ 150 = 0.945 (regional adjustment factor)

D. We calculate the increase factor for Region "A" by multiplying the adjusted weighted national increase factor by the regional adjustment factor.

7.41 percent × 0.845 = 7.0 percent.

E. "Program data" show that in Region "A": Total Hospital-based Facility Costs (less physician fees) = $20,000,000

Total Independent Facility Costs = $17,000,000

Total Number of Outpatient Maintenance Dialysis Treatments = 268,794

F. We use the increase factor (7 percent) from item D. to adjust the hospital-based costs, and then add the independent costs.

$20,000,000 × 1.07 = $21,400,000

$21,400,000 + $17,000,000 = $38,400,000

G. We divide this by the total number of outpatient maintenance dialysis treatments.

$38,400,000 divided by 268,794 = $142.86

This is the adjusted regional average payment per in-facility treatment.

H. Finally, we derive the maximum rate allowed by law by multiplying the adjusted regional average in-facility payment by 70 percent.

$142.86 × 0.70 = $100

This would be the maximum "with equipment" target rate per treatment for home dialysis in Region "A".

4. *Schedule of target reimbursement rates for home hemodialysis.* Shown below is the schedule of regionally adjusted 1981 target reimbursement rates per treatment for home hemodialysis. Two sets of rates are shown. The higher set, entitled "Including Equipment Costs," applies where the facility is furnishing hemodialysis equipment, but not under the provision for 100 percent reimbursement of home dialysis equipment costs described in 42 CFR 405.438. The lower set, entitled "Excluding Equipment Costs," applies where the facility is furnishing the home dialysis equipment under the 100 percent reimbursement provisions of 42 CFR 405.438 (see discussion under section 1 above). In either case, if the facility chooses the target rate reimbursement option, it must furnish home dialysis equipment, including installation, maintenance, and repair, either directly or under arrangements.

Schedule of Target Reimbursement Rates Per Treatment for Home Hemodialysis—Calendar Year 1981

[Effective for Services Furnished on or after Jan. 1, 1981 through Dec. 31, 1981]

HHS region	Including equipment costs[1]	Excluding equipment costs[1]
Boston—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	$108	$106
New York—New Jersey, New York, Puerto Rico, Virgin Island	111	109
Philadelphia—Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia	98	97
Atlanta—Alabama, North Carolina, South Carolina, Florida, Georgia, Kentucky, Mississippi, Tennessee	97	95
Chicago—Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin	111	109
Dallas—Arkansas, Louisiana, New Mexico, Oklahoma, Texas	104	102
Kansas City—Iowa, Kansas, Missouri, Nebraska	109	106
Denver—Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming	99	97
San Francisco—American Samoa, Arizona, California, Guam, Hawaii, Nevada	120	117
Seattle—Alaska, Idaho, Oregon, Washington	116	114

[1]Depreciation or rental, installation, maintenance and repair.

5. *Establishing target reimbursement rates for home peritoneal dialysis.* Under Medicare, peritoneal dialysis has always been subject to the same reimbursement rules as hemodialysis. As a result of medical consultations, we established an equivalence between peritoneal dialysis and hemodialysis furnished in the facility. Peritoneal dialysis is usually done in sessions of 10–12 hours duration, three times per week. The dialysate, tubing, machines and level of skilled labor required for hemodialysis and peritoneal dialysis are similar, and in the absence of cost data to the contrary, we set the reimbursement for normal peritoneal dialysis sessions at the same level as for hemodialysis.

Later case experience showed that sometimes peritoneal dialysis was furnished in a single extended session of 30 hours or more in a week, in place of three separate sessions. Because the labor, overhead and supplies were more related to the total time in dialysis than the number of separate sessions, we reimbursed the extended session the same as three normal dialysis sessions in a week. Further case experience indicated the need for another intermediate reimbursement level to correspond to changing medical patterns. As a result, we provided that peritoneal dialysis sessions of 20 hours duration furnished twice per week be reimbursed at a rate equivalent to one and one-half times the payment for a normal hemodialysis session.

In view of the limited data available on the cost of home peritoneal dialysis, a separate target rate has not been computed for that mode of dialysis. Because the target rate is related to the in-facility payment, we have set the following equivalencies between home peritoneal dialysis and home hemodialysis target rates to parallel the reimbursement for these respective modes of treatment furnished in the facility. We invite comments on the use of these equivalencies, and suggestions on other means of determining reimbursement for home peritoneal dialysis that would more accurately reflect the costs of services.

A. *Peritoneal dialysis sessions of less than 20 hours duration.* If a home peritoneal patient dialyzes for under 20 hours a session, the facility will be reimbursed routinely an amount per session equal to the reimbursement for one home hemodialysis treatment.

B. *Peritoneal dialysis sessions of less than 30 hours, but 20 hours or more duration.* If a home peritoneal dialysis patient dialyzes for 20–29 hours a session, the facility will be reimbursed routinely an amount per session equal to one and a half times the rate for one home hemodialysis treatment.

C. *Peritoneal dialysis sessions of 30 hours or more duration.* If a home peritoneal dialysis patient dialyzes for 30 hours or more per session, the facility will be reimbursed routinely an amount per session equal to three times the rate for one home hemodialysis treatment.

(Sec. 1102, 1814, 1833, 1861(v)(1), 1871, and 1881 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395l, 1395(v)(1), 1395hh and 1395rr))

(Catalog of Federal Domestic Assistance Program No. 13,773 Medicare—Hospital Insurance and No. 13,774, Medicare—Supplementary Medical Insurance)

Dated: January 13, 1981.

Howard Newman,

Administrator, Health Care Financing Administration.

[FR Doc. 81-1741 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-35-M

Privacy Act of 1974; Report of Altered System

AGENCY: Health Care Financing Administration, HHS.

ACTION: Notification of altered system.

SUMMARY: In accordance with 5 U.S.C. 552a(e)(4) and 5 U.S.C. 552a(o), we are proposing to amend the following notice of systems of records: 09–70–0001, Medicare Second Surgical Opinion Experiments.

We have provided background information about the amendments in the "Supplementary Information" section below.

DATES: HCFA has sent a Report of Altered System to the Congress and to the Office of Management and Budget on December 29, 1980. HCFA has requested that OMB grant a waiver of the usual requirement that a revision to a system of records not be put into effect until 60 days after the report is sent to OMB and Congress. If this waiver is granted, the alteration to the system will be effective on the date of the waiver.

ADDRESS: The public should address comments to the Privacy Officer, Office of Management and Budget, Health Care Financing Administration, Bay A–3, 1710 Gwynn Oak Avenue, Baltimore, Maryland 21207. Comments received will be available for inspection at this location.

FOR FURTHER INFORMATION CONTACT: Mr. Alan S. Friedlob, Office of Research, Demonstrations and Statistics, Room 1–E–6, Oak Meadows Building, 6340 Security Boulevard, Baltimore, Maryland 21207, Telephone (301) 597–2364.

SUPPLEMENTARY INFORMATION: System Notice 09–70–0001, Medicare Second Surgical Opinion Experiments, contains data on Medicare beneficiaries and physicians who have participated in the second opinion demonstration programs being conducted by Blue Cross and Blue Shield of Greater New York and Blue Cross and Blue Shield of Michigan. The purposes of collecting this data are to: (1) Operate referral centers to help eligible Medicare beneficiaries locate consultants and obtain second/third opinions, (2) collect information necessary to conduct referral operations and evaluate the impact of the program, and (3) modify claims processing systems to permit waiver of co-payment and deductible requirements under Part B of Medicare on all second/third surgical opinion claims.

The routine uses of System Notice 09–70–0001 are not being changed. Routine use 1(b), "collect information necessary to conduct referral operations and evaluate the impact of the program" is being further specified by extending systems notice 09–70–0001 to include records created by sample surveys associated with evaluation of the Medicare Second Surgical Opinion Experiments, the Consultation Program for Elective Surgery for Massachusetts Medicaid recipients, and the National Second Surgical Opinion Program (NSSOP. This information will be

collected by Abt Associates, Inc., Cambridge, Massachusetts under HCFA Contract No. 500–78–0047, "Evaluation of the Impact of Second Surgical Opinions for Elective Surgery."

Specifically, the amendments to systems notice 09–70–0001 are associated with the following survey activities:

Patient Telephone Survey: A large random sample of Medicare beneficiaries residing in New York and Medicaid recipients in Vermont or Connecticut (the control group for Massachusetts Medicaid recipients) will be surveyed by telephone to identify beneficiaries and recipients who have undergone or who are actively considering undergoing elective surgery. Data will be gathered on surgical recommendations or discussion of surgery, second opinions obtained, and surgery actually undergone.

Personal Interview with Patients: An in-depth interview survey of a sample of Medicare beneficiaries and recipients who participated in the New York second opinion demonstration and Massachusetts second opinion program, as well as a sample of telephone survey respondents who reside in New York and Vermont/Connecticut will be conducted. This survey will gather extensive data on patient characteristics, surgical recommendations/discussions, consultations, patient health attitudes, treatment received and health care costs.

Physician Mail Survey: The physician(s) of consenting respondents to the Personal Interview Survey will be surveyed. Data collected will include physician characteristics and attitudes as well as clinical details and prognosis of the specific case.

Physician Mail Survey—Special Case Study in Detroit SMSA: A random sample of 100 surgeons in the Detroit, Michigan SMSA will be surveyed to ascertain their awareness of the Michigan second opinion demonstration program, their attitude toward the program and towards second opinions in general, and estimates of the utilization of second opinions by their patients.

Patient Telephone Survey—Special Case Study in Detroit SMSA: A telephone survey of 200 patients in the Detroit, Michigan SMSA who have undergone elective surgery will be conducted. The data gathered will include their level of awareness of the Michigan second opinion demonstration program, how they learned of it, whether they used it, and whether they obtained a second opinion elsewhere.

NSSOP Patient Intake Log: This form is used to collect basic data on callers to 15 listholders participating in the NSSOP. This form also records caller consent to be contacted for a follow-up survey. This form has already received OMB clearance. These 15 listholders have been using this form (i.e., collecting data) since January 1980.

NSSOP Intake Log Patient Follow-up Questionnaire: A telephone survey of consenting callers to 15 listholders participating in the NSSOP will be conducted. Data will be obtained on the patient's experience with the NSSOP, their subsequent second surgical opinion experience (if any), and any treatment received subsequent to their call to the NSSOP. A version of this questionnaire has already received OMB clearance.

The notices below contain the amended uses as indicated above.

Dated: December 29, 1980.

Howard Newman,

Administrator, Health Care Financing Administration.

09–70–0001

SYSTEM NAME:

Medicare Second Surgical Opinion Experiments, HHS/HCFA/ORDS.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Blue Cross and Blue Shield of Greater Nw York, 622 Third Avenue, New York, N.Y. 10017, and 3 Park Avenue, New York, N.Y. 10016, and Blue Cross and Blue Shield of Michigan, 600 Lafayette East, Detroit, Mich. 48226; and Abt Associates, Inc., 55 Wheeler Street, Cambridge, Mass. 02138.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Physicians who practice, and Medicare beneficiaries who reside in the carrier area of Blue Cross and Blue Shield of greater New York (plus Queens) or in Macomb, Oakland, or Wayne Counties for which the Medicare carrier is Blue Cross and Blue Shield of Michigan.

Physicians who practice, and Medicaid recipients who reside in the States of Massachusetts and Connecticut or Vermont. Persons contacting National Second Surgical Opinion Program (NSSOP) listholders.

CATEGORIES OF RECORDS IN THE SYSTEM:

Physicians: personal identification and demographic data attitudes toward second opinion programs, clinical details and prognosis of patients who have sought second opinions, estimates of the use of second opinions by their patients.

Beneficiaries: personal identification, demographic data, and health status information pertinent to advisability of patient undergoing elective surgery, surgical recommendations/discussions, treatment received, patient health attitudes, awareness of second opinion programs, satisfaction with second opinion programs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 402 of the Social Security Amendments of 1967, P.L. 90–248, as amended by Section 222(b) of the Social Security Amendments of 1972, P.L. 92–603, 42 U.S.C. 1395b–1.

PURPOSE(S):

To provide data necessary to operate second opinion referral centers and to determine the impact of second opinion programs on Medicare costs, surgery rates, consumer and provider decision-making regarding surgery, and quality of care.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Blue Cross and Blue Shield of greater New York and Blue Cross and Blue Shield of Michigan will use the data to: (a) operate referral centers to help eligible Medicare beneficiaries locate consultants and obtains second/third opinions, (b) collect information necessary to conduct referral operations and evaluate the impact of the program, and (c) modify claims processing systems to permit waiver of co-payment and deductible requirements under part B of Medicare on all second/third surgical opinion claims (i.e., physician and ancillary service costs). The Office of Research, Demonstrations and Statistics (ORDS), HCFA, will use the information to coordinate all data collection, reimbursement, and evaluation activities. HCFA will contract via request for proposals with an independent third party which will use data in the system to evaluate the impact of the second surgical opinion programs.

2. Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

3. In event of litigation where the defendant is: (a) the Department, any component of the Department, or any employee of the Department in his or her official capacity; (b) the United States where the Department determines that the claim, if successful, is likely to directly affect the operations of the

Department or any of its components; or (c) any Department employee in his or her individual capacity where the Justice Department has agreed to represent such employee, the Department may disclose such records as it deems desirable or necessary to the Department of Justice to enable that Department to present an effective defense, provided such disclosure is compatible with the purpose for which the records were collected.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Hardcopy intake forms, first opinion physician/surgeon reports and consultants' reports will be stored in locked metal file cabinets in the referral centers established within the contractors' carrier offices. Completed data tapes created from hardcopy forms will be stored in the tape libraries maintained by the contractors for storage of routine Medicare claims tapes and subject to the same security precautions.

RETRIEVABILITY:

Hardcopy stored in referral centers will be retrievable by beneficiary name. Beneficiary information stored on tape will be retrievable by beneficiary name and health insurance claim number; provider information stored on tape will be retrievable by physician name and provider number.

Where applicable, the evaluation contractor will merge the systems records created by survey sampling activities with systems records already covered by this systems notice. The systems records created by survey activity are temporary in nature, and patient and physician identifiers will not be retained.

SAFEGUARDS:

All records will be retained in secure storage areas accessible only to authorized employees of Blue Cross and Blue Shield of Greater New York, Blue Cross and Blue Shield of Michigan, and the evaluation contractor staff. All employees having access to records have been notified of criminal sanctions for unauthorized disclosure of information on individuals. After the hardcopy and tapes are validated and analyzed by the evaluation contractor, they will be returned to HCFA.

For computerized records, where appropriate, ADP systems security procedures will be instituted with reference to guidelines contained in the Department ADP Systems Manual, Part 6, "ADP Systems Security," and the National Bureau of Standards Federal Information Processing Standards Publications (FIPS PUB 41 and FIPS PUB 31) (e.g., use of password access). By taking all the aforementioned precautions, HCFA has reduced the risk of unauthorized access to a minimum.

RETENTION AND DISPOSAL:

Hardcopy data collection forms and magnetic data tapes with identifiers will be retained in secure storage areas. The disposal technique of degaussing will be used to strip magnetic tape of all identifying names and numbers in December 1987. Hardcopy will be destroyed at this time.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Research, Demonstrations and Statistics, Health Care Financing Administration Room 4228, HHS Building, 330 Independence Avenue, S.W., Washington, D.C. 20201.

NOTIFICATION PROCEDURE:

Any physician or Medicare beneficiary who participates in this demonstration as a provider or recipient of service may request his or her data record in writing. This request should be addressed to the system manager. To obtain data on physicians, the requestor should provide the name and business address of the physician; to obtain data on a Medicare beneficiary, the requestor should provide the beneficiary's name and home address.

RECORD ACCESS PROCEDURES:

Same as notification procedure. Requesters should also reasonably specify the record contents being sought. These access procedures are in accordance with Department regulations (45 CFR, section 5b.5(a)(2)).

CONTESTING RECORD PROCEDURES:

Contact the system manager at the address specified under notification procedure above, and reasonably identify the record and specify the information to be contested. These procedures are in accordance with Department Regulations (45 CFR, section 5b.7).

RECORD SOURCE CATEGORIES:

Referral Center Intake Forms are completed by a referral center analyst upon receiving a call from a Medicare beneficiary requesting a second opinion under the demonstrations. First Opinion Physician/Surgeon Report Forms are completed by the first opinion physician in the Blue Cross and Blue Shield of Michigan demonstration and by the first surgeon in the Blue Cross and Blue Shield of Greater New York demonstration. The consultant's report is completed by second/third opinion consultants who are participating in the demonstrations.

NSSOP Patient Intake Log to be completed by NSSOP listholders. NSSOP Intake Log Patient Followup Questionnaire to be completed by the evaluation contractor through telephone survey. Telephone Questionnaire of Medicare recipients in Connecticut or Vermont to be completed by the evaluation contractor. Patient Interview of Medicare beneficiaries in New York and Medicaid recipients in Massachusetts and Connecticut or Vermont to be completed by the evaluation contractor. Physician Mail Questionnaire to be completed by first opinion and second opinion physicians of patients who participate in the Patient Interviews. Physician Mail Questionnaire to be completed by surgeons who practice in Macomb, Oakland, and Wayne Counties, Michigan. Patient telephone survey of Medicare beneficiaries who reside in Macomb, Oakland, and Wayne Counties, Michigan to be completed by the evaluation contractor.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 81-1765 Filed 1-15-81; 8:45 am]
BILLING CODE 4110-35-M

Office of Human Development Services

White House Conference on Aging; Technical Committee, Meeting

The White House Conference on Aging Technical Committee was established to provide scientific and technical advice and recommendations to the National Advisory Committee of the 1981 White House Conference on Aging and to the Executive Director of the 1981 White House Conference on Aging in developing issues to be considered and to produce technical documents to be used by the Conference.

Notice is hereby given pursuant to the Federal Advisory Committee Act, (Pub. L. 92-463, 5 U.S.C. App. 1, sec. 10, 1976) that the Technical Committee on Physical and Social Environment and Quality of Life will hold their next meeting on Tuesday, January 27, 1981 from 9:00 am until 5:00 pm. The meeting will be held in Room 5051 of HHS-North Building, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The purpose of the meeting will be to review and revise the draft final report.

Further information on the Technical Committee meeting may be obtained

from Mr. Jerome R. Waldie, Executive Director, White House Conference on Aging, Room 4059, 330 Independence Avenue, S.W., Washington, D.C. 20201, telephone (202) 245–1914. Technical Committee meetings are open for public observation.

Dated: January 12, 1981.

Mamie Welborne,

HDS Committee Management Officer.

[FR Doc. 81-1742 Filed 1-15-81; 8:45 am]

BILLING CODE 4110-92-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Intent To Prepare an Environmental Impact Statement on the Proposed Preservation of Wildlife Habitat in an Area of Cape May County, New Jersey, Known as South Cape May Meadows; Correction

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice: Correction.

SUMMARY: This notice advises the public of a correction to the above document published in 46 FR 1040, January 5, 1981. The last sentence in the Supplemental Information Section should read, "The estimated completion date for the Draft EIS is April 1981."

Howard N. Larsen,

Regional Director.

January 7, 1981.

[FR Doc. 81-1551 Filed 1-15-81; 8:45 am]

BILLING CODE 4310-55-M

Bureau of Land Management

Alabama; Meeting of Southern Appalachian Regional Coal Team

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Meeting notice.

SUMMARY: Pursuant to the responsibilities set forth in 43 CFR Part 3400, the regional coal team for the Southern Appalachian Federal Coal Production Region, Alabama Subregion, will meet on February 17, 1981 to discuss the ranking, selection and scheduling process for proposed coal lease sales; alternative coal lease sale schedules; and potential impacts, including proposed mitigation measures on tracts proposed for Federal leasing in the Southern Appalachian Federal Coal Production Region, Alabama Subregion. Consultations with State Governor(s) will also be discussed, along with a draft Secretarial Issue Document containing recommendations for coal leasing in the subregion. These recommendations will be forwarded from the regional coal team chairman, through the Director, Bureau of Land Management, to the Secretary of Interior for his consideration in making a final decision on coal leasing in the Southern Appalachian Federal Coal Production Region, Alabama Subregion. Public attendence at the meeting is welcome. Additional time will be provided at the meeting for public comment prior to finalization of regional coal team recommendations.

DATE: The regional coal team will meet from 1:00 p.m. to 3:00 p.m. on Tuesday, February 17, 1981.

ADDRESS: The meeting will be held at the Sheraton University Inn, 4810 Skyland Boulevard East, Tuscaloosa, Alabama.

FOR FURTHER INFORMATION CONTACT: Bob Moore, Regional Coal Team Chairman, Bureau of Land Management (160), 18th and C Streets, N.W., Washington, D.C. 20240, (202) 343–4636.

Dated: January 12, 1981.

Pieter J. VanZanden,

Acting Eastern States Director, Bureau of Land Management.

[FR Doc. 81-1649 Filed 1-15-81; 8:45 a.m.]

BILLING CODE 4310-84-M

Adoption of Planning Criteria, Jordan, North Rosebud and New Prairie Management Plans

AGENCY: Bureau of Land Management, Interior.

ACTION: Adoption of planning criteria, Jordan, North Rosebud and New Prairie management plans.

SUMMARY: Planning criteria to prepare public land use decisions covering Baker, Prairie, Kinsey, Jordan and North Rosebud planning units in the Miles City District, Bureau of Land Management have been adopted by the District and approved by the Montana State Director. The criteria will be used to prepare the new Prairie and Jordan-North Rosebud Management Framework Plans. Both plans are Transition Period Category C Management Framework Plans. The criteria as well as issues to be addressed in the plan are available for public inspection at the Miles City District offices during normal business hours.

EFFECTIVE DATE: December 12, 1980.

FOR FURTHER INFORMATION CONTACT: Ray Brubaker, District Manager, Miles City District, BLM, P.O. Box 940, Miles City, Montana 59301.

SUPPLEMENTARY INFORMATION: In late August, 1980, a mailer for each of the planning areas explaining significant issues and concerns identified during personal interviews, public meetings, etc., were mailed to individuals and agency and governmental representatives. Of the approximately 3350 copies mailed (2500 Prairie and 850 Jordan-North Rosebud), 71 responses have been received (2%). The majority of responses concern wilderness, coal development and the value of public land administration. No new issues were identified but the candid responses have assisted in criteria revision and will be considered in the district's development of alternatives and in management decisions. A summary of the comments received relating to mailing of planning issues and criteria for Jordan-North Rosebud and New Prairie Planning Areas follows.

The District received 71 responses including 10 from state, federal or local governmental agencies which included comments applicable to two criteria maps, six were requests for further information with special interest expressed in: (a) public land, (b) how the planning area boundaries were formed, (c) cultural resource inventories, (d) air and water quality, loss of wildlife, environment and population impact, (e) forestry, and (f) social and economic impacts of mineral development. Fifteen responses concerned wilderness designation with four favorable to wilderness area designation, eight opposed to wilderness designation and two noncommittal. Two proposed establishmnent of a national monument rather than a wilderness for the Terry Badlands. Five comments related to areas of potential coal or other fuel energy development, including KRCRA boundary redefinition. Two comments concerned access to public land and favored the use of maps, markers, signs, and development of roads to facilitate general access to public land. Five comments expressed concern for ranching and farming and preservation of resources for food production. Four comments expressed opposition to federal ownership or control of land. Two comments favored disposing or trading parcels of scattered or isolated land to consolidate blocks of public land. Three comments expressed opposition to any federal land or resource planning. One comment favored development of corridors for highways, railroads, power lines, and pipelines to serve growth in civil industry and possible military defense. One comment expressed opposition to construction of a dam in northern Prairie County and in favor of road improvements. One comment

emphasized the need for interagency coordination of comprehensive planning.

These comments resulted from mailing approximately 2,500 copies of the New Prairie Planning Area maps and approximately 850 copies of the Jordan-North Rosebud Planning Area maps with return response cards for each. The mailings were distributed to all box holders within the planning areas and to all interagency addresses and energy companies who have expressed interest in information on these areas. A news release explaining the public response and BLM's application of the comments will be published in newspapers in circulation in the planning area. The major issues, problems and criteria for the planning areas are discussed below.

Vegetation Allocation

Draft decisions for vegetation allocation in the New Prairie and Jordan-North Rosebud MFP's and vegetation allocation decisions from the 1979 Redwater MFP will be analyzed in the Big Dry EIS. This EIS is scheduled for completion by 9–30–82.

Where negative surface owner views (by location, acreage and/or number of surface owners) precludes development of a logical mining unit, that area will be considered for deletion from further consideration for coal leasing.

Multiple use constraints, unsuitability criteria and surface owner consultation processes (except on PRLA's) will be applied to coal within the following areas: KRCRA's—Custer Creek and Knowlton; preliminary KRCRA's—Ismay and Carlyle; and revised KRCRA's—Lame Jones and Circle (where boundary revisions are made by USGS prior to 11–30–80).

In mid-November of 1980, the USGS identified high and moderate coal development potential for the Circle KRCRA. This KRCRA boundary revision necessitates updating the surface owner identification, completed in October 1980, to include the revised area. The preliminary KRCRA's for Ismay and Carlyle and a much expanded Lame Jones preliminary KRCRA were received from USGS on 10–8–80. Surface owners over Federal coal for the KRCRA's and preliminary KRCRA's have been identified. Resource data for the recently identified areas is comprised of photo interpretation data except for Federal surface where SVIM data is available.

In the forthcoming planning effort, the Bureau can: (1) include all identified high/moderate coal areas in the planning area and (after applying the data which is available), bring areas through the MFP as acceptable for further consideration for leasing pending further study; or (2) concentrate on smaller areas where resource data is available or can possibly be acquired in time to be available for application. At present, we expect to have the information necessary for at least the Meadowlark PRLA's by February, 1981 (see next paragraph). It is questionable if CRO–CDP maps, specific agricultural data, four seasons worth of wildlife data or cultural resources data could be acquired in FY 1981 for the other coal areas.

Analysis of the Meadowlark Farms PRLA's (M–2732, M–2733, M–2734) will be included in the New Prairie MFP. A *management decision* of whether to include the Meadowlark Farms PRLA coal in the Ft. Union (Coal) EIS for analysis along with the Redwater MFP coal must be made immediately as it affects the EIS time frame and the wilderness designation schedule (there is a direct conflict with WSA 684 on the Meadowlark Farms PRLA's).

It should be noted that coal decisions in the 1979 Redwater MFP are *final decisions* and will not be addressed in the current land use plan or the Big Dry EIS. The Redwater Coal including the Fred Woodson PRLA (M10195) will be addressed in the Fort Union EIS, however.

Wilderness

In accordance with W.O. Instruction Memo 80–352 Change 1, Category C Transition MFP's will identify and analyze conflicts between wilderness use and other resource values and uses, and will be used to recommend area(s) to Congress as suitable or unsuitable for wilderness designation. That memo states that the Wilderness EIS shall not be combined with the Grazing EIS.

Draft MFP Range Management decisions will focus on identification of problem areas, using SVIM range condition as the key indicator, and will propose adjustments/management/treatment/rehabilitation practices for problem areas. For those areas where adequate reservation for wildlife and/or watershed needs were not made in previous vegetation allocations, the current needs will be identified. Site productivity potential versus present livestock allocation will serve as guidance for management decisions. Present vegetation information will continue to guide grazing management in the remaining allotments until additional vegetation studies can be completed for those areas. The MFP decisions will document existing allocations and any needed changes. Actual on-the-ground changes in the allocation of livestock forage will be developed and implemented during activity planning after allotment specific studies are completed.

Draft vegetation allocation decisions for wildlife will identify geographic areas of significant competition for forage or cover between wildlife (primarily big game) and other vegetation users (as identified by Montana FG & P).

Draft vegetation allocation decisions for watershed will specify target cover values and management for all soils series areas using SVIM data and soils surveys. Where watershed condition is critically unstable and/or changes in management are needed or treatment is required to facilitate the desired watershed condition, these needs will be further identified.

Alternatives for allocation of the vegetation resource will be developed in the MFP and further analyzed in the Big Dry EIS. Major alternatives will include: (1) continuation of present grazing management levels, (2) alternative levels of management, (3) reduced levels or adjusted livestock use, (4) livestock forage maximization, (5) elimination of livestock use on public grazing lands.

Final decisions (on-going MFP's) and possible modified final decisions (Redwater MFP) for vegetation allocation will be developed as a result of the EIS. The wildlife and watershed management decisions reached in the MFP's will be used as background for development of alternatives in the EIS.

Since approximately 91% of the public surface in the New Prairie and Jordan-North Rosebud planning areas is in good or excellent range condition and no critical big game-livestock competition areas have been identified, extensive adjustments in vegetation allocation on public surface lands in these planning areas is not anticipated.

Coal

In order to analyze the public coal resource concurrently with other public resources, the Miles City District will proceed with the land use planning, unsuitability, and surface owner consultation processes, applying all the resource data available to the identified coal areas, preliminary and final. The draft coal decisions will identify the coal in the planning areas that is acceptable for further consideration for leasing, acceptable for further consideration for leasing pending further study, and that which is unsuitable.

FY 1981 AWP advises direct the Miles City District to process PRLA's M–2732, M–2733, M–2734, and M–10195. W.O. advises, via MSO (October, 1980) that any portion of the Meadowlark PRLA's (the first three above numbers) within the Terry Badlands WSA cannot be

offered for coal lease until Congress determines whether the area will be wilderness or not. This direction therefore becomes one of our Planning Criteria.

If it is desirable to lease coal in the PRLA's in 1983, wilderness consideration and environmental assessment of the PRLA coal (possibly in the Fort Union EIS) will have to be closely coordinated.

ACEC's

Areas that qualify for ACEC status will be considered for ACEC management as an MFP alternative.

Withdrawal Review

In order to coordinate the land use plans and withdrawal review process within the allowable time frame, the MFP draft decisions will prioritize the identified withdrawals (sequentially) for subsequent review. (This prioritization will be coordinated with the tentative review dates stated in the District Manager's memo of 9–10–80 to the State Director.) This schedule should allow systematic review and multiple use analysis of withdrawals within the 1991 completion date. However, pertinent BLM withdrawals will be fully addressed in the forthcoming planning effort.

Planning Criteria

Land use planning in the New Prairie planning area is both first and second generation. The Jordan-North Rosebud planning effort is all first generation. The Jordan-North Rosebud Planning effort is all in 1977 (the initial pre-planning analysis) and continuing to date. Numerous public meetings have been held and comments received. Revision of the PPA was completed in December, 1979. During FY 1980 the pre-planning analysis data was re-organized to the new format, i.e., Project Situation Analysis, and Project Situation Analysis Summary. Issues Criteria-Planning Criteria were developed and 3350 copies were mailed to boxholders in the planning areas and to governmental agencies of all levels for public comment and inter-agency coordination. The responses received will continue to be used in guiding development of the planning documents.

Quality Control

Pre-planning and planning documents are developed by a multidisciplinary team of resource specialists under the direction of a planning coordinator and in consultation with resource specialists in the resource area and with District and State Office specialists and with their counterparts in other agencies. Technical review is accomplished by the Division of Resources. Management review is completed by the Area Manager and District Manager.

The criteria for the New Prairie and Jordan-North Rosebud planning areas were prepared by an interdisciplinary team and were reveiwed by resource specialists in the District Division of Resources and in the Big Dry Resource Area, as well as by specialists in the State Office Division of Resources and Division of Planning and Environment. Public comments have been reviewed and analyzed and the issues and criteria revised accordingly.

Ray Brubaker,

District Manager.

[FR Doc. 81-1737 Filed 1-15-81; 8:45 am]

BILLING CODE 4310-84-M

Designation of East Mojave National Scenic Area

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of designation of East Mojave National Scenic Area.

SUMMARY: The rich diversity of outstanding natural, scenic and cultural resources of this area of the East Mojave Region of the California Desert Conservation Area warrants it special recognition. The area will be managed in accordance with the California Desert Conservation Area Plan approved December 18, 1980. This designation as the East Mojave National Scenic Area will provide added emphasis to the Bureau of Land Management's plan to protect the area's outstanding natural, scenic and cultural resources.

Pursuant to the authority in section 601 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1781), and 43 CFR Subpart 2070, those public lands administered by the Bureau of Land Management and described in the California Desert Conservation Area Plan as the East Mojave National Scenic Area are hereby designated the East Mojave National Scenic Area.

EFFECTIVE DATE: January 13, 1981.

ADDRESS: Any inquiries or suggestions should be sent to: District Manager, California Desert District, 1695 Spruce Street, Riverside, California 92507.

FOR FURTHER INFORMATION CONTACT: Gerald C. Hillier at the above address or 714 787–1462.

Cecil D. Andrus,

Secretary of the Interior.

January 13, 1981.

[FR Doc. 81-1637 Filed 1-15-81; 8:45 am]

BILLING CODE 4310-84-M

Idaho Falls District Grazing Advisory Board, Meeting

Notice is hereby given in accordance with Pub. L. 92–463 that the Idaho Falls District Grazing Advisory Board will meet February 21, 1981.

The meeting will begin at 9:00 a.m. in the conference room of the Bureau of Land Management Office, 940 Lincoln Road, Idaho Falls, Idaho, 83401. The meeting is open to the public. Interested persons may make oral statements to the Board between 9:00 and 9:30 a.m. or file written statements for the Board's consideration. Anyone wishing to make an oral statement must notify the Idaho Falls BLM District Manager at the above address by February 6, 1981. Depending on the number of persons wishing to make oral statements, a per person time limit may be established.

The agenda for the meeting will include:

1. Update on status of projects discussed at the last meeting.
2. Discussion on Advisory Board projects and expenditure of Advisory Board funds.
3. Use of Range Betterment funds.
4. Election of officers.
5. Allotment Management Plans in the Little Lost River and Birch Creek Valley's.
6. Arrangements for the next meeting.

Summary minutes of the Board meeting will be kept in the District Office and be available for public inspection and reproduction, (during regular business hours) within 30 days following the meeting.

Dated: January 9, 1981.

O'dell A. Frandsen,

District Manager.

[FR Doc. 81-1628 Filed 1-15-81; 8:45 am]

BILLING CODE 4310-84-M

[W-70796 and W-70865]

Trailblazer Pipeline Project, Wyoming; Applications

Notice is hereby given that pursuant to Sec. 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 185) the Overthrust Pipeline Company and Colorado Interstate Gas Company have filed right-of-way applications (W–70796 and W–70865, respectively) to construct, operate, maintain, repair, replace and remove two segments of a 36" O.D. buried pipeline for the purpose of transporting natural gas from the overthrust belt in southwestern Wyoming to facilities located in Beatrice, Nebraska. The proposed pipeline will affect the following described public lands:

W-70796 Overthrust Pipeline Company (Segment I)

Sixth Principal Meridian, Wyoming

Sweetwater County

T. 18 N., R. 106 W.,
Secs. 8, 16, 22 and 24.
T. 18 N., R. 107 W.,
Sec. 4.
T. 19 N., R. 107 W.,
Sec. 32.
T. 18 N., R. 108 W.,
Secs. 2, 10, 16 and 18.
T. 18 N., R. 109 W.,
Secs. 14 and 18.
T. 18 N., R. 110 W.,
Secs. 14, 20 and 22.
T. 18 N., R. 111 W.,
Secs. 18, 20, 22 and 24.

Sweetwater and Uinta Counties

T. 18 N., R. 112 W.,
Secs. 14, 20, 22 and 30.

Uinta County

T. 17 N., R. 113 W.,
Sec. 4.
T. 18 N., R. 113 W.,
Secs. 32 and 34.
T. 18 N., R. 114 W.,
Secs. 32, 34 and 36.
T. 17 N., R. 115 W.,
Secs. 2, 4 and 6.
T. 18 N., R. 115 W.,
Sec. 36.
T. 17 N., R. 116 W.,
Secs. 2, 4 and 6.
T. 17 N., R. 117 W.,
Secs. 2, 8, 10 and 18.
T. 17 N., R. 118 W.,
Secs. 12 and 14.
T. 17 N., R. 119 W.,
Secs. 22 and 24.

W-70865 Colorado Interstate Gas Company (Segment II)

Sixth Principal Meridian, Wyoming

Albany County

T. 13 N., R. 71 W.,
Sec. 2.
T. 14 N., R. 71 W.,
Sec. 32.
T. 14 N., R. 72 W.,
Sec. 30.
T. 17 N., R. 77 W.,
Sec. 12.
T. 18 N., R. 77 W.,
Sec. 34.

Carbon County

T. 21 N., R. 81 W.,
Secs. 18, 20, 22 and 26.
T. 21 N., R. 82 W.,
Secs. 14, 16 and 18.
T. 21 N., R. 83 W.,
Secs. 14 and 30.
T. 21 N., R. 84 W.,
Secs. 25, 26, 32 and 34.
T. 21 N., R. 85 W.,
Secs. 32, 34 and 36.
T. 21 N., R. 86 W.,
Secs. 32 and 34.
T. 21 N., R. 87 W.,
Secs. 28 and 30.
T. 21 N., R. 88 W.,
Secs. 20, 28 and 28.
T. 21 N., R. 89 W.,
Secs. 24, 26, 32 and 34.

Sweetwater County

T. 21 N., R. 90 W.,
Secs. 32, 34 and 36.
T. 20 N., R. 91 W.,
Secs. 4 and 6.
T. 20 N., R. 92 W.,
Secs. 2, 8, 10, 12 and 18.
T. 20 N., R. 93 W.,
Secs. 14 and 18.
T. 20 N., R. 94 W.,
Secs. 24, 26, 28 and 32.
T. 19 N., R. 95 W.,
Sec. 4.
T. 20 N., R. 95 W.,
Secs. 34 and 36.
T. 19 N., R. 96 W.,
Secs. 8 and 10.
T. 19 N., R. 97 W.,
Secs. 8, 10 and 12.
T. 19 N., R. 98 W.,
Secs. 8, 10 and 12.
T. 19 N., R. 99 W.,
Secs. 2, 4 and 12.
T. 20 N., R. 99 W.,
Sec. 32.
T. 19 N., R. 100 W.,
Sec. 2.
T. 20 N., R. 100 W.,
Secs. 30, 32, 34 and 36.
T. 20 N., R. 101 W.,
Secs. 14, 18 and 24.
T. 20 N., R. 102 W.,
Secs. 14, 20 and 30.
T. 19 N., R. 103 W.,
Secs. 4 and 6.
T. 20 N., R. 103 W.,
Secs. 26 and 34.
T. 18 N., R. 104 W.,
Secs. 4 and 6.
T. 19 N., R. 104 W.,
Secs. 2, 10, 22 and 28.
T. 18 N., R. 105 W.,
Secs. 12 and 18.
T. 18 N., R. 106 W.,
Sec. 24.

The purpose of this notice is to inform the public that the Bureau will be proceeding with consideration of whether the applications, affecting approximately 108 miles of public lands within the State of Wyoming, should be approved; and, if so, under what terms and conditions.

Interested persons desiring to express their views concerning these applications should do so promptly. Comments submitted should include your name and address, as well as a reference to the serial numbers assigned the applications; and should be sent to the Wyoming State Office, Bureau of Land Management, P.O. Box 1828, 2515 Warren Avenue, Cheyenne, Wyoming 82001.

Harold G. Stinchcomb,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 81-1561 Filed 1-15-81; 8:45 am]

BILLING CODE 4310-84-M

INTERSTATE COMMERCE COMMISSION

Agricultural Cooperative: The Commission of Intent to Perform Interstate Transportation for Certain Nonmembers

Date: January 12, 1981.

The following Notices were filed in accordance with section 10526 (a)(5) of the Interstate Commerce Act. These rules provide that agricultural cooperatives intending to perform nonmember, nonexempt, interstate transportation must file the Notice, Form BOP 102, with the Commission within 30 days of its annual meetings each year. Any subsequent change concerning officers, directors, and location of transportation records shall require the filing of a supplemental Notice within 30 days of such change. The name and address of the agricultural cooperative, the location of the records, and the name and address of the person to whom inquiries and correspondence should be addressed, are published here for interested persons. Submission of information that could have bearing upon the propriety of a filing should be directed to the Commission's Office of Consumer Protection, Washington, D.C. 20423. The Notices are in a central file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, D.C.

Complete Legal Name of Cooperative Association Or Federation Of Cooperative Associations: (1) Agriland Trucking Cooperative Association, Inc.,
Principal Mailing Address (Street No., City, State, and Zip Code): 2700 Esquire Drive, Boise, Idaho 83704
Where are the Records Of Your Motor Transportation Maintained (Street No., City, State and Zip Code): 2700 Esquire Drive, Boise, ID 83704
Person To Whom Inquiries And Corespondence Should Be Addressed (Name and Mailing Address): R. H. Redmond, 2700 Esquire Drive, Boise, ID 83704
Complete Legal Name of Cooperative Association Or Federation Of Cooperative Associations: (2) Dairymen, Inc.
Principal Mailing Address (Street No., City, State, and Zip Code): 10140 Linn Station Road, Louisville, KY 40223
Where Are Records Of Your Motor Transportation Maintained (Street No., City, State and Zip Code): P.O. Box 18118, Louisville, KY 40218
Person To Whom Inquiries And Correspondence Shoudl Be Addressed (Name and Mailing Address): Mr. Beverly Williams, 10140 Linn Station Road, Louisville, KY 40223
Complete Legal Name Of Cooperative Association Or Federation Of Cooperative Associations: (3) Mid-Western Farm Lines, Inc.

Principal Mailing Address (Street No., City, State, and Zip Code): 2169 E. Blaine, Springfield, MO 65803
Where Are Records Of Your Motor Transportation Maintained (Street No., City, State and Zip Code): 2169 E. Blaine, Springfield, MO 65803
Person To Whom Inquiries And Correspondence Should Be Addressed (Name and Mailing Address): Bruce McCurry—910 Plaza Towers, Springfield, MO 65804
Complete Legal Name Of Cooperative Association Or Federation Of Cooperative Associations: (4) Tennessee Farmers Cooperative
Principal Mailing Address (Steet No., City, State, and Zip Code): P.O. Box 157, LaVergne, Tennessee 37086
Where Are Records Of Your Motor Transportation Maintained (Street No., City, State and Zip Code): P.O. Box 157, LaVergne, Tennessee 37086
Person To Whom Inquiries And Correspondence Should Be Addressed (Name and Mailing Address): Joe L. Wright, P.O. Box 157, LaVergne, Tennessee 37086
Complete Legal Name Of Cooperative Association Or Federation Of Cooperative Associations: (5) Wilcox Marketing, Inc.
Principal Mailing Address (Street No., City, State, and Zip Code): 12551 E. Telegraph Road, Santa Fe Springs, CA 90670
Where Are Records Of Your Motor Transportation Maintained (Steet No., City, State and Zip Code): 12551 E. Telegraph Road, Santa Fe Springs, CA 90670
Person To Whom Inquiries And Correspondence Should Be Adressed (Name and Mailing Address): Lindsey C. Dutton, Route 1 Box 280 A, Springfield, Tennessee

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-1570 Filed 1-15-81; 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 to use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. Parent corporation and address of principal office: Atlantic Richfield Company, 515 South Flower Street, Los Angeles, California 90071.

2. Wholly owned subsidiaries of Atlantic Richfield Company, the principal offices of all of which are located at 515 So. Flower Street, Los Angeles, California 90071:

ABE Beverage, Inc.
(100% by Prestige Stations, Inc.)
ADPI Enterprises, Inc.
(100% by Arco Durethene Plastic, Inc.)
Airtron, Inc.
(100% by ARCO Energy Conservation Inc.)
Allweather, Inc.
(100% by Airtron, Inc.)
AMCOR-Chem, Inc.
Anaconda Overseas Services Inc.
The Anaconda Company (a)
Anaconda Valve Company
Archem Company
Arco Argentina Inc.
(100% by Sinclair International Oil Company)
Arco Asia Inc.
Arco Australia Coal Pty. Ltd.
Arco Australia Limited
Arco Bangladesh Inc.
Arco Brazil Inc.
Arco British Limited
(100% by Sinclair International Oil Company)
Arco Caribbean Inc.
Arco Centennial Corp.
Arco Chennelview, Inc.
Arco Chemical Corporation
Arco Chemical Enterprises, Inc.
Arco Chemical (Europe) Inc.
Arco Chemical International Company
Arco Trading, Inc.
Arco Chile LNG Inc.
Arco Coal Corporation
Arco Colombia Oil Corporation
(100% by Sinclair International Oil Company)
Arco Communications Inc.
Arco Credit Corporation
Arco Crude Trading Inc.
Arco Dubai Inc.
Arco Durethene Plastics Inc.
(100% by ARCO Polymers, Inc.)
Arco East Africa Inc.
Arco Ecuador Corporation
Arco Egypt Inc.
Arco El Salvador Inc.
Arco Energy Conservation, Inc.
Arco Energy Transportation, Inc.
Arco Environmental, Inc.
Arco Exploration, Inc.
Arco Far East Exploration Inc.
Arco Far East Ltd.
Arco Greenland Inc.
Arco Guatemala Inc.
Arco Ilocos Inc.
Arco Inc.
Arco Independence, Inc.
Arco International Oil and Gas Corporation
Arco International Petroleum, Inc.
Arco International Services Inc.
Arco Iran, Inc.
Arco Italy Inc.
Arco Latin America Inc.
Arco Liberia Inc.
Arco Lyondell, Inc.
Arco Malaysia Inc.
Arco Marine, Inc.
Arco Medical International Ltd.
(100% by Arco Medical Products Company)
Arco Medical Products Company
Arco Medical Products (Japan) Ltd.
(100% by Arco Medical Products Company)
Arco Mindoro Inc.
Arco Montana, Inc.
Arco Morocco Inc.
Arco Netherlands, Inc.
Arco New Mexico, Inc.
Arco Nicaragua Corporation
Arco Norge A/S
Arco Norway Inc.
Arco Norway Systems Inc.
Arco Nuclear Company
Arco Offshore Inc.
Arco Oil and Gas Corporation
Arco Oil Limited
Arco Oil Producing, Inc.
Arco Oil Refining Company
Arco Pakistan, Inc.
Arco Performance Chemicals Company, Inc.
Arco Performance Chemicals (PTE) Ltd.
(100% by Arco Performance Chemicals Company, Inc.)
Arco Peru Corporation
Arco Petroleum Company
Arco Philippines Inc.
Arco Pipe Line Company
Arco Polymers (Canada) Limited
(100% by ARCO Polymers, Inc.)
Arco Polymers Chemical Corporation
(100% by ARCO Polymers, Inc.)
Arco Polymers, Inc.
Arco Polymers International, Inc.
(100% by ARCO Polymers, Inc.)
Arco Princeton Corp.
Arco Publications Inc.
Arco (QLD) Coal Pty. Limited
Arco Queensland Mining Limited
Arco Raffinerie GmbH
Arco Sebree, Inc.
Arco Seed Co., Inc.
Arco Solar, Inc.
Arco Solar International, Inc.
Arco Solar Saudi Arabia, Inc.
Arco Somalia Incorporated
Arco South Africa Corporation
Arco Spain Inc.
Arco Tankers, Inc.
Arco Technology, Inc.
Arco Thailand Inc.
Arco Transportation Corporation
Arco Turkey Inc.
Arco Venezuela Inc.
Arco Ventures Group, Inc.
Arco West Africa Inc.
Arcoal, Inc.
Arcobrasil Florestal Ltda.
(100% by Companhia Atlantic de Petroleo)
Arcobrasil Participacoes e Investimentos Ltda.
ARCOtravel Club, Inc.
ARDEV Company, Inc.
Arlan Corporation
Arpet Petroleum Limited
Arphos, Inc.
Arprox Corporation
The Atlantic Refining Company
Atlantic Refining Company of Cuba
Atlantic Richfield Argentina Inc.
Atlantic Richfield Bali North Inc.
Atlantic Richfield Foundation of California
Atlantic Richfield France, Inc.
Atlantic Richfield Hanford Company
Atlantic Richfield Indiana, Inc.
Atlantic Richfield Indonesia Coal Inc.
Atlantic Richfield Indonesia Inc.
(100% by Sinclair International Oil Company)
Atlantic Richfield International Finance Corporation
Atlantic Richfield Investment Company
Atlantic Richfield Kentucky Corporation
Atlantic Richfield Medical Products (Ireland) Limited
Atlantic Richfield Oil Limited
Atreco, Inc.
Atreco Investment Company
Beaver Creek Coal Company
Benson-Goss Fuels, Inc.
(100% by Buckley & Scott Co.)

Bercon Packaging, Inc.
Bogen, Inc.
(100% by Airtron, Inc.)
Bohn Lake Inc.
Bolivian Atlantic Corporation
Bolivian Petroleum Corporation
(100% by Sinclair International Oil Company)
Border Pipe Line Company
Brandywine Oil Company
(100% by Major Petroleum Company)
George Y. Brubaker, Inc.
(100% by Major Petroleum Company)
Buckley & Scott Co.
Buckley & Scott, Whetton, Inc.
(100% by Buckley & Scott Co.)
Candel International Limited
Candelaria Exploration Corporation
Casitas Pipeline Company
CASOLIN, S.A.
(100% by Anaconda Valve Company)
Cello Bag Co., Inc.
(100% by ARCO Durethene Plastics, Inc.)
Chapin, Kieley & Howe, Inc.
(100% by Buckley & Scott Co.)
Cheviot Hills Pipeline Company
Cimarron Properties, Inc.
Columbia Shale Oil, Inc.
Companhia Atlantic de Petroleo
(100% by Arcobrasil Participacoes e Investimentos Ltda.)
Compania Petrolera Carco
Cuyama Pipeline Company
Delta Housing Inc.
Eastern-Narragansett Oil Company
(100% by Buckley & Scott Co.)
Empresa Carioca de Produtos Quimicos S.A.
(100% by Arcobrasil Participacoes e Investimentos Ltda.)
Energy Utilization Systems Inc.
(100% by Northrup Incorporated)
Fahnestock, Inc.
(100% by Airtron, Inc.)
Fip, S.A. de C. V.
(100% by Arilan, S.A. de C. V.)
Four Corners Pipe Line Company
Gardner Oil Company, Inc.
(100% by Buckley & Scott Co.)
Gieske Sheet Metal Co. Missouri
(100% by Airtron)
Greater Pacific Limited
Griffith-Consumers Company
Hondo Coal Company
Hondo Oil & Gas Company
Hope Land Corporation
Housing Services, Inc.
Industrial de Valvulas, S.A. de C. V.)
(100% by Arilan, S.A. de C. V.)
Inmobiliaria Inval, S.A. de C. V.)
(100% by Industrial de Valvulas, S.A. de C. V.)
Integrated Solar International Sales, Inc.
Joaquin Ranch Company
Junction Projects Inc.
Kershen Triticale Company Delaware
Kryoflo, Inc.
(100% by The Walworth Company)
Kuparuk Pipeline Company
Lamborn Land Company
Libyan American Oil Company
Libyan Atlantic Company
Los Palacios Exploration Corporation
Major Petroleum Company
Marlin Delaware Corporation
Megol Corporation
Mesa Pipeline Company
Dick Mills Air Conditioning, Inc.
Wm. Mills Fuel Co., Inc.
(100% by Major Petroleum Company)
Minute Man Oil Sales, Inc.
(100% by Buckley & Scott Co.)
N. T. Development, Inc.
Newtown Square Properties Inc.
Nickel Airtron, Inc.
(100% by Airtron)
Northrup Energy Corporation
(100% by Northrup, Incorporated)
Northrup Incorporated
(100% by Arco Energy Conservation, Inc.)
NUMEC Instruments & Controls Corporation
(100% by ARCO Medical Products Company)
Observer International Inc.
Observer Offers Limited
(100% by The Observer, Limited)
The Observer, Limited
(100% by Observer International Inc.)
Oxirane Chemical Company (a partnership)
(50% by Arprox Corporation & 50% Megol Corporation)
Oxirane Chemical Company (Channelview) (a partnership)
(50% by Megol Corporation & 50% by Arco Princeton)
Oxirance Chemie (Nederland) (a partnership)
(99% by Willet Limited & 1% by ACC)
Oxirane Corporation
Oxirane Europe Inc.
(100% by Oxirance International)
Oxirane Europe Incorporated
(100% by Oxirane International)
Oxirane Export Sales Company
(100% by Oxirane Chemical Company)
Oxirane Funding Company (a partnership)
(50% by ARCO & 50% by Megol Princeton Corp.)
Oxirane Industries (a partnership)
(65% by Oxirane Chemical Company (Channelview) and 35% by Arco Polymers Chemical Corporation)
Oxirane International (a partnership)
(50% by Arco Princeton Corporation & 50% by Megol Corporation)
Oxirane Overseas Corporation
(100% by Oxirane Chemical Company (Channelview))
Oxirane Technology (Japan) Company (a partnership)
(50% by ARCO & 50% by Arco Princeton Corp.)
Pacific Marine Oil Company
Palomar Land Company
Panamericana de Valvulas, S.A. de C. V.
(100% by Arilan, S.A. de C. V.)
Pan American Petroleum Company of California
R. N. Parsons & Son, Inc.
Patroon Fuels, Inc.
Philadelphia Tankers, Inc.
Prestige Stations, Inc.
William C. Pullen, Inc.
(100% by Major Petroleum Company)
Quality Energy Systems, Inc.
(100% by Northrup Incorporated)
Quiggin & Son, Inc.
(100% by by Airtron)
E. J. Read & Sons, Inc.
(100% by Griffith-Consumers Company)
Reno Junction Development, Inc.
Richfield Athabasca Petroleum Company
Richfield Iranian Offshore Petroleum Company
Richfield Oil Corporation
Richfield U. K. Petroleum, Limited
Rio Grande Gasoline Company
Rocket Oil Company
Rodas Exploration Corporation
Rossoe, Inc.
Russell Coal & Oil Company, Inc.
(100% by Buckley & Scott Co.)
S. R. Participacoes Ltda.
Santa Cruz Exploration Corporation
Schultz, Doyle & Stoddard, Inc.
(100% by Buckley & Scott Co.)
Sherman Equipment Corporation
Silva Exploration Corporation
Sinclair Deutschland Erdol Gesellschaft
(100% by Sinclair International Oil Company)
Sinclair International Oil Company
Sinclair Netherlands Oil Company
(100% by Sinclair International Oil Company)
Sinclair Transportation Company Limited
Sinclair (U.K.) Oil Company Limited
(100% by SIOC)
Staples-Savard, Inc.
(100% by Buckley & Scott Co.)
Stingray Tanker Corporation
Tanker Transport, Inc.
Tankers Leasing-Corporation
Thunder Basin Coal Company
Tooele Valley Railway Company
Truflame of Carrollton, Inc.
The Wat Tyler Co., Inc.
(100% by Buckley & Scott Co.)
Venezuelan Atlantic Refining Company
H. K. Wallace, Inc.
(100% by Airtron, Inc.)
Walworth Company
(100% by Arilan, S.A. de C. V.)
West Elk coal Company, Inc.
Willet Limited
Wisconsin Centrifugal, Incorporated
Wright Oil Co., Inc.
(100% by Buckley & Scott Co.)

3. Wholly owned subsidiaries of the Anaconda Company. The address of the Anaconda Company principal office is 555 17th Street, Denver, Colorado 80202:

Almeg Extrusion Company
Anacobre Inc.
(100% by Industrias Nacobre, S.A. de C. V.)
Anacom Co.
Anaconda Aluminum Company
Anaconda Arizona, Inc.
Anaconda Australia Inc.
Anaconda Bauxite, S.A.
(100% by Anaconda Shannon Company)
Anaconda B.V.
Anaconda Canada Exploration Ltd.
Anaconda Chile, Inc.
The Anaconda Company
Anaconda Holland B.V.
Anaconda International Corporation
Anaconda-Iran, Inc.
(100% by Anaconda International Corporation)
Anaconda Ireland Company
(100% by Anaconda Aluminum Company)
Anaconda Jamaica Inc.
(100% by Anaconda International Corporation)
Anaconda Properties Company
Anaconda Shannon Company
Andes del Peru
Arcomex, S.A. de C. V.

(100% by Grupo Condumex, S.A.)
Arelex, S.A. de C. V.
(100% by Grupo Condumex, S.A.)
The British American Metals Company, Limited
Butte, Anaconda & Pacific Railway Company
Centroamericana de Cobre, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Cobre de Hercules, S.A.
Communication Specialties, Inc.
Compania Minera Don Ricardo S.A. de C. V.
(100% by Compania Minera de Cananea, S.A.)
Compania Minera Penacobre, S.A.
(100% by Compania Minera de Cananea, S.A.)
Conductores Guadalajara, S.A.)
(100% by Grupo Condumex, S.A.)
Condumex, S.A.
(100% by Grupo Condumex, S.A.)
Condutel, S.A. de C. V.
(100% by Grupo Condumex, S.A.)
Cranston Properties, Inc.
Dexter de Mexico, S.A.
(100% by Industrias Nacobre, S.A. de C. V.)
Empaquetadora de Desperdicios, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Estrategia en Mercadotecnia, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Face, S.A. de C.V.
(100% by Grupo Condumex, S.A.)
Indael, S.A. de C.V.
(100% by Grupo Condumex, S.A.)
Intelmex, S.A.
(100% by Grupo Condumex, S.A.)
Lingobronce, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Lugatom, S.A.
(100% by Promociones Industriales Mexicanas, S.A.)
Macopel, S.A. de C.V.
(100% by Grupo Condumex, S.A.)
Manguera Flex, S.A. de C.V.
(100% by Industrias Nacobre, S.A. de C.V.)
Nacional de Cobre, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Raritan Terminal and Transportation Company
Salmat, S.A. de C.V.
(100% by Grupo Condumex, S.A.)
Santa Maria Development Company, S.A.
Servicios Condumex, S.A. de C.V.
(100% by Grupo Condumex, S.A.)
Servicios Industriales Nacobre, S.A.
(100% by Industrias Nacobre, S.A. de C.V.)
Tenemex, S.A.
(100% by Grupo Condumex, S.A.)
Topaz Beryllium Company

1. Parent corporation: Baskin-Robbins Ice Cream Company, 31 Baskin-Robbins Place, P.O. Box 1200, Glendale, California 91209.

2. Subsidiaries: Baskin-Robbins, Inc., 31 Baskin-Robbins Place, P.O. Box 1200, Glendale, California 91209, with manufacturing facilities at:

Baskin-Robbins, Inc., 1119 S. Victory Blvd., Burbank, CA 91502
Baskin-Robbins, Inc., 425 Main Street North, Southbury, CT 06488
Baskin-Robbins, Inc., 1918 Texas Avenue, Bryan, TX 77801
Baskin-Robbins, Inc., 1017 Locust Street, Owensboro, KY 42301
Flavor Forces, Inc., 1001 S. Victory Blvd., Burbank, CA 91502

1. Parent corporation and address of principal office: Carolina Enterprises, Inc., Tarboro, NC.

2. Wholly-owned subsidiaries which will participate in the operations and State(s) of incorporation:

Empire of Carolina, Inc., 41 Madison Ave., New York, NY 10010
Marx Toys Ltd., P.O. Box 2121, Rocky Mount, NC 27801

1. Parent corporation: CMC, Inc., 501 25th Avenue North, Nashville, Tennessee 37202.

2. Wholly-owned subsidiaries: (a) Cumberland Freight Line, Inc., 501 25th Avenue North, Nashville, Tennessee 37202.

1. Parent corporation and address of principal office: General Mills, Inc., P.O. Box 1113, Minneapolis, MN 55440.

2. Wholly-owned subsidiaries and addresses of their respective principal offices:

a. Casa Gallardo, Inc., 11715 Administrative Drive, St. Louis, MO 63141
b. CPC Products Corp., P.O. Box 1113, Minneapolis, MN 55440.
c. Eddie Bauer, Inc., 15010 Northeast 36th Street, Redmond, WA 98052
d. Fashion Flair, Inc., 498 Seventh Avenue, New York, NY 10018
e. Foot-Joy, 144 Field Street, Brockton, MA 02403
f. General Mills Apparel Corporation, 34th Floor, Rockefeller Center, 630 5th Avenue, New York, NY
g. General Mills Products Corp., P.O. Box 1113, Minneapolis, MN 55440.
h. General Mills Restaurant Group, Inc., P.O. Box 1431, Orlando, FL 32802
i. Good Mark Foods, Inc., P.O. Box 18300, Raleigh, NC 27619
j. H. E. Harris & Company, Inc., 645 Summer Street, Boston, MA 02210
k. LeeWards Creative Crafts, Inc., 1200 St. Charles Road, Elgin, IL 60120
l. Lord Jeff Knitting Co., Inc., 10 Maple Street, Norwood, NJ 07648
m. Louise's Home Style Ravioli Company, 370 Commercial Street, Malden, MA 02148
n. Pioneer Products, Inc., 808 Southwest 12th Street, P.O. Box 279, Ocalo, FL 32670
o. Saluto Foods Product Corp., P.O. Box 967, Benton Harbor, MI 49022
p. Ship'n Shore Products Corp., Bridgewater-at-Aston, Aston, PA 19014
q. The Talbots, Inc., 175 Beal Street, Hingham, MA 02043
r. E. H. Thompson Company, P.O. Box 1005, Jackson, FL 32201
s. Trans World Seafood, Inc., 600 Third Avenue, 14th Floor, New York NY 10016
t. Wallpapers Inc., P.O. Box 5016, Hayward, CA 94540
u. Wallpapers To Go, Inc., P.O. Box 5016, Hayward, CA 94540
v. York Steak House Systems, Inc., P.O. Box 27975, Columbus, OH 43227
w. General Mills Canada, Ltd., 1330 Martin Grove Road, Rexdale, Ontario, Canada M9W 4X4

3. Divisions of parent corporation and addresses of their principal offices:

a. David Crystal Division, 498 Seventh Avenue, New York, NY 10018
b. Dunbar, 601 Fulton Street, Berne, IN 46711
c. The Donruss Division, 975 Kansas Street, P.O. Box 2038, Memphis, TN 38106
d. The Gorton Division, 327 Main Street, P.O. Box 361, Gloucester, MA 01930
e. Kittinger, 1893 Elmwood Avenue, Buffalo, NY 14207
f. O-Cel-O, 305 Sawyer Avenue, Tonawanda, NY 14150
g. Pennsylvania House, 137 North Tenth Street, Lewisburg, PA 17837
h. Ship'n Shore Products Corp., Bridgewater-at-Aston, Aston, PA 19014

4. Divisions of wholly-owned subsidiaries and addresses of their principal offices:

a. Fundimensions Division of CPG Products Corp., 2650—23 Mile Road, Mt. Clemens, MI 48043
b. Jessie Jones Division of GoodMark Foods, Inc., P.O. Box 18300, Raleigh, NC 27619
c. Kenner Products Division of CPG Products Corp., 1014 Vine Street, Cincinnati, OH 45202
d. Lark Luggage Division of CPG Products Corp., 350 Fifth Avenue, New York, NY 10001
e. Monet Division of General Mills Products Corp., P.O. Box 376, Murray Hill Station, New York, NY 10016
f. Parker Brothers Division of CPG Products Corp., P.O. Box 1000, Beverly, MA 01915
g. Red Lobster Inns of America, a Division of General Mills Restaurant Group, Inc., P.O. Box 13330, Orlando, FL 32809
h. R & R Stamp Division of H. E. Harris & Co., Inc., 645 Summer Street, Boston, MA 02210
i. Slim Jim Division of GoodMark Foods, Inc., P.O. Box 18300, Raleigh, NC 27619
j. Tom's Distribution, Inc., CPG Products Corp., P.O. Box 60, Columbus, GA 31902
k. Tom's Foods Division of CPG Products Corp., P.O. Box 60, Columbus, GA 31902
l. Yoplait, USA of General Mills Products Corp, P.O. Box 9329, Minneapolis, MN 55440
m. Yoplait USA Division of General Mills Products Corp., P.O. Box 9329, Minneapolis, MN 55440
o. Blue Water Seafoods Division of General Mills, Canada, Ltd., 1640 Crescent, Lachine, Montreal, Quebec, Canada H8T 2N1
p. Eddie Bauer Division of General Mills Canada, Ltd., 1020 Lawrence Avenue West, Toronto, Ontario, Canada MCA 1C3
q. Impressions Division of General Mills Canada, Ltd., 7883 Keele Street, Concord, Ontario, L4K 1B7 Canada
r. Lancia-Bravo Foods Division of General Mills Canada, Ltd., 58A Hook Avenue, Toronto, Ontario M6P 1T5 Canada
s. Parker Brothers Division of General Mills Canada, Ltd., P.O. Box 600, 7883 Keele Street, Concord, Ontario L4K 1B7 Canada.

1. Parent Corporation: Mattel Incorporated, 5150 Rosecrans Ave., Hawthorne, California 90250.

2. Subsidiary(s) to participate in the operation:

(A) Standard Plastic Products, Inc., 450 Oak Tree Avenue, South Plainfield, New Jersey 07080
(B) Ringling Bros.—Barnum & Bailey, Circus World Inc., Orlando, Florida 32801
(C) Ringling Bros.—Barnum & Bailey, Combined Shows, Inc., 3201 New Mexico Ave., N.W., Washington, D.C. 20016
(D) H & H Plastics Company Inc., 7701 E. Compton Blvd., Paramount, California 90723
(E) A & A Die Casting Co., 12901 South Western, Gardena, California 90249
(F) Mattel Plastics Purchasing, 7617 E. Compton Blvd., Paramount, California 90723
(G) Monogram Models, Inc., 8601 Waukengen Road, Morton Grove, Illinois 60053

1. Parent corporation and address of principal office: Memphis Compress & Storage Co., Inc., 2350 Florida Street, Memphis, TN 38109.

2. Wholly-owned subsidiaries which all participate in the operations, and the address of their respective principal office:

a. Wilson Compress & Storage Co., Inc., 2350 Florida Street, Memphis, TN 38109
b. Shelby Delivery Service, Inc., 2350 Florida Street, Memphis, TN 38109
c. Chickasaw Warehouse Company, Inc., 2350 Florida Street, Memphis, TN 38109
d. Alexander International, Inc., 2350 Florida Street, Memphis, TN 38109

1. Parent Corporation: Morton Shoe Companies, Inc.

2. Wholly-Owned subsidiaries:

Morton's Shoe Stores, Inc.
Laconia Shoe Company, Inc.
Hampshire Manufacturing Corporation
Paris Shoe Company, Inc.

1. Parent Corporation and address: Southern Railway Company, 920 15th Street, N.W., Washington, D.C. 20005

2. Wholly-owned subsidiaries which will participate in intercorporate hauling operations are:

The Alabama Great Southern Railroad Company
Central Of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railway Company
Georgia Southern and Florida Railway Company
Norfolk Southern Railroad Company
Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railraod Company
Chattanooga Station Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railroad Company
Louisiana Sourthern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
Tennessee, Alabama & Georgia Railroad Company
Tennessee Railway Company
Airforce Pipeline, Inc.
Arrowood-Southern Company
Arrowood-Southern Executive Park, Inc.
The Atlanta and Charlotte Air LIne Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railroad Company
Citico Realty Company
Danville and Western Railroad Company
Durham and South Carolina Railroad Company
Elberton Southern Railroad Company
The Georgia Midland Railroad Company
Lenoir Car Works
Macon Terminal Company
Memphis and Charleston Railway Company
The National Investment Company
Norfolk Southern Industrial Development Corp.
Ocean Steamship Company of Savannah
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals Of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Distribution Services, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Investment Company
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
Terminal Properties, Inc.
Virginia and Southwestern Railway Company

1. Parent corporation and address of principal office: Trinity Bag & Paper Co., Inc., 529 5th Avenue, New York, NY 10017.

2. Wholly-owned subsidiaries which will participate in the operations, and address of their respective principal offices:

Terminal Paper Bag Co., Inc., P.O. Box 47, Yulee, FL 32097
Trinity Midwest Corporation, P.O. Box 301, Plainfield, IL 60544

Agatha L. Mergewovich,

Secretary.

[FR Doc. 81-1574 Filed 1-15-81; 8:45 am]

BILLING CODE 7035-01-M

Motor Carriers; Permanent Authority Decisions; Decision-Notice

The following applications, filed on or after July 3, 1980, are governed by Special Rule 247 of the Commission's Rules of Practice, see 49 CFR 1100.247. Special rule 247 was published in the **Federal Register** on July 3, 1980, at 45 FR 45539. For compliance procedures, refer to the **Federal Register** issue of December 3, 1980, at 45 FR 80109.

Persons wishing to oppose an application must follow the rules under 49 CFR 1100.247(B). Applications may be protested *only* on the grounds that applicant is not fit, willing, and able to provide the transportation service and to comply with the appropriate statutes and Commission regulations. A copy of any application, together with applicant's supporting evidence, can be obtained from any applicant upon request and payment to applicant of $10.00.

Amendments to the request for authority are not allowed. Some of the applications may have been modified prior to publication to conform to the Commission's policy of simplifying grants of operating authority.

Findings

With the exception of those applications involving duly noted problems (e.g.s., unresolved common control, fitness, water carrier dual operations, or jurisdictional questions) we find, preliminarily, that each applicant has demonstrated its proposed service warrants a grant of the application under the governing section of the Interstate Commerce Act. Each applicant is fit, willing, and able to perform the service proposed, and to conform to the requirements of Title 49, Subtitle IV, United States Code, and the Commission's regulations. Except where noted, this decision is neither a major Federal action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

In the absence of legally sufficient interest in the form of verified statements filed on or before March 2, 1981 (or, if the application later becomes unopposed) appropriate authorizing documents will be issued to applicants with regulated operations (except those with duly noted problems) and will remain in full effect only as long as the applicant maintains appropriate compliance. The unopposed applications involving new entrants will be subject to the issuance of an effective notice setting forth the compliance requirements which must be satisfied before the authority will be issued. Once this compliance is met, the authority will be issued.

Within 60 days after publication an applicant may file a verified statement in rebuttal to any statement in opposition.

To the extent that any of the authority granted may duplicate an applicant's other authority, the duplication shall be construed as conferring only a single operating right.

Note.—All applications are for authority to operate as a motor common carrier in interstate or foreign commerce over irregular routes, unless noted otherwise. Applications for motor contract carrier authority are those where service is for a named shipper "under contract".

Volume No. OP1–002

Decided: January 6, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 153330F, Filed December 29, 1980. Applicant: JERRY E. BIRELEY d.b.a. J.E.B. DRAYAGE, 2715 Palm Ave., Livermore, CA 94550. Representative: Arden Riess, P.O. Box 6067, 319 E. Charter Way, Stockton, CA 95206. Transporting for or on behalf of the United States Government, *general commodities* (except used household goods, hazardous or secret materials, and sensitive weapons and munitions), between points in the U.S.

MC 153331F, filed December 29, 1980. Applicant: SURFACE FREIGHT CORPORATION, 151 Harvard Ave., Stamford, CT 06902. Representative: Leonard A. Jaskiewicz, 1730 M St., N.W., Suite 501, Washington, DC 20036. Transporting *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S.

MC 153361F, filed December 17, 1980. Applicant: ACORN TRAFFIC CONSULTANTS, INC., P.O. Box 161, Brentwood, TN 37027. Representative: Henry E. Seaton, 929 Pennsylvania Bldg., 425 13th St., N.W., Washington, DC 20004. As a *broker of general commodities* (except household goods), between points in the U.S.

Volume No. OP1–006

Decided: January 8, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 147311 (Sub-4F), filed December 18, 1980. Applicant: T & S TRANSPORTATION, INC., 7420 Ranco Rd., P.O. Box 9729, Richmond, VA 23228. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Cheviot, Bridgetown, and Miamitown, OH, on the one hand, and, on the other, points in the U.S.

Note.—The purpose of this application is to substitute motor carrier for abandoned rail carrier service.

MC 147880 (Sub-1F), filed December 22, 1980. Applicant: AQUA-TERRA ORGANIC FARMS, INC., 257 Oak St., San Francisco, CA 94102. Representative: Ronald C. Chauvel, 100 Pine St., Suite 2550, San Francisco, CA 94111. Transporting, for or on behalf of the United States Government, *general commodities* (except used household goods, hazardous or secret materials, and sensitive weapons and munitions), between points in the U.S.

Volume No. OP4–194

Decided: January 12, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman. (Member Liberman not participating.)

MC 60066 (Sub-24F), filed December 24, 1980. Applicant: BEE LINE MOTOR FREIGHT, INC., 1804 Paul St., Omaha, NE 68102. Representative: Donald L. Stern, Suite 610, 7171 Mercy Rd., Omaha, NE 68106. Transporting *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81–1673 Filed 1–15–81; 8:45 am]

BILLING CODE 7035–01–M

Motor Carrier Permanent Authority Decisions; Decision-Notice

The following applications, filed on or after July 3, 1980, are governed by Special Rule 247 of the Commission's Rules of Practice, see 49 CFR 1100.247. Special Rule 247 was published in the **Federal Register** of July 3, 1980, at 45 FR 45539. For compliance procedures, refer to the **Federal Register** issue of December 3, 1980, at 45 FR 80109.

Persons wishing to oppose an application must follow the rules under 49 CFR 1100.247(B). A copy of any application, together with applicant's supporting evidence, can be obtained from any applicant upon request and payment to applicant of $10.00.

Amendments to the request for authority are not allowed. Some of the applications may have been modified prior to publication to conform to the Commission's policy of simplifying grants of operating authority.

Findings

With the exception of those applications involving duly noted problems (e.g., unresolved common control, fitness, water carrier dual operations, or jurisdictional questions) we find, preliminarily, that each applicant has demonstrated its proposed service warrants a grant of the application under the governing section of the Interstate Commerce Act. Each applicant is fit, willing, and able to perform the service proposed, and to conform to the requirements of Title 49, Subtitle IV, United States Code, and the Commission's regulations. Except where noted, this decision is neither a major Federal action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

In the absence of legally sufficient interest in the form of verified statements filed on or before March 2, 1981 (or, if the application later becomes unopposed) appropriate authorizing documents will be issued to applicants with regulated operations (except those with duly noted problems) and will remain in full effect only as long as the applicant maintains appropriate compliance. The unopposed applications involving new entrants will be subject to the issuance of an effective notice setting forth the compliance requirements which must be satisfied before the authority will be issued. Once this compliance is met, the authority will be issued.

On or before March 17, 1981, an applicant may file a verified statement in rebuttal to any statement in opposition.

To the extent that any of the authority granted may duplicate an applicant's other authority, the duplication shall be construed as conferring only a single operating right.

Note.—All applications are for authority to operate as a motor common carrier in interstate or foreign commerce over irregular routes, unless noted otherwise. Applications for motor contract carrier authority are those where service is for a named shipper "under contract".

Volume No. OP1–003

Decided: January 6, 1981.

By the Commission, Review Board No. 1, Members Carleton, Joyce and Jones.

MC 117730 (Sub-83F), filed December 11, 1980. Applicant: KOUBENEC MOTOR SERVICE, INC., Route No. 7, Huntley, IL 60142. Representative: Stephen H. Loeb, Suite 2027, 33 North LaSalle St., Chicago, IL 60602. Transporting *general commodities* (except classes A and B explosives and household goods as defined by the Commission), between points in the U.S., under continuing contract(s) with American Cyanamid Company of Wayne, NJ.

MC 140231 (Sub-11F), filed October 16, 1980. Applicant: LUMBER DISTRIBUTORS, INC., Building 149 Marsh Street, Southside, Port Newark, NJ 07114. Representative: Morton E. Kiel, Suite 1832, 2 World Trade Center, New York, NY 10048. Transporting (1) *construction materials, equipment and supplies*, (2) *materials, equipment and supplies* used in the manufacture and distribution of commodities in (1) above, (3) *lumber and wood products* as described in Item 24 of the Standard Transportation Tariff Code, (4) *metals*, (5) *minerals*, and (6) *commodities which because of size or weight*, require the

use of special equipment, between points in ME, VT, NH, MA, RI, CT, NY, NJ, PA, DE, MD, DC, VA, NC, WV and OH.

MC 148751 (Sub-9F) (Republication), filed November 6, 1980, previously noticed in the **Federal Register** issue of December 2, 1980. Applicant: LINCOLN FREIGHT LINES, INC., P.O. Box 427, Lapel, IN 46051. Representative: Norman R. Garvin, 1301 Merchants Plaza, East Tower, Indianapolis, IN 46204. Transporting (1) *paper and paper articles*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1) above (except commodities in bulk), between points in IL and MO, on the one hand, and, on the other, points in IN, KY, MI, MO, and OH.

Note.—The purpose of this republication is to add points in IL as a portion of the base territorial description.

MC 152171 (Sub-2F), filed December 22, 1980. Applicant: C & L TRUCKING, INC., P.O. Box 409, Judsonia, AR 72081. Representative: Timothy C. Miller, Suite 301, 1307 Dolley Madison Blvd., McLean, VA 22101. Transporting *general commodities* (except classes A and B explosives, and household goods as defined by the Commission), between points in the U.S., under continuing contract(s) with American Cyanamid Company of Wayne, NJ.

Volume No. OP1–001

Decided: January 7, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 200 (Sub-517F), filed December 16, 1980. Applicant: RISS INTERNATIONAL CORPORATION, P.O. Box 100, 215 W. Pershing Rd., Kansas City, MO 64141. Representative: H. Lynn Davis (same address as applicant). Transporting *lumber and lumber products*, between St. Joseph, MO, and Ilion, NY.

MC 200 (Sub-520F), filed December 22, 1980. Applicant: RISS INTERNATIONAL CORPORATION, P.O. Box 100, 215 W. Pershing Rd., Kansas City, MO 64141. Representative: H. Lynn Davis (same address as applicant). Transporting *general commodities* (except classes A and B explosives and household goods as defined by the Commission), between points in Hudson County, NJ, on the one hand, and, on the other, points in Milwaukee County, WI.

MC 7840 (Sub-37F), filed December 16, 1980. Applicant: ST. LAWRENCE FREIGHTWAYS, INC., 650 Cooper St., Watertown, NY 13601. Representative: E. Stephen Heisley, 805 McLachen Bank Bldg., 666 Eleventh St., NW, Washington, DC 20001. Transporting (1) *paper, paper products, plastics, plastic articles, soap, and soap dispensers*, and (2) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in the U.S., restricted to traffic originating at or destined to the facilities of Crown Zellerbach Corporation.

MC 9291 (Sub-18F), filed December 15, 1980. Applicant: CARROL BALL TRANSPORT, INC., P.O. Box 53, Centerville, KS 66014. Representative: Clyde N. Christey, Kansas Credit Union Bldg., 1010 Tyler, Suite 110L, Topeka, KS 66612. Transporting *general commodities* (except classes A and B explosives and household goods as defined by the Commission), between points in the U.S., under continuing contract(s) with Hoover Universal, Incorporated, of Georgetown, KY.

MC 19201 (Sub-141F), filed December 16, 1980. Applicant: PENNSYLVANIA TRUCK LINE, INC., 49th and Parkside Ave., Philadelphia, PA 19131. Representative: James V. Fleming III (same address as applicant). Transporting *general commodities* (except classes A and B explosives and household goods as defined by the Commission), between points in CT, DE, IL, IN, KY, MD, MA, MI, MO, NJ, NY, OH, PA, RI, VA, WV, and DC, restricted to traffic having a prior or subsequent movement by rail or water.

MC 22301 (Sub-30F), filed December 16, 1980. Applicant: SIOUX TRANSPORTATION CO., INC., 1230 Steuben St., P.O. Box 3088, Sioux City, IA 51102. Representative: Michael J. Ogborn, P.O. Box 82028, Lincoln, NE 68501. Transporting *rubber and rubber products*, between Lincoln, NE, and Sun Prairie, WI.

MC 29910 (Sub-314F), filed December 22, 1980. Applicant: ABF FREIGHT SYSTEM, INC., 301 South Eleventh St., Fort Smith, AR 72901. Representative: Joseph K. Rever (same address as applicant). Transporting *chemicals and related products*, between Houston, TX, on the one hand, and, on the other, points in CT, IL, IN, IA, KY, MA, MI, MO, NJ, NY, OH, PA, RI, and WI.

MC 44801 (Sub-19F), filed December 11, 1980. Applicant: DICK HARRIS & SON TRUCKING CO., INC., P.O. Box 10277, Lynchburg, VA 24506. Representative: Eugene M. Malkin, Suite 1832, 2 World Trade Center, New York, NY 10048. Transporting (1) *malt beverages and wine* (except in bulk), and (2) *materials and supplies* used in the distribution of the commodities in (1) above between points in VA, on the one hand, and, on the other, those points in the U.S. in and east of WI, IL, KY, TN, and MS.

MC 60430 (Sub-31F), filed December 9, 1980. Applicant: FRIEDMAN'S EXPRESS, INC., P.O. Box 480, Wilkes-Barre, PA 18703. Representative: Maxwell A. Howell, 1100 Investment Bldg., 1511 K St., N.W., Washington, DC 20005. Over regular routes, transporting *general commodities* (except classes A and B explosives, household goods as defined by the Commission, and commodities in bulk), (1) between Newark, NJ, and Stroudsburg, PA, from Newark over US Hwy 22 to junction NJ Hwy 31, then over NJ Hwy 31 to junction US Hwy 202, then over US Hwy 202 to junction PA Hwy 611, then over PA Hwy 611 to Stroudsburg, PA, and return over the same route, (2) between New Hope, PA, and Riegelsville, NJ, from New Hope over PA Hwy 32 to Riegelsville, PA then across the Delaware River to Riegelsville, NJ, and return over the same route, serving the off-route points on Stockton and Milford, NJ, and points in Bucks County, PA, and (3) between Philadelphia and Doylestown, PA, over US Hwy 611, serving all intermediate points in (1)–(3) above.

Note.—Applicant intends to tack the above requested authority with its existing regular-route operations.

MC 78400 (Sub-98F), filed December 19, 1980. Applicant: BEAUFORT TRANSFER CO. a corporation, P.O. Box 151, Gerald, MO 63037. Representative: Ernest A. Brooks II, 1301 Ambassador Bldg., St. Louis, MO 63101. Transporting (1) *vinyl*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of printed vinyl, between Union, MO, on the one hand, and, on the other, points in PA, NM, LA, FL, VA, and CA.

MC 114211 (Sub-488F), filed December 16, 1980. Applicant: WARREN TRANSPORT, INC., P.O. Box 420, Waterloo, IA 50704. Representative: Adelor J. Warren (same address as applicant). Transporting *general commodities* (except classes A and B explosives), between points in Polk County, IA, on the one hand, and, on the other, points in the U.S.

MC 114211 (Sub-491F), filed December 16, 1980. Applicant: WARREN TRANSPORT, INC., P.O. Box 420, Waterloo, IA 50704. Representative: Adelor J. Warren (same address as applicant). Transporting *such commodities* as are dealt in or used by agricultural equipment and industrial equipment dealers and manufactuers (except commodities in bulk), between Armstrong, IA, on the one hand, and on the other, points in the U.S.

MC 119741 (Sub-288F), filed December 15, 1980. Applicant: GREEN FIELD TRANSPORT CO., INC., 1515 Third

Ave., NW., P.O. Box 1235, Fort Dodge, IA 50501. Representative: D. L. Robson (same address as applicant). Transporting *mobile home interior furnishings*, from Grand Prairie, TX, Pine Bluff, AR, and Memphis, TN, to Newton, KS.

MC 129600 (Sub-37F), filed December 15, 1980. Applicant: POLAR TRANSPORT, INC., 176 King St., Hanover, MA 02339. Representative: Alton C. Gardner (same address as applicant). Transporting (1) *foodstuffs*, (2) *meats, meat products, and meat byproducts, and articles distributed by meat-packing houses* (except foodstuffs), and (3) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1) and (2) above, between points in the U.S., under continuing contract(s) with Swift Independent Packing Company, of Chicago, IL.

MC 129600 (Sub-39F), filed December 23, 1980. Applicant: POLAR TRANSPORT, INC., 176 King Street, Hanover, MA 02339. Representative: Alton C. Gardner, 176 King Street, Hanover, MA 02339. Transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between points in the U.S., under continuting contract(s) with Ascott Associates Co., of Malden, MA.

MC 134551 (Sub-22F), filed December 30, 1980. Applicant: LANTER REFRIGERATED DISTRIBUTING CO., No. 3 Caine Dr., Madison, IL 62060. Representative: Ernest A. Brooks II, 1301 Ambassador Bldg., St. Louis, MO 63101. Transporting *pharmaceuticals, and such commodities* as are dealt in chain food, grocery, and discount stores, between points in AR, IA, IL, IN, KS, KY, LA, MI, MO, MS, NE, OH, OK, TN, TX, and WI.

MC 135410 (Sub-116F), filed December 15, 1980. Applicant: COURTNEY J. MUNSON, d.b.a. MUNSON TRUCKING, North 6th Street Road, Monmouth, IL 61462. Representative: Daniel O. Hands, Suite 200, 205 W. Touhy Ave., Park Ridge, IL 60068. Transporting (1) *meat and packing-house products*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of meat (except commodities in bulk), between points in Des Moines and Lee Counties, IA, on the one hand, and, on the other, points in IL, IN, MN, MO, NE, and WI.

MC 135861 (Sub-91F), filed December 29, 1980. Applicant: LISA MOTOR LINES, INC., P.O. Box 4550, Fort Worth, TX 76106. Representative: Billy R. Reid, 1721 Carl St., Fort Worth, TX 76103. Transporting *sugar*, between points in the U.S., under continuing contract(s) with Godchaux-Henderson Sugar Co., Inc., of Reserve, LA.

MC 142900 (Sub-3F), filed December 24, 1980. Applicant: ED MARKS TRUCKING, INC., 1305 West Idaho St., Kalispell, MT 59901. Representative: Edward L. Marks (same address as applicant). Transporting *lumber, lumber products, and wood products*, from points in MT to points in UT.

MC 146580 (Sub-5F), filed December 22, 1980. Applicant: FREIGHT SYSTEMS, INC., 2300 James Street, Suite 1E, Bellingham, WA 98225. Representative: Alan P. Sherbrooke, 30th Floor, The Bank of California Center, Seattle, WA 98164. Transporting *health and personal care products*, between points in the U.S., under continuing contract(s) with Northwestern Drug Co., of Auburn, WA.

MC 147770 (Sub-3F), filed December 16, 1980. Applicant: WEST AMERICAN TRANSPORT, INC., 1260 West North Temple, Salt Lake City, UT 84116. Representative: Mark K. Boyle, 10 Broadway Bldg., Suite 400, Salt Lake City, UT 84101. Transporting (1) *farm products, metal products, and machinery*, and (2) *parts and supplies*, for the commodities in (1) above, between points in the U.S.

MC 149500 (Sub-1F), filed December 15, 1980. Applicant: INTERMODAL SERVICES, INC., 11650 Courthouse Blvd., Inver Grove Heights, MN 55075. Representative: Samule Rubenstein, P.O. Box 5, Minneapolis, MN 55440. Transporting *agricultural baler twine*, from Albert Lea, MN, to points in the U.S.

MC 150211 (Sub-10F), filed December 22, 1980. Applicant: ASAP EXPRESS, INC., P.O. Box 3250, Jackson, TN 38301. Representative: Jerry Ross (same address as applicant). Transporting *General commodities* (except classes A and B explosives, household goods as defined by the Commission, Commodities in bulk, and those requiring special equipment), between points in Chester County, TN, on the one hand, and, on the other, points in IN.

MC 150231 (Sub-6F), filed December 29, 1980. Applicant: MAVERICK TRANSPORTATION, INC., 1803 East Broad St., Texarkana, AR 75502. Representative: Steve Williams (same address as applicant). Transporting *iron and steel articles*, between points in AR, on the one hand, and, on the other, points in AL, IL, IN, IA, KY, LA, MI, MN, MS, MO, NE, OH, OK, PA, TN, TX, and WI.

MC 151471 (Sub-1F), filed December 12, 1980. Applicant: STEINBECKER BROS., INC., P.O. Box 852, Greeley, CO 80632. Representative: Charles J. Kimball, 350 Capitol Life Center, 1600 Sherman St., Denver, CO 80203. Transporting *meats, meat produces*, and *meat byproducts*, and *articles distributed by meat-packing houses* as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (except hides and commodities in bulk), between points in the U.S., under continuing contract(s) with Denver Meat Company, Inc., of San Jose, CA.

MC 151930 (Sub-1F), filed December 16, 1980. Applicant: SAMUEL BRUSCEMI, d.b.a., NEWCOMER TRUCKING CO., 1200 Island Ave., McKees Rocks, PA 15136. Representative: John A. Pillar, 1500 Bank Tower, 307 Fourth Ave., Pittsburgh, PA 15222. Transporting *general commodities*, (except classes A and B explosives, and household goods as defined by the Commission), between Pittsburgh, PA, on the one hand, and, on the other, points in Greene, Fayette, and Washington Counties, PA.

MC 152210 (Sub-1F), filed December 11, 1980. Applicant: WESTERN TANK SERVICE, d.b.a., NORTHWEST TANK SERVICE, P.O. Box. 24282, Seattle, WA 98124. Representative: Boyd Hartman, P.O. Box 3641, Bellevue, WA 98009. Transporting *industrial waste*, between points in ID, OR, WA, and UT.

MC 152621 (Sub–1F), filed December 24, 1980. Applicant: RUSH TRANSPORT, INC., Mapletree Industrial Park, P.O. Box 272, Palmer, MA 01069. Representative: James M. Burns, 1383 Main St.—Suite 413, Springfield, MA 01103. Transporting (1) *plastic articles* and (2) *materials, equipment and supplies* used in the manufacture and distribution of plastic articles, between Stratford, CT, Covington, GA, Bakersfield and Woodland, CA, Frankfort and Jacksonville, IL, Lowell, MA, Washington, NJ, Shawnee, OK, Canandaigua, and Macedon, NY, and Temple, TX, on the other hand, and, on the other, points in the U.S.

MC 153100F, filed December 9, 1980. Applicant: MT. STATE BIT SERVICE, INC., P.O. Box 4295, Morgantown, WV 26505. Representative: Brooks E. Smith, P.O. Box 660, Morgantown, WV 26505. Transporting *ammonium nitrate fertilizer and oxidizer*, between points in the U.S., under continuing contract(s) with Hercules Incorporated, of Wilmington, DE.

MC 153161 (Sub–1F), filed December 19, 1980. Applicant: WAYNE SOLVENTS, INC., 120 Grace Avenue, Newark, NY 14513. Representative:

Raymond A. Richards, 35 Curtice Pk., Webster, NY 14580. Transporting (1) *chemicals, chemical products, petroleum products, solvents, mineral spirits, and metals,* and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in the U.S., under continuing contract(s) with Chemical & Metallurgical Enterprises, Inc., Wayne Solvents, Inc., and Arcade Chemical Industries, Inc., of Newark, NY.

MC 153360, filed December 19, 1980. Applicant: JAY R. RUHL, 525 B. West 28th Div. Hwy., Lititz, PA 17543. Representative: John W. Metzger, 49 North Duke Street, Lancaster, PA 17602. Transporting *agricultural limestone,* (1) from points in Lancaster County, PA, to points in DE, MD, and NJ, and (2) from Viola and laurel, DE, to points in MD and VA.

Volume No. OP1-004

Decided: January 7, 1981

By the Commission, Review Board No. 3, Members Parker, Fortier and Hill.

MC 135410 (Sub-110F), filed November 19, 1980, and previously noticed in FR issue of December 10, 1980. Applicant: COURTNEY J. MUNSON, d.b.a. MUNSON TRUCKING, North 6th St., Road, P.O. Box 266, Monmouth, IL 61462. Representative: Daniel O. Hands, Suite 200, 205 W. Touhy Ave., Park Ridge, IL 60068. Transporting *such commodities* as are dealt in or used by bakeries (except commodities in bulk), between Wheeling, IL, on the one hand, and, on the other, points in FL, IA, IN, MI, MN, NE, and WI.

Note.—This republication shows Wheeling, IL as the origin or destination point.

MC 145441 (Sub-125F), filed November 28, 1980, and previously noticed in FR issue of December 11, 1980. Applicant: A.C.B. TRUCKING, INC., P.O. Box 5130, North Little Rock, AR 72119. Representative: Ralph E. Bradbury (same address as applicant). Transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), between the facilities of Foremost McKesson, Inc. at points in the U.S., on the one hand, and, on the other, points in the U.S.

Note.—This republication clarifies the territorial description.

Volume OP1-005

Decided: January 8, 1981.

By the Commission, Review Board, No. 2, Members Chandler, Eaton, and Liberman.

MC 200 (Sub-524F), filed December 18, 1980. Applicant: RISS INTERNATIONAL CORP., P.O. Box 100, 215 W. Pershing Road, Kansas City, MO 64141. Representative: H. Lynn Davis (same address as applicant). Transporting (1) *food and related products,* and (2) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in Grand and Hall Counties, NE, on the one hand, and, on the other, points in the U.S.

MC 200 (Sub-525F), filed December 18, 1980. Applicant: RISS INTERNATIONAL CORP., P.O. Box 100, 215 W. Pershing Road, Kansas City, MO 64141. Representative: H. Lynn Davis (same address as applicant). Transporting *metal products,* and *materials, equipment, and supplies* used in the manufacture and distribution of metal products, between points in Marion County, WV, on the one hand, and, on the other, points in AR, OK, and TX.

MC 200 (Sub-526F), filed December 18, 1980. Applicant: RISS INTERNATIONAL CORP., P.O. Box 100, 215 W. Pershing Road, Kansas City, MO 64141. Representative: H. Lynn Davis (same address as applicant). Transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between points in Sangamon County, IL, on the one hand, and, on the other, points in the U.S.

MC 29910 (Sub-317F), filed December 22, 1980. Applicant: ABF FREIGHT SYSTEM, INC, 301 South Eleventh St., Fort Smith, AR 72901. Representative: Joseph K. Reber (same address as applicant). Transporting (1) *paper and paper products,* and (2) *materials and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in Berk County, PA, and Baltimore and Anne Arundel Counties, MD, on the one hand, and, on the other, points in the U.S.

MC 60430 (Sub-32F), filed December 16, 1980. Applicant: FRIEDMAN'S EXPRESS, INC., P.O. Box 480, Wilkes-Barre, PA 18703. Representative: Maxwell A. Howell, 1100 Investment Bldg., 1611 K St., N.W., Washington, DC 20005. Transporting *general commodities* (except classes A and B explosives, household goods as defined by the Commission, and commodities in bulk), between Philadelphia, PA, on the one hand, and, on the other, Allentown, Bloomsburg, Easton, Reading and Scranton, PA.

Note.—Applicant intends to tack the above requested authority with its existing regular-route authority.

MC 82841 (Sub-297F), filed December 18, 1980. Applicant: HUNT TRANSPORTATION, INC., 10770 "I" St., Omaha, NE 68127. Representative: Donald L. Stern, Suite 610, 7171 Mercy Rd., Omaha, NE 68106. Transporting (1) *iron and steel articles,* and (2) *materials and equipment* used in the manufacture and distribution of the commodities in (1) above, between points in Middlesex County, NJ, on the one hand, and, on the other, those points in the U.S. in and east of TX, OK, KS, NE, IA, and MN.

MC 82841 (Sub-298F), filed December 18, 1980. Applicant: HUNT TRANSPORTATION, INC., 10770 "I" St., Omaha, NE 68127. Representative: Donald L. Stern, 7171 Mercy Rd., Suite 610, Omaha, NE 68105. Transporting (1) *glass and glass products,* and (2) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in the U.S., restricted to traffic originating at or destined to the facilities of Libby-Owens-Ford Company.

MC 108631 (Sub-19F), filed December 31, 1980. Applicant: BOB YOUNG TRUCKING, INC., Schoenersville Road at Industrial Drive, Bethlehem, PA, 18017. Representative: Alan Kahn, 1430 Land Title Bldg., Philadelphia, PA 19110. Transporting *malt beverages and malt beverage containers,* between the facilities of Schaefer Brewing Company at Fogelsville, PA, on the one hand, and, on the other, points in CT, DE, FL, ME, MD, MA, NH, NJ, NY, RI, VT, VA, and DC.

MC 111231 (Sub-330F), filed December 17, 1980. Applicant: JONES TRUCK LINES, INC., 610 East Emma Ave., Springdale, AR 72764. Representative: Don A. Smith, P.O. Box 43, 510 North Greenwood Ave., Fort Smith, AR 72902. Transporting (1) *alcoholic liquors,* and (2) *materials, equipment, and supplies* used in the manufacture and distribution of alcoholic liquors, between points in IL, on the one hand, and, on the other, points in the U.S.

MC 115841 (Sub-779F), filed December 2, 1980. Applicant: COLONIAL REFRIGERATED TRANSPORTATION, INC., McBride Lane, P.O. Box 22168, Knoxville, TN 37922. Representative: Richard L. Hollow (same address as applicant). Transporting (1) *adhesives and sealant compounds,* and (2) *materials and supplies* used in the manufacture and distribution of the commodities in (1) above (except commodities in bulk), from Conyers, GA, Chicago and Kankakee, IL, Mishawaka, IN, Muscatine, IA, Kansas City and St. Louis, MO, Ashland, Columbus and Piqua, OH, and Huntington, WV, to Hutchinson, KS.

MC 119990 (Sub-12F), filed December 22, 1980. Applicant: MERCHANTS DELIVERY CO., a Corporation, 1212 East 19th Street, Kansas City, MO 64108. Representative: David W. Howard, 601 West 47th Street, Kansas City, MO 64112. Transporting *general commodities* (except classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), from Kansas City, MO, to those points in KS bounded by a line beginning at the junction of U.S. Hwy 81 and the KS–NE State line and extending along U.S. Hwy 81 to junction KS Hwy 61, then along KS Hwy 61 to junction KS Hwy 96, then along KS Hwy 96 to junction Interstate Hwy 235, then along Interstate Hwy 235 to junction Interstate Hwy 35, then along Interstate Hwy 35 to the KS–OK State line, then along the KS–OK State line to junction U.S. Hwy 77, then along U.S. Hwy 77 to the KS–NE State line, then along the KS–NE State line to the point of beginning, including points on the described boundary lines, and the commercial zones of any points in the described area, restricted against the transportation of packages or articles weighing individually more than 100 pounds or in the aggregate more than 750 pounds from one consignor at one location to one location on any one day.

Note.—The person or persons who appear to be engaged in common control must either file an application under 49 U.S.C. §§ 11343–11344 or submit an affidavit indicating why such approval is unnecessary.

MC 14170 (Sub-1F), filed December 23, 1980. Applicant: NATIONWIDE TRUCK LINES, INC., P.O. Box 609, Ennis, TX 75119. Representative: William J. Lippman, Steele Park, Suite 330, 50 South Steele Street, Denver, CO 80209. Transporting *bakery products* (except frozen), from Marietta, OK and Louisville, KY, to points in AL, AR, AZ, CA, CT, DE, GA, ID, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, NE, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, TN, TX, UT, VA, VT, WA, WI, WV, and WY.

MC 145680 (Sub-6F), filed December 22, 1980. Applicant: FREIGHT SYSTEMS, INC., 2300 James Street, Suite 1E, Bellingham, WA 98225. Representative: Alan P. Sherbrooke, 30th Floor, The Bank of California Center, Seattle, WA 98164. Transporting *general commodities* (except classes A and B explosives and household goods as defined by the Commission), between points in the U.S., under continuing contract(s) with Amway Corporation, of Ada, MI.

Condition: Issuance of a permit in this proceeding is subject to the coincidental cancellation, at applicant's written request, of Permit No. MC 146580 (Sub-4).

MC 148510 (Sub-3F), filed December 19, 1980. Applicant: THOMPSON TRUCK SERVICE, INC., 4714 Primm Street, St. Louis, MO 63116. Representative: B. W. LaTourette, Jr., 11 S. Meramec, Suite 1400, St. Louis, MO 63105. Transporting *such commodities* as are dealt in by retail department stores, between points in the U.S., under continuing contract(s) with P. N. Hirsch & Co. Stores, Inc., or St. Louis, MO.

MC 150080 (Sub-2F), filed December 22, 1980. Applicant: CONTROLLED CARRIERS, INC., P.O. Box 367, Exton, PA 19341. Representative: Edward N. Button, 580 Northern Ave., Hagerstown, MD 21740. Transporting *paper products*, and *materials and supplies* used in the manufacture and distribution of paper products, between points in Chester County, PA, on the one hand, and, on the other, points in the U.S.

MC 151471 (Sub-2F), filed December 22, 1980. Applicant: STEINBECKER BROS., INC., P.O. Box 852, Greeley, CO 80632. Representative: Steven K. Kuhlmann, 2600 Energy Center, 717 17th St., Denver, CO 80202. Transporting *such commodities* as are dealt in by restaurant suppliers, between points in CO and NM, on the one hand, and, on the other, points in the U.S.

MC 152020 (Sub-2F), filed December 11, 1980. Applicant: ALBERT G. DRIEBE, R.D. No. 1, Box 1229, Stroudsburg, PA 18360. Representative: Joseph A. Keating, Jr., 121 S. Main St., Taylor, PA 18517. Transporting (1) *masonry cement*, from points in Stroud Township, PA, to points in the U.S., (2) *plastic displays*, between East Stroudsburg, PA, on the one hand, and, on the other, points in the U.S., and (3) *such commodities* as are dealt in by retail and wholesale grocery stores, and hotel and restaurant establishments, between points in Monroe County, PA, on the one hand, and, on the other, points in the U.S.

MC 152100 (Sub-1F), filed December 23, 1980. Applicant W & H TRUCK SYSTEMS, INC., 7601 West 59th St., Summit, IL 60501. Representative: Abraham A. Diamond, 29 South LaSalle St., Chicago, IL 60603. Transporting *foodstuffs* (except in bulk), and *materials, equipment, and supplies* used in the manufacture and distribution of foodstuffs, between points in Cook, DuPage, and Will Counties, IL, on the one hand, and, on the other, those points in the U.S. in and east of MT, WY, CO, and NM.

MC 153411F, filed December 30, 1980. Applicant: ALLRED TRUCKING CO., INC., 995 Marion Road, Columbus, OH 43207. Representative: A. Charles Tell, 100 East Broad St., Columbus, OH 43215. Transporting *general commodities* (except classes A and B explosives, household goods as defined by the Commission, and commodities in bulk), between points in Franklin County, OH, on the one hand, and, on the other, points in the U.S.

MC 153440F, filed December 31, 1980. Applicant: CLEAR-VIEW ENTERPRISES, INC., d.b.a. CVE TRUCKING, 1801 South Lumber St., Chicago, IL 60616. Representative: Patrick H. Smyth, 19 South LaSalle St., Suite 401, Chicago, IL 60603. Transporting *salt and salt products*, between points in the U.S., under continuing contract(s) with International Salt Company, of Clarks Summit, PA.

Volume No. OP4–193

Decided: January 12, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman. (Member Liberman not participating.)

MC 117786 (Sub-283F), filed December 24, 1980. Applicant: RILEY WHITTLE, INC., P.O. Box 19038, Phoenix, AZ 85005. Representative: A. Michael Bernstein, 1441 E. Thomas Rd., Phoenix, AZ 85014. Transporting *general commodities* (except household goods as defined by the Commission, classes A and B explosives, and commodities in bulk), between points in the U.S., restricted to traffic originating at or destined to the facilities used by Hammermill Paper Company.

MC 141216 (Sub-9F), filed December 22, 1980. Applicant: DARREL K. OAKLEY, d.b.a. OAKLEY ENTERPRISES, P.O. Box 387, Rapid City, SD 57709. Representative: J. Maurice Andren, 1734 Sheridan Lake Rd., Rapid City, SD 57701. Transporting (1) *contractors materials and supplies*, from points in IL, IN, IA, MO, and NE, to points in MT, ND, SD, and WY, and (2) *lumber*, between points in IL, IN, IA, MO, and NE, on the one hand, and, on the other, points in SD.

MC 141396 (Sub-10F), filed December 30, 1980. Applicant: DELP, INC., Hwy. 71 So., P.O. Box 369, Springdale, AR 72764. Representative: Stanley W. Ludwig, P.O. Box 285, 529 S. Holcomb St., Springdale, AR 72764. Transporting (1) *frozen foostuffs*, in containers, and (2) *materials, equipment, and supplies* used in the manufacture of the commodities named in (1) above, between the facilities of Mexican Original Products, Inc., at or near Fayetteville, AR, on the

one hand, and, on the other, points in the U.S. (except AK and HI).

MC 147806 (Sub-3F), filed December 22, 1980. Applicant: SOUTHERN HEAVY HAUL, INC., 5202 Industry Ave., Pico Rivera, CA 90660. Representative: Milton W. Flack, 8383 Wilshire Blvd., Suite 900, Beverly Hills, CA 90211. Transporting (1) *metal products*, and (2) *materials, equipment, and supplies* used in the manufacture, installation, and distribution of metal products, between points in IL, IN, MI, MO, OH, OK, PA, and TX, on the one hand, and, on the other, points in AZ, CA, CO, OR, TX, UT, and WA. Condition: Issuance of a certificate in this proceeding is subject to prior or coincidental cancellation at applicant's written request, of Permit No. MC 147806 (Sub. No. 2).

MC 146648 (Sub-139F), filed December 23, 1980. Applicant: BRISTOW TRUCKING CO., INC., P.O. Box 6355 A, Birmingham, AL 35217. Representative: James W. Segrest (same address as applicant). Transporting (1) *such commodities* as are dealt in by a manufacturer or distributors of paper products, and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities named in (1) above, between points in CA, NM, AZ, UT, WA, OR, OK, ID, and TX.

MC 151586 (Sub-1F), filed December 23, 1980. Applicant: TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., 2639 So. Soto St., Vernon, CA 90023. Representative: Scott T. Robertson, P.O. box 94748, Lincoln, NE 68509. Transporting (1) *meats, meat products, meat byproducts, and articles distributed by meat packing-houses* as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (a) between points in Shelby County, IA, on the one hand, and, on the other, Cincinnati, OH, Philadelphia, PA, New York, NY, and points in Douglas and Sarpy Counties, NE, (b) between points in Douglas and Sarpy Counties, NE, on the one hand, and, on the other, Jacksonville, FL, New York, NY, Chicago, IL, points in Sedgwick County, KS and Dallas County, TX, and DC, (c) between points in Multnomah, Washington, and Clackamas Counties, OR, Kitsap and King Counties, WA, and CA, on the one hand, and on the other, Oklahoma City, OK, and points in MN, KS, IA, NE, TX, and CO, (d) between points in Hale County, TX, on the one hand, and, on the other, points in WA, OR, AZ, UT, GA, FL, AL, SC, NC, TN, WI, MN, NV, and IL, (e) between points in Sioux County, IA, on the one hand, and, on the other, points in AZ, CA, ID, MT, NV, NM, OR, UT, WA, and WY, and (f) between Los Angeles, CA, on the one hand, and, on the other, Kansas City, MO, and points in NC, SC, VA, and WA, and (2)(a) *such commodities* as are dealt in by grocery and food business houses, and *alcoholic beverages*, and (b) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities named in (2)(a) above, between points in Ward and Cass Counties, ND, Minnehaha, Borwn, and Pennington Counties, SD, Hall and Lancaster Counties, NE, Linn County, IA, Benton, Sherburne, and Stearns Counties, MN, on the one hand, and, on the other, points in Santa Clara, and San Joaquin Counties, CA.

Volume No. OP4–195

Decided: January 12, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 5227 (Sub-78F), filed December 17, 1980. Applicant: ECKLEY TRUCKING, INC., P.O. Box 201, Mead, NE 68041. Representative: A. J. Swanson, P.O. Box 1103, 226 N. Phillips Ave., Sioux Falls, SD 57101. Transporting *general commodities* (except household goods as defined by the Commission, classes A and B explosives, and commodities in bulk), between points in NE, on the one hand, and, on the other, points in the U.S.

MC 50307 (Sub-103F), filed December 30, 1980. Applicant: INTERSTATE DRESS CARRIERS, INC., 215 County Ave., Secaucus, NJ 07094. Representative: Arthur Liberstein, 888 Seventh Ave., New York, NY 10106. Transporting *wearing apparel and materials, supplies and equipment* used in the manufacture of wearing apparel (except commodites in bulk) between New York, NY, Perkasie, PA and Youngstown, OH.

MC 113267 (Sub-372F), filed December 24, 1980. Applicant: CENTRAL & SOUTHERN TRUCK LINES, INC., 3215 Tulane Rd., P.O. Box 30130 AMF, Memphis, TN 38130. Representative: Lawrence A. Fischer (same address as applicant). Transporting *meats, meat products, meat by products, and articles distributed by meat packing-houses*, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (except hides and commodities in bulk), (1) from the facilities of Wilson Foods Corporation, at Oklahoma City, OK, to points in AL, AR, FL, GA, KY, LA, MS, NC, SC, and TN, and (2) from the facilities of Fischer Packing Company, at Louisville, KY, to points in AL, AR, FL, GA, LA, MS, NC, SC, and TN.

MC 114457 (Sub-581F), filed December 30, 1980. Applicant: DART TRANSIT COMPANY, a Corporation, 2102 University Ave., St. Paul, MN 55114. Representative: James H. Wills (same address as applicant). Transporting *general commodities* (except those of unusual value, Classes A and B explosives, commodities in bulk, and those requiring special equipment), between the facilities of Target Stores, Division of Dayton-Hudson Corporation, on the one hand, and, on the other, points in the U.S.

MC 114457 (Sub-582F), filed December 30, 1980. Applicant: DART TRANSIT COMPANY, a Corporation, 2102 University Ave., St. Paul, MN 55114. Representative: James H. Wills (same address as applicant). Transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), between the facilities of The Pillsbury Company, on the one hand, and, on the other, points in the U.S.

MC 120257 (Sub-53F), filed December 24, 1980. Applicant: K. L. BREEDEN & SONS, INC., P.O. Box 4267, Lone Star, TX 75668. Representative: Bernard H. English, 6270 Firth Rd., Ft. Worth, TX 76116. Transporting (1) *valves and hydrants*, and 92) *materials, equipment, and supplies* (except in bulk), used in ther manufacture and distribution of the commodities named in (1) above, between the facilities of American Valve & Hydrant Manufacturing Company, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 128087 (Sub-12F), filed December 24, 1980. Applicant: JOHN N. JOHN III, INC., 1000 West Second St., P.O. Box 921, Crowley, LA 70526. Representative: John N. John, III (same address as applicant). Transporting *liquid amorphous polypropylene*, (1) for La Porte, TX to Crowley, LA, and (2) from Baytown, TX to points in the U.S. (except AK and HI).

MC 124887 (Sub-128F), filed December 30, 1980. Applicant: SHELTON TRUCKING SERVICE, INC., Route 1, Box 230, Altha, FL 32421. Representative: Sol H. Proctor, 1101 Blackstone Bldg., Jacksonville, FL 32202. Transporting (1) *ores and minerals*, (2) *chemicals and related products*, and (3) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities in (1) and (2) above, between points in Caldwell County, KY,

Mineral and Nye Counties, NV, Quitman County, MS, and Seneca County, OH, on the one hand, and, on the other, points in the U.S.

MC 135007 (Sub-88F), filed December 22, 1980. Applicant: AMERICAN TRANSPORT, INC., 7850 "F" St., Omaha, NE 68127. Representative: Arthur J. Cerra, 2100 Ten Main Center, P.O. Box 19251, Kansas City, MO 64141. Transporting *meat, meat products, meat byproducts, and articles distributed by meat-packing houses*, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766 (except hides and commodities in Bulk), and *foodstuffs*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1) above, between points in the U.S., under continuing contract(s) with Swift Independent Packing Company, a Division of Swift & Company, of Chicago, IL.

MC 139457 (Sub-29F), filed December 30, 1980. Applicant: G. L. SKIDMORE d.b.a. JELLY SKIDMORE TRUCKING COMPANY, P.O. Box 38, Paris, TX 75460. Representative: Paul D. Angenend, P.O. Box 2207, Austin, TX 78768. Transporting (1) *foodstuffs and animal food*, and, (2) *materials, equipment and supplies* used in the manufacture of the commodities named in (1) above, between points in the U.S., under continuing contract(s) with Campbell Soup (Texas) Inc., of Paris, TX.

MC 139897 (Sub-7F), filed December 30, 1980. Applicant: ORRAN HOFSTETTER, INC., P.O. Box 237, Route 2, Orrville, OH 44667. Representative: James Duvall, P.O. Box 97, 220 W. Bridge St., Dublin, OH 43017. Transporting *commodities* in bulk, in dump vehicles, between points in OH, on the one hand, and, on the other, points in the U.S.

MC 152337 (Sub-1F), filed December 30, 1980. Applicant: CENTRAL STATES TRUCKING CO., 1311 S. First Ave., Maywood, IL 60153. Representative: Edward G. Bazelzon, 39 S. La Salle St., Chicago, IL 60603. Transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), between St., Louis, MO and points in IL, IN, IA, KY, MI, OH, and WI, on the one hand, and, on the other, Chicago, IL, restricted to traffic having a prior or subsequent movement by rail.

MC 153367F, filed December 17, 1980. Applicant: TRANSX, LTD., 2595 Inkster Blvd., Box 36, Group 200, R.R. 2, Winnipeg, Manitoba, Canada R3C2E6. Representative: Robert L. Cope, Suite 501, 1730 M St., N.W., Washington, DC 20036. In foreign commerce only, transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between ports of entry on the international boundary line between the U.S. and Canada, in MI, MN, and ND, on the one hand, and, on the other, points in IA, IL, KS, MO, NE, SD, and WI.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-1672 Filed 1-15-81; 8:45 am]

BILLING CODE 7035-01-M

Motor Carrier Permanent Authority Decisions; Decision-Notice

The following applications, filed on or after March 1, 1979, are governed by Special Rule 247 of the Commission's *Rules of Practice* (49 CFR 1100.247). These rules provide, among other things, that a petition for intervention, either in support of or in opposition to the granting of an application, must be filed with the Commission within 30 days after the date notice of the application is published in the **Federal Register**. Protests (such as were allowed to filings prior to March 1, 1979) *will be rejected.* A petition for intervention without leave must comply with Rule 247(k) which requires petitioner to demonstrate that it (1) holds operating authority permitting performance of any of the service which the applicant seeks authority to perform, (2) has the necessary equipment and facilities for performing that service, and (3) has performed service within the scope of the application either (a) for those supporting the application, or, (b) where the service is not limited to the facilities of particular shippers, from and to, or between, any of the involved points.

Persons unable to intervene under rule 247(k) may file a petition for leave to intervene under Rule 247(l) setting forth the specific grounds upon which it is made, including a detailed statement of petitioner's interest, the particular facts, matters, and things relied upon, including the extent, if any, to which petitioner (a) has solicited the traffic or business of those supporting the application, or, (b) where the identity of those supporting the application is not included in the published application notice, has solicited traffic or business identical to any part of that sought by application within the affected marketplace. The Commission will also consider (a) the nature and extent of the property, financial, or other interest of the petitioner, (b) the effect of the decision which may be rendered upon petitioner's interest, (c) the availability of other means by which the petitioner's interest might be protected, (d) the extent to which petitioner's interest will be represented by other parties, (e) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record, and (f) the extent to which participation by the petitioner would broaden the issues or delay the proceeding.

Petitions not in reasonable compliance with the requirements of the rule may be rejected. An original and one copy of the petition to intervene shall be filed with the Commission indicating the specific rule under which the petition to intervene is being filed, and a copy shall be served concurrently upon applicant's representative, or upon applicant if no representative is named.

Section 247(f) provides, in part, that an applicant which does not intend to timely prosecute its application shall promptly request that it be dismissed, and that failure to prosecute an application under the procedures of the Commission will result in its dismissal.

If an applicant has introduced rates as an issue it is noted. Upon request, and applicant must provide a copy of the tentative rate schedule to any protestant.

Further processing steps will be by Commission notice, decision, or letter which will be served on each party of record. *Broadening amendments will not be accepted after the date of this publication.*

Any authority granted may reflect administrative acceptable restrictive amendments to the service proposed below. Some of the applications may have been modified to conform to the Commission's policy of simplifying grants of operating authority.

Findings

With the exception of those applications involving duly noted problems (e.gs., unresolved common control, unresolved fitness questions, and jurisdictional problems) we find, preliminarily, that each common carrier applicant has demonstrated that its proposed service is required by the present and future public convenience and necessity, and that each contract carrier applicant qualifies as a contract carrier and its proposed contract carrier service will be consistent with the public interest and the transportation policy of 49 U.S.C. 10101. Each application is fit, willing, and able properly to perform the service proposed and to conform to the requirements of Title 49, Subtitle IV, United States Code,

and the Commission's regulation. Except where specifically noted, this decision is neither a major Federal Action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

In those proceedings containing a statement or note that dual operations are or may be involved we find, preliminarily and in the absence of the issue being raised by a petitioner, that the proposed dual operations are consistent with the public interest and the transportation policy of 49 U.S.C. 10101 subject to the right of the Commission, which is expressly reserved, to impose such terms, conditions or limitations as it finds necessary to insure that applicant's operations shall conform to the provisions of 49 U.S.C. 10930(a) (formerly section 210 of the Interstate Commerce Act.)

In the absence of legally sufficient petitions for intervention, filed on or before February 17, 1981 (or, if the application later becomes unopposed), appropriate authority will be issued to each applicant (except those with duly noted problems) upon compliance with certain requirements which will be set forth in a notification of effectiveness of the decision-notice. To the extent that the authority sought below may duplicate an applicant's other authority, such duplication shall be construed as conferring only a single operating right.

Applicants must comply with all specific conditions set forth in the following decision-notices within 30 days after publication, or the application shall stand denied.

Note.—All applications are for authority to operate as a common carrier, by motor vehicle, in interstate or foreign commerce, over irregular routes, except as otherwise noted.

Volume No. 394

Decided: December 11, 1980.

By the Commission, Review Board No. 3, Members Parker, Fortier, and Hill.

MC 35320 (Sub-605F), filed June 13, 1980, and previously noticed in **Federal Register** issue of July 31, 1980. Applicant: T.I.M.E.-DC, INC., 2598 74th St., P.O. Box 2550, Lubbock, TX 79408. Representative: Kenneth G. Thomas (same address as applicant). *Over regular routes*, transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment), (1) between Minneapolis, MN, and Seattle, WA, from Minneapolis, MN, over Interstate Hwy 94 to junction Interstate Hwy 90, then over Interstate Hwy 90 to Seattle, and return over the same route, serving no intermediate points, and (2) between junction Interstate Hwy 90 and U.S. Hwy 395, at or near Ritzville, WA, and Portland, OR, from junction Interstate Hwy 90 and U.S. Hwy 395 over U.S. Hwy 395 to junction WA Hwy 14, then over WA Hwy 14 to junction U.S. Hwy 730, at or near the WA–OR State line, then over U.S. Hwy 730 to junction Interstate Hwy 80N, at or near Boardman, OR, then over Interstate Hwy 80N to Portland, OR, and return over the same route, serving no intermediate points, as alternate routes for operating convience only.

Note.—Applicant intends to tack this authority with its existing regular-route authority. This republication clarifies the territorial description.

MC 52460 (Sub-279F), filed May 5, 1980, previously noticed in **Federal Register** issue of August 13, 1980, and corrected as published this issue. Applicant: ELLEX TRANSPORTATION, INC., P.O. Box 9637, 1420 West 35th St., Tulsa, OK 74107. Representative: Michael A. Calvert (same address as applicant). Transporting *foodstuffs*, (except in bulk), from the facilities of McIlhenny Company, at or near Avery Island, LA, and Collinsville, IL, to points in AL, AK, CO, FL, GA, IL, IA, KS, LA, MS, MO, NM, NC, OK, SC, TN, and TX.

Note.—The purpose of this republication is to correct the spelling of the company and clarify the origin.

MC 142960 (Sub-3F (Republication)), filed January 29, 1980, previously noticed in the FR issues of April 3, 1980 and October 15, 1980. Applicant: HUGH AND LAILA PIXLEY d.b.a. PIXLEY TRANSPORTATION, 1410 Oak, P.O. Box 927, Forsyth, MT 59327. Representative: Hugh Pixley (same address as applicant). *Contract carrier*, transporting *passengers and their baggage* in the same vehicle with passengers, between points in Boundary, Bonner, Kootenai, and Shoshone Counties, ID, Divide, Williams, McKenzie, Burke, Mountrail, Renville, and Ward Counties, ND, Spokane County, WA, Lincoln, Sanders, Mineral, Glacier, Flathead, Lake, Missoula, Granite, Powell, Lewis and Clark, Teton Pondera, Liberty, Cascade, Jefferson, Broadwater, Gallatin, Meagher, Chouteau, Hill, Blaine, Fergus, Judith Basin, Wheatland, Sweet Grass, Park, Phillips, Petroleum, Musselshell, Golden Valley, McCone, Roosevelt, Daniels, Sheridan, and Richland Counties, MT, under continuing contract(s) with Burlington Northern, Inc., of Missoula, MT.

Note.—The purpose of this republication is to indicate the points in ID and ND as county-wide points.

Volume No. 395

Decided: January 6, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 143140 (Sub-4F), filed April 29, 1980. Applicant: SEYMOUR BUS LINES, INC., Route 3, Maynardville, TN 37807. Representative: Lewis S. Witherspoon, 88 E. Broad St., Columbus, OH 43215. Transporting *passengers and their baggage*, in the same vehicle with passengers, in special and charter operations, in round-trip tours, beginning and ending at points in Davidson and Hamilton Counties, TN, Bell, Clay, Harlan, Knox, Laurel, Leslie, Letcher, and Whitley Counties, KY, and Lee, Wise and Scott Counties, VA, and extending to points in the U.S. (including AK but excluding HI).

Volume No. 396

Decided: January 6, 1981.

By the Commission, Review Board No. 1, Members Carleton, Joyce, and Jones.

MC 150640 (Sub-4F (Republication)), filed April 23, 1980, previously noticed in the **Federal Register** issues of July 15, 1980, August 26, 1980, and November 26, 1980. Applicant: EMERSON EXPRESS CO., INC., 545 Lyell Ave., Rochester, NY 14606. Representative: Raymond A. Richards, 35 Curtice Park, Webster, NY 14580. *Contract carrier*, transporting *scrap materials, metals, stainless steel, batteries*, and *reconditioned steel containers*, including *tubs*, between points in Monroe County, NY, on the one hand, and, on the other, New York, NY, points in Nassau and Suffolk Counties, NY, and points in AL, CT, IL, IN, KY, MA, MI, MO, NJ, OH, PA, and TN, under continuing contract(s) with (1) Krieger Waste Paper Co., (2) Genesee Scrap & Tin Bailing Corp. (3) Atkin's Waste Materials, Inc., (4) L. Atkin's Sons, and (5) Lyell Metal Co., Inc., all of Rochester, NY.

Note.—The purpose of this republication is to add the contracting shipper of Lyell Metal Co., Inc., named in (5) above.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-1874 Filed 1-15-81; 8:45 a.m.]

BILLING CODE 7035-01-M

[Volume No. 1]

Motor Carrier Permanent Authority Decisons; Decision-Notice

Decided: January 12, 1981.

The following restriction removal applications, filed after December 28,

1980, are governed by 49 CFR 1137. Part 1137 was published in the **Federal Register** of December 31, 1980, at 45 FR 86747.

Persons wishing to file a comment to an application must follow the rules under 49 CFR 1137.12. A copy of any application can be obtained from any applicant upon request and payment to applicant of $10.00.

Amendments to the restriction removal applications are not allowed.

Some of the applications may have been modified prior to publication to conform to the special provisions applicable to restriction removal.

Findings

We find, preliminarily, that each applicant has demonstrated that its requested removal of restrictions or broadening of unduly narrow authority is consistent with 49 U.S.C. 10922(h).

In the absence of comments filed on or before February 10, 1981, appropriate reformed authority will be issued to each applicant. Prior to beginning operations under the newly issued authority, compliance must be made with the normal statutory and regulatory requirements for common and contract carriers.

By the Commission, Restriction Removal Board, Members Sporn, Alspaugh, and Shaffer.

Agatha L. Mergenovich,

Secretary.

MC 60014 (Sub-206X), filed January 8, 1981. Applicant: AEOR TRUCKING CO., Box 308, Monroeville, PA 15146. Representative: A. Charles Tell, Baker & Hostetler, Suite 1800, 100 East Broad St., Columbus, OH 43215. Applicant seeks to remove restrictions in Sub Nos. 9 and 38 which authorize transportation of iron and steel articles from named points in PA, WV, and OH to points in KY, TN, AL, and MS, and the transportation of "size and weight" commodities from points in 19 named states to points in the United States (with exeptions) in order to authorize roundtrip operations.

MC 115093 (Sub-26X), filed January 6, 1981. Applicant: MERCURY MOTOR EXPRESS, INC., 2511 North Grady Ave. (P.O. Box 23406), Tampa, FL 33607 (33623). Representative: Joseph W. Watson (same address as above). Applicant seeks to remove restrictions from the irregular-route portion of its lead Certificate No. MC–115093 which authorizes the transportation of general commodities between points in NC, TN, VA, WV, PA, MD, DE, NJ, RI, CN, MA, DC, and those in NY, on and south of NY Hwy 7, on the one hand, and, on the other, points in FL, GA, and SC, by (1) removing restrictions against handling articles of unusual value, household goods, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, and (2) removing restrictions on service (a) between points in FL, GA and SC, on the one hand, and, on the other, points in TN and (b) between points in SC, on the one hand, and, on the other, points in NC which require that the traffic move from, to or through points in a specified part of NC and SC.

MC 118831 (Sub-198X), filed January 5, 1981. Applicant: CENTRAL TRANSPORT, INC., P.O. Box 7007, High Point, NC 27264. Representative: Ben H. Keller, III, (same adress as applicant). Applicant seeks to remove restrictions in its Sub-No. 148 in order to (1) broaden the commodity description from dry chemicals, in bulk, to commodities, in bulk, (2) remove the territorial restrictions against transportation to AK and HI (3) remove restrictions against the transportation of fly ash to points in NC, SC, GA, and FL, and carbon to Covington, VA, and (4) authorize service between Richland County, SC, and points in the United States in place of its limited authority from a named facility near Eastman, SC, to points in the United States.

MC 136123 (Sub-9X), filed January 8, 1981. Applicant: MEAT DISPATCH, INC., P.O. Box 1058, Palmetto, FL 33561. Representative: William L. Beasley (same as above). Applicant seeks to remove restrictions in its Sub-No. 17 permit which authorizes it to serve Arcata Graphics Division of Depew, NY, under contract(s), in order to (1) broaden its commodity authority to transport such commodities as are manufactured in the printing industry, and (2) broaden its territorial authority to between points in the United States.

MC 138635 (Sub-125X), filed January 2, 1981. Applicant: CAROLINA WESTERN EXPRESS, INC. Box 3995, Gastonia, NC 28052. Representative: Eric Meierhoefer, Suite 423, 1511 K Street, N.W., Washington, DC 20005. The application seeks to remove restrictions in Sub-Nos. 46 and 68F to (1) broaden the commodity descriptions from general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk and those requiring special equipment) to general commodities (except classes A and B explosives) and (2) remove the restrictions limiting transportation to traffic moving on bills of lading of freight forwarders.

MC 144678 (Sub-35X), filed January 6, 1981. Applicant: AMERICAN FREIGHT SYSTEM, INC., 9393 West 110th Street, Overland Park, Kansas 66210. Representative: Harold H. Clokey, Vice President and General Counsel, American Freight System, Inc., 9393 West 110th Street, Overland Park, KS 66210. Applicant seeks removal of restrictions in Sub-Nos. 3F, 4F, and 8F in order to (1) broaden the commodity descriptions from general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk and those requiring special equipment) to general commodities (except classes A and B explosives and household goods as defined by the Commission); (2) authorize service at all intermediate points, and (3) in Sub No. 8 remove a restriction that authorizes service at the junction of Interstate Hwy. 35 and U.S. Hwy. 50 for purposes of joinder only, and a restriction that limits the regular route operations against the transportation of traffic moving between the Kansas City, MO–KS, Commercial Zone and Wichita, KS.

MC 145477 (Sub-1X), filed January 7, 1981. Applicant: MID–CITIES MOTOR FREIGHT, INC., 324 Michigan, St. Joseph, MO 65404. Representative: Tom B. Kretsinger, Kretsinger & Kretsinger, 20 East Franklin, Liberty, MO 64068. Applicant seeks to remove restrictions in its lead certificate in order to (1) broaden the commodity description from general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment) to general commodities (except classes A and B explosives, and household goods as defined by the Commission), and (2) remove the restriction limiting the authority to the transportation of traffic originating at and destined to Kansas City, Faucett, and St. Joseph, MO.

[FR Doc. 81–1571 Filed 1–15–81; 8:45 am]

BILLING CODE 7035–01–M

Motor Carrier Transfer; Decision Notice

As indicated by the findings below, the Commission has approved the following applications filed under 49 U.S.C. 10924, 10926, 10931 and 10932.

We find:

Each transaction is exempt from section 11343 (formerly section 5) of the Interstate Commerce Act, and complies with the appropriate transfer rules.

This decision is neither a major Federal action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

Petitions seeking reconsideration must be filed on or before February 5, 1981. Replies must be filed within 20 days after the final date for filing petitions for reconsiderations; any interested person may file and serve a reply upon the parties to the proceeding. Petitions which do not comply with the relevant transfer rules at 49 CFR 1132.4 may be rejected.

If petitions for reconsideration are not timely filed, and applicants satisfy the conditions, if any, which have been imposed, the application is granted and they will receive an effective notice. The notice will indicate that consummation of the transfer will be presumed to occur on the 20th day following service of the notice, unless either applicant has advised the Commission that the transfer will not be consummated or that an extension of time for consummation is needed. The notice will also recite the compliance requirements which must be met before the transferee may commence operations.

Applicants must comply with any conditions set forth in the following decision-notices on or before February 17, 1981, or within any approved extension period. Otherwise, the decision-notice shall have no further effect.

By the Commission, Review Board Number 5, Members Krock, Taylor, and Williams.

MC–FC–78801. By decision of December 1, 1980 issued under 49 U.S.C. 10926 and the transfer rules at 49 C.F.R. 1132 Review Board Number 5 approved the transfer to S&P Trucking, Inc., of Kennett, MO of Certificate No. MC 140475 (Sub-Nos. 2, 4, and 6) issued to Holcomb Trucking Company, Inc. of Holcomb, MO. The authority in Sub-Nos. 2, 4 and 6 was issued May 19, 1976, January 22, 1979, and November 6, 1980, respectively. This authority authorizes the transportation, over irregular routes, in interstate or foreign commerce, of (1) dry fertilizer and dry fertilizer materials, in bulk, from the facilities of Cargill Incorporated, at or near New Madrid, MO, to points in Arkansas, Illinois (except East St. Louis and those points in Illinois located within the St. Louis, MO-East St. Louis, IL commercial zone), Iowa, Kentucky, and Tennessee, 92) fertilizer and fertilizer ingredients (except petroleum and petroleum products), from points in Dunklin County, MO (except Malden), and points in Pemiscott County, MO to points in Alabama, Arkansas, Illinois (except East St. Louis and its commercial zone), Kentucky, Louisiana, Mississippi, and Tennessee, (3) dry fertilizer and dry fertilizer ingredients, from Memphis and Nashville, TN to points in Missouri, (4) dry fertilizer and fertilizer ingredients (a) from Nashville, TN to points in Missouri and (b) from the facilities utilized by United States Steel Corporation in Memphis, TN to points in Missouri, and (5) dry fertilizer and fertilizer ingredients, in bulk, in dump vehicles, from Memphis, TN (except the facilities utilized by United States Steel Corporation) to points in Missouri. Applicant's representative is: Thomas P. Rose, P.O. Box 205, Jefferson City, MO 65102.

MC 78854. By decision of November 19, 1980 issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR Review Board Number 5 approved the transfer to Lane's Transport (Toronto) Limited of Certificate No. MC 120951 (Sub-No. 2) issued March 27, 1979 to Duggan's Trucking, Inc. authorizing the transportation in interstate or foreign commerce, over irregular routes, of general commodities (except those of unusual value, classes A and B explosives, household goods, as defined by the Commission, commodities in bulk, and those requiring special equipment), (1) between points in Erie County, NY, and (2) between points in Erie County, NY, on the one hand, and, on the other, points in Niagara County, NY. Applicant's representative is: Robert D. Gunderman, Suite 710, Statler Building, Buffalo, NY 14202.

Note.—Common control is involved.

MC–FC–78863. By decision of December 12, 1980, issued under 49 U.S.C. 10931 or 10932 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to D.C. Transport, Inc. d.b.a. Roughneck Trucking, Inc., of 2611 Albany, Houston, TX 77006 of Certificate of Registration No. MC 120750 (Sub-No. 1) issued 2/12/76, to D.C. Transport, Inc., of 10707 Goodnight, Dallas, TX 75220, evidencing a right to engage in transportation in interstate commerce corresponding in scope to No. 5091, dated 9/2/80 issued by the Railroad Commission of Texas, authorizing oilfield equipment and pipe, machinery, and various other named commodities, with certain restrictions, between points in Texas. TA lease is not sought. Transferee holds no authority.

MC–FC–78868. By decision of December 12, 1980 issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to H & P Trucking, Inc., of Mt. Vernon, MO of Certificate MC 117568 (Sub-No. 21F) issued July 25, 1980 to Wade Truck Lines, Inc., of Verona, MO, authorizing the transportation of sand, gravel, rock, and asphalt, in bulk, in dump truck vehicles, over irregular routes, between points in McDonald, Barry, Stone, and Taney Counties, MO, and points in Benton, Washington, Madison, Marion, Baxter, Carroll, and Boone Counties, AR. Applicant's representative: Charles J. Fain, 333 Madison St., Jefferson City, MO 65101.

MC–FC–78827. By decision of November 5, 1980, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to FRANK'S TRUCKING CORP., of La Grange, IL, of Certificate MC 126949 issued September 2, 1976 to ATLANTIC COAST IMPORT CARRIERS, INC., of La Grange, IL authorizing the transportation by irregular routes of *cream and condensed milk*, in containers, *and butter*, from Columbus and Toledo, OH, Fort Wayne and Bluffton, IN, and points in that part of Michigan on and south of Michigan Highway 21 between Grand Rapids and Port Huron, and on and east of U.S. Highway 131 between Grand Rapids and the Michigan-Indiana State line; to Springfield, Worcester and Boston, MA, and points in Massachusetts within 20 miles of Boston and Providence, RI, New York, NY, Paterson, Newark, Hillside, Belleville, Woodbridge, and Perth Amboy, NJ, Wilmington, DE, Philadelphia, Hershey and Harrisburg, PA, and Baltimore, MD; and *empty containers* used in the transportation of the commodities described above, from the above-specified destination points to the above-specified origin points. Applicant's representative is: Joan Devitt, President, 316 S. 6th Avenue, La Grange, IL 60525.

MC–FC–78905. By decision of December 30, 1980, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to DAVID S. WRIGHT, d.b.a. WRIGHT'S TRANSFER & STORAGE, a portion of Certificate No. MC–20084 issued July 2, 1951, to LEO BERTRAND CRITES, d.b.a. CRITES TRANSFER, authorizing the transportation of *household goods* as defined by the Commission, (a) between points in Pendleton County, WV, on the one hand, and, on the other, points in VA, WV, KY, OH, PA, MD, and DC, (b) between Cumberland, MD, and points within 10 miles of Cumberland, on the one hand, and, on the other, points in NY on and south of US Hwy 6, and those in MD, NJ, PA, VA, WV, and DC,

and (c) between Mountain Lake Park, MD, and points within 20 miles of Mountain Lake Park, on the one hand, and, on the other, points in MD, PA, OH, VA, WV, and DC. Applicants' Representative is Edward N. Button, 580 Northern Avenue, Hagerstown, MD 21740.

Note.—Application for TA has not been filed. Transferee holds no authority from this Commission.

MC–FC–78903. By decision of December 30, 1980, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to BOUTWELL ENTERPRISES, INC., of Jay, FL, of Certificate MC–138102 (Sub-No. 2), issued November 28, 1973 and Certificate No. MC–138102 (Sub-No. 3), issued September 9, 1980, to CARSON D. BOUTWELL, d.b.a. BOUTWELL TRUCK LINES, of Jay, FL, authorizing the transportation of (1) *dry bulk fertilizer*, from Cottondale & Pensacola, FL, to points in AL and MS; and (2) *dry fertilizer*, from points in Escambia and Santa Rosa Counties, FL, to points in AL, GA, MS, and LA. Applicant's representative: Bobby A. Boutwell, P.O. Box 338, Jay, FL 32565.

Note.—Transferee does not hold any ICC authority. Application for TA has not been filed. This application was previously assigned docket MC–F–14520F.

MC–FC–78893. By decision of December 19, 1980, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to CAROLINA AGRICULTURAL DISTRIBUTORS, INC., a corporation of Plymouth, NC, of Certificate No. MC–145928 (Sub Nos. 2, 4 and 5) issued July 12, 1979, and April 30, July 7, and July 11, 1980, respectively, to PANTEGO DISTRIBUTING CO., INC. of Pantego, NC, authorizing the transportation of (1) *paper, paper products and wood pulp* from the facilities of Weyerhaeuser Co., Inc., in NC, to points in CT, FL, ME, MA, NH, NJ, NY, RI, VT, and the facilities of Weyerhaeuser Co., Inc. at Seymour, IN. (2) *Manufactured forest products*, from points in NC to points in CT, FL, ME, MA, NH, NJ, RI, VT, SC, GA, AL, MS, KY TN, WV, OH, MI, IL, IN, and WI, restricted to the transportation of traffic originating at the facilities of Weyerhaeuser Co., Inc. (3) *Forest products* from the facilities of Weyerhaeuser, Inc., in NC to points in Ny, NJ, DE, MD, PA, and VA. (4) *Lumber and lumber products, and iron, steel and aluminum articles* between Philadelphia, PA, on the one hand, and, on the other, Newport News, VA. Applicant's representative is: Peter A. Greene, 1920 N St., N.W., Washington, D.C. 20036. Application for temporary authority has been filed.

MC–FC–78880. By decision of December 11, 1980, issued under 49 U.S.C. § 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to T. DEL FARNO TRUCKING CO., of Pawtucket, RI, of Certificate MC–144899 (Sub-No. 1F), issued June 25, 1980, to B.T. OILFIELD TRANSPORT, INC., of North Kingstown, RI, authorizing the transportation of (1) *machinery, equipment, materials, and supplies* used in, or in connection with, the discovery, development, production, refining, manufacture, processing, storage, transmission, and distribution, of natural gas and petroleum and their products and by-products, and (2) *machinery, materials, equipment, and supplies* used in, or in connection with, the construction, operation, repair, servicing, maintenance and dismantling of pipe lines, including the stringing and picking up thereof, between North Kingstown, RI, on the one hand, and, on the other, points in AR, CT, DE, GA, IL, IN, LA, MD, MA, MI, MS, NC, NJ, NY, OH, OK, PA, RI, SC, TX, VA, and WV. Applicant's representative: Frank J. Weiner, 15 Court Square, Boston, MA 02108.

Note.—Transferee holds Certificate MC 96165 and sub-numbers thereunder. Application has been filed for TA under 49 U.S.C. 11359.

MC–FC–78865. By decision of December 11, 1980 issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 5 approved the transfer to WACHUSETT TRANSPORATION CO., INC., of Clinton, MA, of Certificate MC 146219F, issued February 26, 1980, to FROZEN FOOD DELIVERY SERVICE, INC. (Shawmut Community Bank and T.H.E. Appraisal Corporation, Successors in Interest), of Berlin, MA, authorizing the transportation of *cereal, plastic articles, lunch and picnic kits, napkins, sugar, condiments, and straws* (except commodities in bulk), from the facilities of Van Brode Milling Co. Inc., at Clinton, MA, to points in AL, CA, FL, GA, IL, IN, IA, KS, MD, MI, MN, MS, MO, NE, NJ, NY, NC, ND, OH, OK, PA, SC, SD, TN, VA, WV, WI, and DC. Applicants' representative: James M. Burns, 1383 Main Street, Suite 413, Springfield, MA 01103.

Note.—Application for TA has been filed. Transferee holds no permanent authority from this Commission.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81–1572 Filed 1–15–81; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Federal Advisory Council on Occupational Safety and Health; Meeting

Notice is hereby given that the Federal Advisory Council on Occupational Safety and Health, established under Section 1.5 of Executive Order 12196 of February 26, 1980 (Vol. 45, No. 40), will meet on February 3, 1981 starting at 10:00 a.m. in Room N5437 A, B, C, and D, of the Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. The meeting will be open to the public.

The agenda provides for:

I. Call to Order

II. Approval of Minutes of Meeting October 28, 1980

III. Announcements

IV. Update of Training Requirements in 29 CFR 1960

V. Report on Labor-Management Safety and Health Committees

VI. Committee Reports and Recommendations

A. Conference Committee

B. Special OPM-Standards

C. Interagency Task Group on Federal Employee Medical Records

VII. New Business

The Council welcomes written data, views or comments concerning safety and health programs for Federal employees, including comments on the agenda items. All such submissions received by close of business January 30, 1981, will be provided to the members of the Council and included in the record of the meeting.

The Council will consider oral presentations relating to agenda items. Persons wishing to orally address the Council at the meeting should submit a written request to be heard by close of business January 30, 1981. The request must include the name and address of the person wishing to appear, the capacity in which appearance will be made, a short summary of the intended presentation and an estimate of the amount of time needed.

All communications regarding this Advisory Council should be addressed

to Robert J. Broderick, Acting Director, Office of Federal Agency Safety and Health Programs, Department of Labor, OSHA, Bicentennial Building, 600 E Street, Suite 500, N.W., Washington, D.C. 20210, telephone (202) 376–3005.

Signed at Washington, D.C. this 12th day of January, 1981.

Eula Bingham,

Assistant Secretary.

[FR Doc. 81-1091 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-26-M

Office of the Secretary

Senior Executive Service; Reappointment of Members to the Performance Review Board

This notice amends Department of Labor notice published in 44 FR 55240, dated September 25, 1979, listing Department of Labor members of the Performance Review Board of the Senior Executive Service.

Alfred M. Zuck has been reappointed as Chairperson for a three-month period, January 1, 1981, through March 31, 1981. Charles E. Pugh has also been reappointed for a three-month period, January 1, 1981, through March 31, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Frank A. Yeager, Director of Personnel Management, Room C5526, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, D.C. 20210, telephone 202–523–9191.

Signed at Washington, D.C., this 13th day of January, 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-1033 Filed 1-15-81; 8:45 am]

BILLING CODE 4510-23-M

MERIT SYSTEMS PROTECTION BOARD

Regulation Review

AGENCY: Merit Systems Protection Board.

ACTION: Notice of Orders and opportunity to file comments in Board proceedings.

SUMMARY: 5 U.S.C. sec. 1205(e) authorizes the Board to review rules and regulations issued by the Office of Personnel Management and their implementation by other Federal agencies in order to determine if they have required or would require any federal employee to commit a prohibited personnel practice in violation of 5 U.S.C. sec. 2302(b). The Board has issued orders, described below, under section 1205(e). Those orders schedule five matters for review and deny review of some rules and regulations raised in petitions filed pursuant to section 1205(e)(1)(B).

DATES: In all of the matters scheduled for review, the respondents' briefs are to be filed by March 13, 1981. Interested persons are invited to file comments. These comments may be filed at any time prior to Board's determination but the Board cannot guarantee that it will be able to consider filed comments unless they are received by April 1, 1981. All filings are to be made in accordance with 5 CFR Part 1203, the Board's interim regulations governing review of OPM regulations. 46 FR 2326 (Jan. 9, 1981). All pleadings, briefs and comments received in these matters will be publicly available for inspection in the Office of the Secretary of the Merit Systems Protection Board.

ADDRESS: Office of the Secretary, Merit Systems Protection Board, Room 350, 1717 H Street, NW, Washington, D.C. 20419 (202) 632–4525.

FOR FURTHER INFORMATION CONTACT: Bruce Mayor, Office of the General Counsel, Merit Systems Protection Board (202) 653–8386.

SUPPLEMENTARY INFORMATION: The Board will review the following rules and regulations on its own motion:

a. Volume 5 CFR 432.201(a) which limits the coverage of 5 U.S.C. sec. 4303, *Actions based on unacceptable performance*, to actions based solely on unacceptable performance and 5 CFR 752.401(a)(2) which extends the coverage of adverse actions under 5 U.S.C. sec. 7512 to actions taken for both performance and conduct cases. (*In Re reduction-in-grade or removals for performance and non-performance related reasons*, Docket No. HQ12058110011). The issues to be addressed in this review are, whether these regulations: (1) deny federal employees substantial rights provided by Chapter 43 of the Civil Service Reform Act; (2) require the commission of prohibited personnel practices with respect to employees against whom a reduction-in-grade or a removal is proposed for performance and non-performance related reasons in violation of 5 U.S.C. sec. 2302(b)(11); and/or (3) deny federal employees an opportunity to demonstrate improved performance before they can be reduced-in-grade or removed.

b. Volume 5 CFR 735.206, which restricts federal employees from using official information in furtherance of a private interest and 5 CFR 1001.735–208 which restricts OPM employees from making public disagreements with or criticisms of officials, policies or practices of OPM or other Federal agencies in areas relating to OPM's functions. (*In Re disclosure of information*, Docket No. HQ12058110010). The issues to be addressed in this review are whether these regulations: (1) prohibit disclosure of information in areas which are protected under 5 U.S.C. sec. 2302(b)(8); (2) violate the "whistleblower" protections of the Civil Service Reform Act which restrict disclosure of information only where it is specifically prohibited by law or required by Executive order in the interest of national defense or the conduct of foreign affairs; and/or (3) require the commission of a prohibited personnel practice with respect to employees who disclose information which they reasonably believe evidences a violation of law, mismanagement, waste of funds, abuse of authority or a danger to public health or safety.

c. 335 Federal Personnel Manual, Chapter S1–5(c)(1)(b) (1979), which permits agencies to except from their competitive merit plans promotions which result from an employee's position being reclassified at a higher grade because of an accretion of duties. (*In Re exceptions from competitive plans*, Docket No. HQ1205811012). The issues to be addressed in this review are whether this rule: (1) permits the non-competitive promotion of an employee whose position is upgraded as a result of the addition of duties by planned management action;
(2) permits the granting of special preferences or advantages in violation of 5 U.S.C. 2302(b)(6); and/or discrimination in violation of 5 U.S.C. 2302(b)(1), and/or (3) permits the evasion of the Chapter 43 requirement that promotion determinations be based, in part, upon performance appraisals in violation of 5 U.S.C. 2303(b)(1).

The Board will also review the following rules and regulations raised in petitions filed with it pursuant to 5 U.S.C. 1205(e)(1)(B):

a. Volume 5 CFR 752.401(c)(9) which excludes from adverse action procedural requirements the furlough of seasonal, part-time and intermittent employees. (*National Treasury Employees Union* v. *Jule M. Sugarman, Acting Director, Office of Personnel Management*, Docket No. HQ120500006). The issues to be addressed in this review are whether: (1) the regulation impermissibly restricts, on its face or as implemented, the statutory procedures found at 5 U.S.C. 7511–7514 (Subchapter II) with regard to the specific personnel actions at issue or with regard to the class of employees involved and (2) Subchapter II implements or directly concerns the merit principles contained in 5 U.S.C.

2301(b)(2), (6) and (8)(A) so that their violation constitutes a prohibited personnel practice under 5 U.S.C. 2302(b)(11).

b. Federal Personnel Manual Supplement 335–1, Subchapter S6 which, as implemented by the Customs Service, has restricted the availability to employees and others of crediting plans used by promotion and selection panels to rate and rank candidates for employment and promotion. (*National Treasury Employees Union* v. *Jule M. Sugarman, Acting Director, Office of Personnel Management, et al.*, Docket No. HQ120500003). The issues to be addressed in this review are whether: (1) has the Customs Service arbitrarily refused access to such plans; and (2), in the event that it has, does the arbitrary refusal of access to crediting plans constitute a violation of sec. 2302(b).

The Board will not review the following rules and regulations raised in petitions filed with it pursuant to 5 U.S.C. 1205(e)(1)(B):

a. Volume 5 CFR 771.204, which permits agencies to exclude bargaining unit employees for the coverage of agency grievance systems, (Petition of Robert M. Tobias, et al., dated Feb. 7, 1980).

b. Volume 5 CFR 752.401(c)(2) which excludes actions which entitle employees to grade retention under Part 536 from adverse action procedural requirements. (Petition of Robert M. Tobias, et al., dated Feb. 7, 1980); and

c. Federal Personnel Manual Supplement 335–1 Subchapter S6 which instructs agency personnel to maintain proper security and control over examination materials used to evaluate employees for promotion and internal placement (Petition of Vincent L. Connery, dated Feb. 7, 1980). The Board will, as noted above, review the implementation of this rule by the Customs Service.

For the Board.

Ruth T. Prokop,

Chairwoman.

January 13, 1981.

[FR Doc. 81–1760 Filed 1–15–81; 8:45 am]

BILLING CODE 6325–20–M

OFFICE OF PERSONNEL MANAGEMENT

Performance Review Board Members

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This is notice of Performance Review Board Membership to review the performance appraisal of a Presidential appointee, The Federal Inspector, Alaska Natural Gas Transportation System, who was formerly a SES career member and elected to retain SES benefits, except pay, under 5 U.S.C. 3392(c).

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: Jule Sugarman, Deputy Director, Office of Personnel Management, 1900 E St., N.W., Washington, D.C. 20415 (202–632–6106).

SUPPLEMENTARY INFORMATION: The following is a listing of Performance Review Board members proposed by the U.S. Office of Personnel Management:

Mr. Lloyd Miller, Deputy Managing Director, National Transportation Safety Board

Dr. Robert Fairman, Acting Assistant Secretary for Administration, Department of Transportation

Ms. June G. Brown, Inspector General, Department of Interior.

Office of Personnel Management.

Beverly M. Jones,

Issuance System Manager.

[FR Doc. 81–1753 Filed 1–15–81; 8:45 am]

BILLING CODE 6325–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–17434; File No. SR–Amex–80–33]

American Stock Exchange, Inc.; Proposed Rule Change

Pursuant to Section 19(b)(1) of the Securities Act of 1934 (the "Act"), 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94–29, 16 (June 4, 1975), notice is hereby given that on December 31, 1980 the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

The Exchange's Statement of Terms of Substance of the Proposed Rule Change

([Brackets] indicate material to be deleted and italics indicate material to be added.)

Article IV, Section 2(m)

Registered Address

(m) Every member [, member firm and member corporation] *and member organization* shall register with the Exchange an address and subsequent changes thereof where notices may be served. [The registered address of every member who personally transacts business upon the Exchange must be in its vicinity.[1]] Any notice mailed to a member or member organization at the last address registered at the Exchange shall be presumed to have been received by such member or member organization.

The Exchange's Statement of Purpose and Basis

The purpose and basis of the foregoing rule change is as follows: Article IV, Section 2(m) of the Exchange Constitution requires that every member and member organization register an address with the Exchange where notices may be served. The registered address of every member who personally transacts business on the Floor must be in the "vicinity of the Exchange". Notices mailed by the Exchange to a member's registered address are presumed to have been received by the member.

The local address requirement was originally intended to facilitate the expeditious clearance and settlement of transactions on the floor of the Exchange. However, the creation of modern clearance and settlement facilities such as the National Securities Clearing Corporation and the Depository Trust Company has eliminated the need for this requirement.

The proposed amendment is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(2) and 6(b)(5) of the Act in particular in that it would enhance the ability of qualified persons to become members of the Exchange and remove an impediment to and enhance the perfection of the mechanism of a free and open market and a national market system, by removing a geographical location requirement for members who wish to personally transact business on the floor of the Exchange. The proposed amendment is also consistent with Section 6(b)(5) in that it would foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, by making Exchange requirements consistent with the geographical location requirements for members of the National Securities Clearing Corporation.

Comments Received From Members, Participants or Others on Proposed Rule Change

No comments were solicited or received with respect to the proposed rule change.

Burden on Competition

The Amex has determined that no burden on competition will be imposed by the proposed amendment. On the

[1] This has been interpreted to encompass the New York metropolitan area.

contrary, elimination of the local registered address requirement for Floor members will enhance competition.

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submission should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and all written submissions will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number references in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

[FR Doc. 81-1501 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-17440; File No. SR-NASD-80-27]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. 94-29, 16 (June 4, 1975), notice is hereby given that on December 31, 1980, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

The NASD's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change amends the numerical designation of one of the Rules of Fair Practice of the National Association of Securities Dealers, Inc., changing Article III, Section 35 to Article III, Section 34.

The NASD's Stated Purpose of the Proposed Rule Change

The purpose of the proposed rule change is to change the numerical designation of Section 35 to Section 34 thereby maintaining the consecutive numbering system employed in the Rules of Fair Practice of the Association. The proposed rule change makes no other changes to the affected rule or any other Rules of Fair Practice of the Association. In connection with this filing, the Commission's attention is directed to File No. SR-NASD-77-8 containing all documentation relating to the filing of Article III, Section 35 as approved by the Commission in Securities Exchange Act Release No. 16967 (July 8, 1980).

The NASD's Statement of Basis Under the Act for Proposed Rule Change

Section 15A(b)(2) of the 1934 Act requires that the Association possess the capacity to carry out the purposes of that Act. Implicit in that requirement is authority for the Association to administer rules adopted by the Association and approved by the Commission. The proposed rule change is being made pursuant to that authority.

Comments Received From Members, Participants or Others on Proposed Rule Change

No comments were solicited or received regarding the proposed rule change.

The NASD's Statement on Burden on Competition

The Association believes that, because of the technical nature of the proposed rule change, no burden will be imposed on competition.

The foregoing rule change has become effective, pursuant to Section 19(b)(3) of the Securities Exchange Act of 1934. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file 6 copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street NW., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted within 21 days of the date of this publication.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

January 12, 1981.

[FR Doc. 81-1502 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

[Release 34-17441; File No. SR-NASD-80-28]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on January 5, 1981, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

Statement of the Terms of Substance of the Proposed Rule Change

Text of Proposed Rule Change

The following is the full text of a proposed amendment to Schedule D under Article XVI of the Association's By-Laws. (New language is italicized.)

Part XI of Schedule D of the Association's By-Laws is deleted in its entirety and replaced with the following:

XI—Publication and Dissemination of Quotations to the News Media

The NASDAQ Committee shall recommend lists of quotations of NASDAQ securities for dissemination by the news media. The criteria for such lists shall be determined by the NASDAQ Committee in light of the space available for publication and the information desired by the news media and the investing public. The criteria shall be based on the dollar value of securities traded except in the case of:

A. Convertible debt securities, which shall be based on the principal amount outstanding, and

B. Securities subject to a distribution, which shall be initially based on the size of the distribution.

The NASDAQ Committee may, under appropriate circumstances, grant exceptions to its established criteria if it determines that it is in the public interest to do so.

Purpose of Proposed Rule Change

The proposed rule change revises Part XI of Schedule D of the Association's By-Laws. The revision clearly states that the criteria for inclusion in the quotation lists constitute only recommendations to the media. The amendment also will permit revisions of the size or number of lists, as well as the precise criteria for determining eligibility for inclusion in any recommended list, which will become immediately effective under the provisions of Section 19(b)(3) of the Act.* At the same time, the proposed rule does clearly state the basis upon which these criteria will be applied. It distinguishes between equity and debt issues, and new and established issues. This will permit the Association to respond quickly to changing market conditions, media requirements or requests from issuers, the investing public, or the securities industry. Therefore, the Association believes the proposed rule change will permit it to administer its quotations list program in a more efficient and responsive fashion.

Basis Under the Act for the Proposed Rule Change

Section 15A(b)(11) provides that an association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that the rules of the association contain provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange, which may be distributed or published by any member or other persons associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations to prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing and publishing quotations.

Comments Received From Members, Participants or Others on the Proposed Rule Change

Comments regarding this proposed rule change were neither solicited nor received.

*The criteria will be submitted to the Commission in a separate filing.

Burden on Competition

Since this rule change only deals with recommendations of the content of the lists for dissemination by the news media, the Association does not anticipate any burden on competition.

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submission should file six (6) copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted on or before February 9, 1981.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

January 12, 1981.

[FR Doc. 81-1593 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-17431; File No. SR-NYSE-80-42]

Self-Regulatory Organization; Proposed Rule Change by New York Stock Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), notice is hereby given that on December 15, 1980 the above mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

The Exchange's Statement of the Terms of Substance of the Proposed Rule Change

The proposed amendments to Rule 460, if adopted, would formally adopt a provision of Rule 460 which the Securities and Exchange Commission (SEC or Commission) contends was never validly adopted by the Exchange's Board of Directors and (ii) to add to Rule 460 a provision that specialists and persons affiliated with specialists should avoid acquiring or owning more than 5 percent of a stock in which they or one of their affiliates is registered as specialists.

The Exchange's Statement of Basis and Purpose

The basis and purpose of the proposed amendment to Rule 460 are as follows:

The Supplementary material to Rule 460—i.e., .10 thereunder—provides that a specialist should not be in a control relationship with any specialty stock company and states that this applies to ownership of 10 percent or more of the stock of the company and entering into business transactions involving, for example, loans or the acceptance of finder's fees.

The purpose of the restriction is to prevent a potential conflict between the specialist's obligation to maintain a fair and orderly market and his acquisition of "insider" status. Such a conflict might make it difficult for the specialist to act solely in the interest of a fair and orderly market.

In a recent review of an Exchange disciplinary proceeding against a member for violations of various rules (including Rule 460.10) the SEC—while upholding the sanction imposed by the Exchange—set aside one of the Exchange's findings of a violation of Rule 460.10 on the grounds that "the record indicates that Subsection .10 was never validly adopted as a rule by the Exchange's Board of Directors".

While the Exchange disagrees with the SEC's contention that Rule 460.10 "was never validly adopted," in order to avoid future enforcement problems, the Exchange's Board has formally approved the provision and the Exchange is now asking the Commission to approve it pursuant to Rule 19b-4.

* * * * *

Also, in September 1978, the Board approved a rule change (Proposed Rule 98(b)), as included in File No. SR-NYSE-78-59 which was designed to codify and Exchange policy that a specialist and persons affiliated with a specialist should avoid acquiring or owning, either individually or as a group, more than 5

percent of the stock of a specialty company. In any case where 5 percent is exceeded, the Exchange could require that stock be liquidated.

The 5% policy is designed to supplement, and provide a buffer, to the absolute prohibition against owning more than 10% of the stock. It seems appropriate therefore that the 5% policy should be included in Rule 460.10.

At the same time, the Exchange is proposing a minor change to the language originally proposed in SR-NYSE-78-59 to make clear that the rule contains latitude to enable the 5% limit to be exceeded where circumstances warrant. And, the Exchange is also adding a reporting requirement in connection with the 5% policy.

* * * * *

With the proposed amendment to the supplementary material of Rule 460, as contained in Exhibit I, the Exchange also proposes to repeal subparagraph (c) of present Rule 98.10, which would be superseded by Rule 460.10, as proposed.

The Exchange's Basis Under the Act for Proposed Rule Change

The proposed rule changes are consistent with Section 6(b)(1) in that they would better enable the Exchange to enforce compliance by its members and persons associated with members with rules of the Exchange; specifically, Rule 460.10 and present Exchange policy which would be codified by the proposed amendment to this Rule.

Comments Received From Members, Paticipants or Others on Proposed Rule Changes

The Exchange has not solicited nor has it received any comments regarding the proposed rule changes.

Burden On Competition

The proposed rule changes will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule changes, or

(B) Institute proceedings to determine whether the proposed rule changes should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted on or before February 9, 1981.

For the Commission by the Division of Market Regulation pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

January 9, 1981.

[FR Doc. 81-1594 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-17439; File No. SR-PSE-80-26]

Self-Regulatory Organization; Proposed Rule Change by the Pacific Stock Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-29, 16 (June 4, 1975), on December 9, 1980, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

The Exchange's Statement of the Terms of Substance of the Proposed Rule Change

The Pacific Stock Exchange Incorporated ("PSE") proposes to amend Article XI and XIV of its Constitution to prohibit violations of Board policies, required to be filed with the Securities and Exchange Commission, and to assure due notice before summary suspension or expulsion of members or member organizations.

The Exchange's Statement of Basis and Purpose of the Proposed Rule Change

The purpose of the proposed change is to provide procedural due process in the summary suspension or expulsion of members or member organizations and to prohibit violations of Board policies required to be filed with the Securities and Exchange Commission.

The proposed changes to the PSE Constitution are consistent with Section 6(b) of the Act in general and further the objectives of Sections 6(b)(5), 6(b)(6) and 6(b)(7) of the Act, in particular, in that they are designed to promote just and equitable principles of trade to protect investors and the public interest and to provide for members and member organizations to be appropriately disciplined for violations of the Securities Exchange Act of 1934 and the rules, policies and procedures of the PSE.

Comments Received From Members, Participants, or Others on Proposed Rule Change

Comments have neither been solicited nor received from members on the proposed rule change.

The Exchange's Statement on Burden on Competition

The exchange believes the proposed rule change will impose no burden on competition.

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 L Street N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted on or before February 9, 1981.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

January 12, 1981.

George A. Fitzsimmons,

Secretary.

[FR Doc. 81-1595 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-17442; File No. SR-PHLX 80-29]

Self-Regulatory Organizations; Proposed Rule Change by Philadelphia Stock Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), as amended by Pub. L. No. 94-24, 16 (June 4, 1975), notice is hereby given that on January 2, 1981, the above-mentioned self-regulatory organization filed with the Securities and Exchange Commission a proposed rule change as follows:

The Exchange's Statement of the Terms of Substance of the Proposed Rule Change

The Philadelphia Stock Exchange ("PHLX"), pursuant to Rule 19b-4 of the Securities Exchange Act of 1934 ("Act") proposes to amend Rule 631 ("Connection with Non-Members"), as follows : (brackets indicate words to be deleted; italics indicate words to be added).

Rule 631. No member or member organization shall establish or maintain any private wire connection, private radio, television or wireless system, between his or its offices and the office of any non-member without (notification) *application* to *and approval by* the Committee.

Every such means of communication shall be registered with the Committee. Notice of the discontinuance of any such means of communication shall be promptly given to the Committee.

The Exchange's Basis and Purpose of Proposed Rule Change

The purpose of the proposed rule change is to clarify the intent of the Rule 631 by providing that formal application to and approval by the Committee is a prerequisite to the installation of any type of communication line between the offices of a member or member organization and that of a non-member. Approval of such installation is based on compliance with the rules and policies of the Exchange and the Act and the rules and regulations thereunder.

The proposed rule change would enhance the PHLX's capacity to comply and enforce compliance by its members and persons associated with its members with the Act, the rules and regulations thereunder and its own rules.

Comments were not solicited or received.

The PHLX has determined that the proposed amendment will not impose any burden on competition.

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the above-mentioned self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, Washington, D.C. 20549. Copies of the filing with respect to the foregoing and of all written submissions will be available for inspection and copying in the Public Reference Room, 1100 "L" Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number referenced in the caption above and should be submitted on or before February 9, 1981.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

George A. Fitzsimmons,

Secretary.

January 12, 1981.

[FR Doc. 81-1596 Filed 1-15-81; 8:45 am]

BILLING CODE 8010-01-M

VETERANS ADMINISTRATION

Station Committee on Educational Allowances; Meeting

Notice is hereby given pursuant to Section V, Review Procedure and Hearing Rules, Station Committee on Educational Allowances that on February 10, 1981, at 9:00 a.m., the Veterans Administration Regional Office, St. Petersburg, Florida, Station Committee on Educational Allowances shall, at the Federal Building, Room 621, 144 1st Avenue South, St. Petersburg, Florida, conduct a hearing to determine whether Veterans Administration benefits to all eligible persons enrolled in Lakeland college of Business and Fashion, Lakeland, Florida, should be discontinued, as provided in 38 CFR 21.4143, because a requirement of law is not being met or a provision of the law has been violated. All interested persons shall be permitted to attend, appear before, or file statements with the committee at that time and place.

Dated: January 9, 1981.

Carlos L. Rainwater,

Director.

[FR Doc. 81-1563 Filed 1-15-81; 8:45 am]

BILLING CODE 8320-01-M

Vocational Rehabilitation and Counseling; Policies and Procedures

AGENCY: Veterans Administration.

ACTION: Public notice and request for comment.

SUMMARY: The Veterans Administration is publishing for public notice and comment a summary of new provisions to be administered in the vocational rehabilitation and counseling program. This summary of the Veterans' Rehabilitation and Education Amendments of 1980 will acquaint veterans, educational institutions and the public at large with the anticipated changes in the vocational rehabilitation and counseling program.

DATE: Comments must be received on or before February 17, 1981.

ADDRESS: Send written comments to: Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue, N.W., Washington, D.C. 20420.

Comments will be available for inspection at the address shown above during normal business hours until February 27, 1981.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen L. Lemons, Assistant Director for Policy and Program Development, Vocational Rehabilitation and Counseling Service (282), Veterans Administration, 810 Vermont Avenue, NW., Washington, D.C. 20420 (202-389-2026).

SUPPLEMENTARY INFORMATION: This publication contains DVB Circular 28-80-3, Vocational Rehabilitation and Counseling Provisions of the Veterans' Rehabilitation and Education Amendments of 1980 (Pub. L. 96-466). This circular contains a summary of the Veterans Administration vocational rehabilitation program. This circular has been implemented and has been

distributed through normal channels to interested persons. Comments received will be used in developing VA Regulations and policies to implement Pub. L. 96–466.

ADDITIONAL COMMENT INFORMATION

Interested persons are invited to submit written comments, suggestions, or objections regarding this document to the Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue, NW., Washington, D.C. 20420. All written comments received will be available for public inspection at the above address only between the hours of 8 am and 4:30 pm, Monday through Friday (except holidays) until February 27, 1981. Any person visiting Veterans Administration Central Office in Washington, D.C. for the purpose of inspecting any such comments will be received by the Central Office Veterans Services Unit in room 132. Such visitors to a VA field station will be informed that the records are available for inspection only in Central Office and furnished the above address and room number.

Approved: January 7, 1981.

Max Cleland,

Administrator.

Vocational Rehabilitation and Counseling Provisions of the Veterans' Rehabilitation and Education Amendments of 1980 (Pub. L. 96–466); DVB Circular 28–80–3

November 7, 1980.

1. *Purpose.* This issue is to inform DVB field staff about changes to Chapter 31, title 38 U.S.C., resulting from the enactment of Pub. L. 96–466. While the focus is on the vocational rehabilitation provisions of the law, other aspects relevant to VR&C (Vocational Rehabilitation and Counseling) operations are also discussed.

2. *Background.* During FY 1978 the VA completed and submitted to the Congress a study of the VA vocational rehabilitation program as mandated by Pub. L. 95–202. The study included an analysis of the VA vocational rehabilitation program, a comparison of Chapter 31 provisions with the State/Federal program provisions, and recommendations for administrative and legislative changes needed to up-date and modernize the program. Subsequently, proposed legislation was introduced in both houses of Congress by request of the VA. After consideration of these and other proposals, Congress enacted Pub. L. 96–466, "Veterans' Rehabilitation and Education Amendments of 1980," which was signed into law on October 17, 1980. Title I of Pub. L. 96–466 updates and expands the VA vocational rehabilitation program. This complete revision of Chapter 31, the first since its inception in 1943, improves the vocational rehabilitation program and assures that service-connected disabled veterans will benefit from the latest concepts and methods developed in the field of rehabilitation. The VA has the authority to make the Chapter 31 program more responsive to the needs of service-disabled veterans, especially the more seriously disabled.

3. *Overview.* a. *Title I—Rehabilitation Amendments.* (1) *Purposes.* The purpose of the rehabilitation program is expanded to provide for all services and assistance necessary to enable service-disabled veterans to achieve maximum independence in daily living, and to the maximum extent feasible, to become employable and to obtain and maintain suitable employment. This statement of purpose significantly differs from the traditional view which limited vocational rehabilitation to restoration of employability through training, and the provisions of the new law clearly reflect this fundamental change in philosophy.

(2) *Eligibility and Entitlement.* Eligibility for and entitlement to services are organized around two basic concepts—employment handicap and serious employment handicap. Employment handicap must be shown in each case as part of the determination of basic entitlement. The basic period of eligibility has been extended from 9 to 12 years. Rehabilitation programs will not exceed 48 months, unless a longer period is warranted in the individual case. A finding of a serious employment handicap is a key factor in most provisions for extension of the period of eligibility beyond the basic 12-year period and for extension of the duration of a rehabilitation program beyond 48 months.

(3) *Extended Evaluation and Independent Living Services.* Those veterans for whom feasibility of vocational rehabilitation cannot be immediately determined will now enter extended evaluation programs and receive pretraining services. Such evaluation and services will be provided to determine if the veteran may attain a level necessary to either enter vocational rehabilitation training or a rehabilitation program having the objective of achieving maximum independence in daily living. For this last purpose, a special pilot program of limited scope and duration has been authorized to enable some of the most severely disabled veterans to undergo an intensive and innovative program of independent living services.

(4) *Individualized Planning.* Rehabilitation planning will now include not only those services needed to improve the veteran's ability to function in employment, but also in his or her family and community. An individual written rehabilitation plan, to be jointly developed by VA staff and the veteran, will be the means through which the goals of most rehabilitation programs are developed, and will delineate the means and time by which these goals will be achieved.

(5) *Allowances.* Enhanced financial provisions include an overall 17 percent increase in subsistence allowance, an increase in the revolving fund loan maximum, increased subsistence allowance for nominal pay or nonpay training, subsistence allowance during periods of extended evaluation, liberalization of post-rehabilitation payment and other considerations. Under a new option, Chapter 31 participants with remaining Chapter 34 entitlement may elect to receive the higher Chapter 34 educational allowance, in lieu of subsistence allowance and other training costs, while still being able to receive almost the full range of Chapter 31 services.

(6) *Employment Assistance.* To carry out the full purposes of the program, the scope of services and assistance has been broadened to include employment assistance as an integral part of the program for service-connected veterans who are or have been in vocational rehabilitation programs. In this way, veterans will be assisted to obtain and retain employment.

b. *Title III—Educational Assistance Program Adjustments.* While the basic provisions of this title are addressed in DVB Circular 22–80–39, VR&C staff should make note that effective October 1, 1980, mandatory counseling under Chapter 35 is repealed. Provisions for special restorative training, specialized vocational training and requested counseling are retained.

c. *Title IV—Post-Vietnam Era Veterans' Educational Assistance Program Adjustments.* Clarification of Chapter 32 is provided to indicate that effective October 1, 1980, individuals under this contributory program are eligible for counseling on request.

d. *Title V—Veterans' Employment Assistance Amendments.* This title addresses a variety of employment-related issues in title 38, U.S.C., Chapters 41, 42, and other chapters. The DVOP (Disabled Veterans Outreach Program) is continued and strengthened.

Specific priority groups of veterans are established; appointments of DVOP personnel are tied to State veteran population; and assignments of personnel are apportioned between local State employment offices and VA locations. These provisions, effective October 1, 1980, will assist the VR&C effort in fulfilling Chapter 31 training and employment initiatives. They will be discussed more fully in separate issues.

4. *Implementation.* Provisions effective October 1, 1980, or upon enactment are discussed in paragraph 5. These are for immediate implementation. During the period from enactment to March 31, 1981, all other provisions of Chapter 31, Title 38, U.S.C., will remain in effect. Provisions effective April 1, 1981, are discussed briefly in paragraph 6 and will be more fully developed in subsequent issues prior to the effective date.

5. *Provisions Effective October 1, 1980.* a. *Section 1508—Allowances.* This section deals with a variety of issues involving payment of subsistence allowance, including rate increases. The following provisions are for immediate implementation.

(1) *Subsistence Allowance.* Rates are increased 17 percent (see exhibit A). Hines DPC will adjust running IHL and NCD awards to show the new rates and will notify RO's (regional offices) of those cases in which RO input will be necessary. All new awards should use the new rates for periods of payment extending beyond October 1, 1980.

(2) *Nonpay Training.* On-job or work experience trainees in a Federal agency at nominal or no pay are eligible for subsistence allowance at the institutional rate, rather than OJT rate.

(a) All new entrance or reentrance awards for nonpay OJT trainees will be at institutional rates of subsistence allowance effective October 1, 1980. Both the authorization document (VA Form 22–1905, Authorization and Certification of Entrance or Reentrance Into Training and Certification of Trainee Status) and the award document (VA Form 22–1907a, Authorization of Subsistence Allowance) will be annotated in the "Remarks" section as follows: "Unpaid Federal work experience: in the receipt of institutional rates effective October 1, 1980."

(b) VR&C staff in each RO will immediately undertake a search to identify all Federal OJT or work experience cases with running awards paying the old OJT rate. VA Form 22–1905 will be prepared with the annotation in the "Remarks" section: "Adjust award for unpaid Federal work experience to pay insitutional rates effective October 1, 1980." Upon receipt of VA Form 22–1905, the adjudicator will prepare VA Form 22–1907a and annotate the "Remarks" section of the award form, "Unpaid Federal work experience: in receipt of institutional rates effective October 1, 1980." This project, including award preparation, should be completed no later than December 15, 1980.

(3) *Post-Rehabilitation Pay.* Post-rehabilitation pay will now extend for a 2-month period following the training program and will no longer be paid as a lump sum. Payment will be at the full-time rate for the type of training pursued, regardless of the rate of pursuit during the final enrollment period. When preparing VA Form 22–1905 for a post-rehabilitation payment, the VR&C staff member must clearly specify in the "Remarks" section that a 2-month post-rehabilitation payment should be made. Upon receipt of VA Form 22–1905, the adjudicator will prepare a reentrance award on VA Form 22–1907a to extend the veteran's last award period for exactly 2 months. In the "Remarks" section, the adjudicator will annotate: "Award represents 2-month post-rehabilitation payment." The lump-sum payment indicator in item 4 of the VA Form 22–1907a will no longer be used.

(4) *Incarcerated Chapter 31 Trainees.* Specific provisions of the law now restrict and, in some instances, prohibit payment of chapter 31 subsistence allowance to veterans incarcerated in a Federal, State or local penal institution, halfway house, or participating in a work release program. Immediately, VR&C staff will identify such trainees and suspend all running awards. Detailed instructions for processing these cases will be forthcoming in an appendix to this circular.

b. *Section 1512—Revolving Fund Loans.* The existing RFL (Revolving Fund Loan) benefit is modified to increase the maximum loan which may be authorized from $200 to an amount twice the monthly subsistence rate for a single veteran in institutional training (currently $564).

(1) *Loan Approval and Documentation.* Prudent management is a critical aspect of administering this substantially increased benefit. Strict assurance must be given that loans in any amount are authorized only for meritorious reasons. The VRS must make careful evaluation of the need for the loan and the amount of the loan. The VRS will document findings of the evaluation on VA Form 22–1905d, Special Report of Training.

(2) *Loan Amount and Repayment.* The loan amount shall not exceed that needed to assure the veteran's continuation in the program. Repayment should be made as quickly as possible, taking into account the effect of such terms upon the veteran's ability to continue in his or her rehabilitation program. The VRS must review with the veteran whether there is a need for other kinds of assistance, for example, assistance in budgeting.

(3) *Special Considerations.*

(a) New loan requests will not be approved until any outstanding RFL has been fully recouped.

(b) Any loan in excess of $200 will require Central Office approval. Such requests accompanied by complete documentation justifying the request will be forwarded to the Field Director (28).

(4) *Other Provisions.* Chapter 34 educational assistance allowance has been added to sources for RFL repayment. Also, note that chapter 31 trainees who elect to receive a chapter 34 educational assistance allowance are not eligible for the RFL benefit.

c. *Section 1516—Promotion of Employment and Training.* Employment as the goal of rehabilitation is emphasized by targeting veterans who are or have been participating under the chapter 31 program, any veterans with service-connected disabilities and Vietnam era veterans targeted under Title 38, U.S.C., Chapter 42, "Employment and Training of Disabled and Vietnam Era Veterans." Both direct outreach efforts to employers by VA staff and coordination with other Agencies are mandated in order to develop and establish employment and on-the-job training opportunities. Stations should include this in all VA/DOL (Department of Labor) local agreements. This section also authorizes payment to an employer/trainer which does not exceed the direct expenses incurred in providing on-job training or employment. Regulations to implement the provisions for payment to an employer/trainer will be developed in consultation with the DOL and distributed. No local action on payment to an employer/trainer will be taken until these regulations are received.

d. *Section 1518—Personnel Training, Development and Qualifications.* Ongoing professional training for VR&C personnel is authorized to enable them to provide such services under Chapter 31 in accordance with the most advanced knowledge, methods, and techniques available. VA may contract with consultants and/or agencies to provide training and staff development. Training in areas of mutual concern will be coordinated by the VA with DOL and RSA (Rehabilitation Services Administration). The Administrator will

establish qualifications for professional staff providing evaluation and rehabilitiation services under Chapter 31.

e. *Section 1519—Rehabilitation Research and Special Projects.* Research and special projects are authorized to advance psychological, educational, employment social, vocational, industrial and economic aspects of rehabilitation of veterans. Authorization is given to actively engage in and/or support studies, projects and research and to make grants and enter into contracts with educational institutions and other agencies. Cooperation with RSA, DOL, and NIHR (National Institute for Handicapped Research) in areas of mutual concern is also mandated. All such efforts will be undertaken only with prior Central Office approval.

f. *Section 1520—Pilot Program of Independent Living Services and Assistance.* Beginning in FY 1982 and continuing through FY 1985, a pilot program of independent living services will be provided for severely handicapped service-connected veterans for whom a vocational goal is not reasonably feasible, including veterans in long-term care facilities of the VA. Each year up to 500 veterans may enter this program, which will be implemented in the various geographic regions of the United States. An individualized written plan will be prepared in the same manner as for a veteran in a vocational rehabilitation program. Services necessary to carry out the rehabilitation plan will be provided through contractual arrangements made with outside agencies and organizations or through DM&S (Department of Medicine and Surgery). A report on these programs including accomplishments, cost effectiveness and legislative recommendations must be submitted to the Congress by September 30, 1984. Although the effective date for funding the pilot program is October 1, 1981, planning for program establishment will begin on October 1, 1980, the effective date of the program.

g. *Section 1521—Veterans' Advisory Committee on Rehabilitation.* This section requires the Administrator to appoint an advisory committee with whom to consult on a regular basis concerning the chapter 31 program. The members will include veterans with service-connected disabilities and persons distinguished in the general and special fields of rehabilitation. Ex officio members will represent DVB, DM&S, RSA, NIHR, and DOL. An annual report will be submitted to the Administrator and forwarded to Congress along with other relevant reports and recommendations.

h. *Other Provisions.* (1) *Section 1780—Payment of Educational Allowance or Subsistence Allowance.* Chapter 36, Title 38, U.S.C., is amended to provide that, in addition to weekends and legal holidays, up to 5 days in a 12-month period will not be counted as absences if the institution is not in session on those days due to teacher conferences or teacher training sessions, and regularly scheduled classes would otherwise have been held.

(2) *Section 1781—Limitations on Educational Assistance.* Chapter 36, Title 38, U.S.C., is amended to include subsistence allowance granted under chapter 31 as an additional category of prohibited payments to certain servicepersons and Government employees receiving training. This codifies existing VA Regulation 10022.

(3) *Section 1795—Limitation on Period of Assistance Under Two or More Programs.* Chapter 36, Title 38, U.S.C., is amended to include Chapter 32 entitlement used in consideration of the 48-month limitation under two or more programs. Although assistance received under Chapter 31 must be included with assistance under other chapters in considering the aggregate 48-month limitation on total training, additional months of benefits may be allowed under Chapter 31 when determined necessary to accomplish rehabilitation in the individual case.

i. *Title V—Disabled Veterans Outreach Program.* (1) *Scope and Eligibility.* The DVOP is placed on a continuing basis at a level of approximately 2,000 specialists nationwide. DVOP personnel are assigned only those duties directly related to meeting the employment needs of eligible veterans. Priority is as follows: Disabled Vietnam veterans who are participating in or have completed a program of vocational rehabilitation under Chapter 31, other disabled veterans, and eligible veterans included under employment emphasis under Chapter 42.

(2) *Location of DVOP Personnel.* No more than three-fourths of DVOP staff stationed in each State will be stationed at local State employment offices. DVOP staff not stationed at local employment offices shall be stationed at VA centers providing a program of readjustment counseling, veterans assistance offices, or other sites as may be determined appropriate for coordinated development of job training and employment opportunities.

6. *Provisions Effective April 1, 1981.* The majority of the provisions which complete the updating and expansion of the vocational rehabilitation program are effective April 1, 1981. Instructions governing the implementation of these provisions will be issued prior to that effective date.

a. *Section 1500—Purpose.* The purposes of chapter 31 are modified to include all services and assistance needed to "enable veterans with service-connected disabilities to achieve maximum independence in daily living and, to the maximum extent feasible, to become employable and to obtain and maintain suitable employment."

b. *Section 1501—Definitions.* Terms defined include employment handicap, serious employment handicap, rehabilitation program, vocational goal, vocational rehabilitation program, independence in daily living, program of independent living services and assistance, and rehabilitated to the point of employability.

c. *Section 1502—Basic Entitlements.* The conditions of basic entitlement for rehabilitation include the existence of a service-connected compensable disability incurred or aggravated during or after World War II. In addition, a serviceperson with a service-connected disability which will probably be classified as compensable who is hospitalized pending discharge is eligible. Need for rehabilitation because of an "employment handicap" must be established in all cases.

d. *Section 1503—Periods of Eligibility.* The basic 9-year period currently in effect is extended to 12 years. Conditions for extension beyond the basic period of eligibility have been liberalized for veterans with "serious employment handicaps," for veterans prevented from participating in a vocational rehabilitation program due to medical factors or due to eligibility not being established, and for severely disabled veterans participating in the pilot program of independent living services and assistance.

e. *Section 1504—Scope of Services and Assistance.* The statutory range of services and assistance available is expanded while retaining all services and assistance furnished under current law and regulations. New provisions include authorization for extended evaluation and reevaluations to determine potential for rehabilitation, to determine whether a serious employment handicap exists, to provide a basis for planning a rehabilitation program, and/or to improve the rehabilitation potential of a veteran. Placement and followup services and assistance necessary to establish severely disabled veterans in self-employment are also added. Many services and types of assistance

currently available through VA regulations are now included specifically in the law.

f. *Section 1505—Duration of Rehabilitation Programs.* The current basic 48-month period for rehabilitation services is continued, and conditions for an extension beyond 48 months have been liberalized to accomplish the purposes of vocational rehabilitation for a veteran with a serious employment handicap. A period for extended evaluation of up to 12 months is authorized if the VA is unable to determine whether the veteran can achieve a vocational goal, with additional 6-month extensions of that period possible for an individual veteran. A severely disabled veteran found to be in need of a program of independent living services and assistance may be authorized a rehabilitation program for a basic period of 24 months, but the period may be extended if it is determined that a longer period is necessary and likely to result in a substantial increase in the level of independent living.

g. *Section 1506—Initial and Extended Evaluations.* An initial evaluation will be made in all cases to establish eligibility for the Chapter 31 program, to determine whether a serious employment handicap exists, and to determine whether the achievement of a vocational goal is feasible. That initial evaluation shall consist of counseling and diagnostic or other services. In addition, an extended evaluation will be authorized when it cannot be determined whether the achievement of a vocational goal is reasonably feasible. Each veteran with a serious employment handicap will be provided counseling and an individually written vocational rehabilitation plan, whether pursuing a vocational goal or an independent living goal.

h. *Section 1507—Individualized Vocational Rehabilitation Plan.* The minimum essential elements of an individualized written plan of vocational rehabilitation are prescribed in the law for the veteran with a serious employment handicap. The plan developed jointly with the veteran will be reviewed annually and redeveloped if appropriate. A veteran not in agreement with an original or redeveloped plan may submit his or her objections and request a VA review of the plan. Time limits are established for the review process.

i. *Section 1508—Allowances.* (1) *Election of Chapter 34 Allowance.* A Chapter 31 eligible veteran may elect to use remaining Chapter 34 entitlement and receive educational assistance in lieu of subsistence allowance, but remain eligible for certain other Chapter 31 services. Despite election of Chapter 34 allowance, the veteran is a vocational rehabilitation trainee. The St. Paul DPC statistical system will be updated to reflect Chapter 34 award periods which form part of a program of vocational rehabilitation. System modifications to simultaneously reduce remaining Chapters 31 and 34 entitlement for such veterans will be developed.

(2) *Extended Evaluation.* Subsistence allowance is now authorized for veterans participating in extended evaluation.

(3) *Specialized Rehabilitation Facility.* For a veteran pursuing a rehabilitation program in residence at a special rehabilitation facility, authority has been granted to make payment to the facility for room and board in lieu of subsistence allowance. If such a payment to the facility is made, however, the veteran will receive the portion of the subsistence allowance for dependents for a full-time institutional program.

(4) *Temporary Hospitalization Rating.* If a hospitalized trainee is temporarily receiving compensation at the 100 percent level as a result of hospitalization in excess of 21 days, the sum of the combined Chapter 31 subsistence allowance and compensation benefits is limited either to the sum of the subsistence allowance due and the pre-hospitalization compensation rate received, or the 100 percent disability compensation rate, whichever is the greater.

j. *Section 1509—Entitlement to Independent Living Services and Assistance.* If it is determined that the achievement of a vocational goal is not reasonably feasible, a veteran is entitled to be considered as one of those selected to be in the pilot program of independent living services and assistance to achieve maximum independence in daily living.

k. *Section 1510—Leaves of Absence.* The authority to grant leaves of absence to veterans pursuing vocational rehabilitation training is continued. The current 30-day limit during a 12-month period is eliminated.

l. *Section 1511—Regulations to Promote Satisfactory Conduct and Cooperation.* Authority to establish regulations to promote satisfactory conduct and cooperation is continued. In addition, the VA must determine that all reasonable counseling efforts have been made prior to discontinuing services and assistance for failure to maintain satisfactory conduct and cooperation. The specific penalties formerly stated in the law are removed.

m. *Section 1513—Vocational Rehabilitation for Hospitalized Members of the Armed Forces and Veterans.* The VA will continue to afford vocational rehabilitation services and assistance to persons hospitalized pending discharge from military service. However, payment of subsistence allowance is prohibited. In addition, Chapter 31 services, including subsistence, subject to limitations in subparagraph i(4) above, may be provided to a veteran receiving care in a VA facility or other medical or hospital facility.

n. *Section 1514—Vocational Rehabilitation Outside the United States.* Regulations will be prescribed to allow provision of a vocational rehabilitation program outside the United States, if it is determined to be necessary for purposes of rehabilitation, and if it is in the best interests of the veteran and the Government. Some provisions of the previous law are eliminated and more flexibility is delegated to the VA than was formerly permitted.

o. *Section 1515—Rehabilitation Resources.* The VA will utilize facilities, staff and resources of the VA and those of other Agencies or public and private facilities or individuals for purposes of providing training, work experience, or other rehabilitation services, through contract agreement or other arrangements. A veteran pursuing on-job training or work experience in a Federal agency continues to be considered an employee of the United States under Chapter 81, title 5, U.S.C., but not for purposes of laws administered by the OPM (Office of Personnel Management). Medical care is to be provided in VA facilities or as otherwise set forth under Chapter 17, title 38, U.S.C.

p. *Section 1517—Employment Assistance.* The VA is now required to provide employment assistance to veterans with a service-connected disability who have participated under Chapter 31 or in a similar program under the Rehabilitation Act of 1973. The services to veterans include direct placement, assistance of DVOP staff, use of DOL's employment services, the services of OPM, placement facilities provided under the Rehabilitation Act of 1973 or other public or nonprofit organizations. The VA must assure that the veteran rehabilitated for self-employment in a small business is provided the full benefit of the resources of the SBA (Small Business Administration), including veterans preference. If a veteran trained under a State program is unable to obtain

necessary equipment, initial stocks and supplies through that program or from other sources, the VA may provide them.

7. *Inservice Training.* This legislation represents the most important change in the program since it was established in 1943, and it is essential that provisions are communicated to the regional office Director and to VR&C and other staffs who will be carrying out the program. Each person in the VR&C Division will be furnished a copy of this issue. A staff meeting will be scheduled and the circular's provisions will be reviewed in-depth. Staffs in other Divisions, including Adjudication and Veterans Services, will be invited to participate in these meetings or, if desired, the VR&C Officer will brief staffs of those Divisions as part of their own inservice training programs.

Dorothy L. Starbuck,

Chief Benefits Director.

RATES FOR SUBSISTENCE ALLOWANCE UNDER CHAPTER 31 OF TITLE 38, U.S.C.

Type of program	No deps.	One dep.	Two deps.	Add'l amt. for each dep. over two
Institutional training:[1]				
Full time	$282	$349	$411	$30
Three-quarter time	212	262	308	23
Half time	141	175	206	15
Farm-cooperative, apprenticeship or other on-job training:				
Full time	246	297	343	22
Extended evaluation:				
Full time	282	349	411	30
Independent living training:				
Full time	282	349	411	30
Three-quarter time	212	262	308	23
Half time	141	175	206	15

[1] Institutional training includes IHL, NCD, and nonpay or minimal pay OJT or work experience in a Federal agency.

[FR Doc. 81-1839 Filed 1-15-81; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 46, No. 11
Friday, January 16, 1981

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).

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1

FEDERAL COMMUNICATIONS COMMISSION.

The Federal Communications Commission voted to hold a Closed Meeting on Thursday, January 29, 1981, following the Regular Open Meeting, at 1919 M Street, N. W., Washington, D.C. on the following subject:

Internal Personnel Matters

Additional information concerning this meeting may be obtained from Edward Dooley, FCC Public Affairs Office, telephone number (202) 254-7674.

The Public Notices for the Regular Open and Closed Meeting, for the above dates will be issued at a later date.

Issued: January 13, 1981.

Federal Communication Commission.

William J. Tricarico,

Secretary.

[S-0070-81 Filed 1-14-81; 10:08 am]

BILLING CODE 6712-01-M

2

FEDERAL COMMUNICATIONS COMMISSION.

During the Open Meeting scheduled for January 8, 1981, the Commission discussed the consideration of *FOIA Request for Employee Disqualification Statements filed pursuant to Section 19.735-204(e)(3) of the Rules.*

The prompt and orderly conduct of Commission business did not permit prior notice of this additional item.

Additional information concerning this matter may be obtained from Edward Dooley, FCC Public Affairs Office, telephone number (202) 254-7674.

Issued: January 13, 1981.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[S-0069-81 Filed 1-14-81; 10:07 am]

BILLING CODE 6712-01-M

3

FEDERAL COMMUNICATIONS COMMISSION.

The Federal Communications Commission held an Emergency Closed Meeting on Thursday, January 8, 1981 following the Regular Open Meeting, at 1919 M Street, N.W., Washington, D.C. on the following subject:

Internal Personnel Matters

The prompt and orderly conduct of Commission business did not permit announcement of this matter prior to the meeting.

Additional information concerning this meeting may be obtained from Edward Dooley, FCC Public Affairs Office, telephone number (202) 254-7674-

Issued: January 13, 1981.

Federal Communications Commission

William J. Tricarico,

Secretary.

[S-0068-81 Filed 1-14-81; 10:08 am]

BILLING CODE 6712-01-M

4

FEDERAL RESERVE SYSTEM.

BOARD OF GOVERNORS

TIME AND DATE: 10 A.M., WEDNESDAY, JANUARY 21, 1981.

PLACE: Board Building, C Street entrance between 20th and 21st Streets NW., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Proposal to revise Regulation C (Home Mortgage Disclosure) to implement amendments to the Home Mortgage Disclosure Act.

2. Request for an interpretation of Regulation Y (Bank Holding Companies and Change in Bank Control) that placement of equity interests in real estate projects is within the regulation's permissible lending activities.

3. Any items carried forward from a previously announced meeting.

Note.—This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board (202) 452-3204.

Dated: January 13, 1981.

James McAfee,

Assistant Secretary of the Board.

[S-0066-81 Filed 1-13-81; 4:30 pm]

BILLING CODE 6210-01-M

5

FEDERAL RESERVE SYSTEM.

Board of Governors

TIME AND DATE: Approximately 11:00 a.m., Wednesday, January 21, 1981, following a recess at the conclusion of the open meeting.

PLACE: 20th Street and Constitution Avenue, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board.

Dated: January 13, 1981.

James McAfee,

Assistant Secretary of the Board.

[S-0067-81 Filed 1-14-81; 8:46 am]

BILLING CODE 6210-01-M

6

MERIT SYSTEMS PROTECTION BOARD.

AGENCY HOLDING THE MEETING: Merit Systems Protection Board.

TIME AND DATE: 11 a.m., Monday, January 19, 1981.

PLACE: Hearing Room, Merit Systems Protection Board, 1717 H Street NW., Washington, D.C. 20419.

STATUS: Open.

MATTERS TO BE CONSIDERED: Oral Arguments on Motion for Subpoena in *Acting Special Counsel v. Paul D. Sullivan,* Docket No. HQ120600018.

CONTACT PERSON FOR MORE INFORMATION: Kathy W. Semone, Director, Division of Records and Inquiries, Office of the Secretary, 202-632-4525.

January 14, 1981.

Merit Systems Protection Board.

Ruth T. Prokop,

Chairwoman.

[S-0071-81 Filed 1-14-81; 2:32 pm]

BILLING CODE 7400-02-M

7

NUCLEAR REGULATORY COMMISSION.

DATE: Monday, January 19 and Wednesday, January 21, 1981.

PLACE: Commissioners' Conference Room, 1717 H Street NW., Washington, D.C.

STATUS: Open/closed.

MATTERS TO BE CONSIDERED: *Monday, January 19:*

2:30 p.m.

1. Briefing on Spent Fuel Storage (approximately 1 hour, public meeting)
2. Briefing on a Significant Enforcement Action (approximately 1 hour, closed)

Wednesday, January 21:

10:00 a.m.

1. Meeting with AIF on Future of Nuclear Power Regulation (approximately 1½ hours, public meeting)

2:00 p.m.

1. Briefing on Adequacy of Sequoyah Ignition Systems (approximately 1½ hours, public meeting)

AUTOMATIC TELEPHONE ANSWERING SERVICE FOR SCHEDULE UPDATE: (202) 634-1498. Those planning to attend a meeting should reverify the status on the day of the meeting.

CONTACT PERSON FOR MORE INFORMATION: Walter Magee (202) 634-1410.

Walter Magee,

Office of the Secretary.

[S-0072-81 Filed 1-14-81; 3:55 pm]

BILLING CODE 7590-01-M

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AGENCY PUBLICATION ON ASSIGNED DAYS OF THE WEEK

The following agencies have agreed to publish all documents on two assigned days of the week (Monday/Thursday or Tuesday/Friday).

This is a voluntary program. (See OFR NOTICE 41 FR 32914, August 6, 1976.)

Monday	Tuesday	Wednesday	Thursday	Friday
DOT/SECRETARY	USDA/ASCS		DOT/SECRETARY	USDA/ASCS
DOT/COAST GUARD	USDA/FNS		DOT/COAST GUARD	USDA/FNS
DOT/FAA	USDA/FSQS		DOT/FAA	USDA/FSQS
DOT/FHWA	USDA/REA		DOT/FHWA	USDA/REA
DOT/FRA	MSPB/OPM		DOT/FRA	MSPB/OPM
DOT/NHTSA	LABOR		DOT/NHTSA	LABOR
DOT/RSPA	HHS/FDA		DOT/RSPA	HHS/FDA
DOT/SLSDC			DOT/SLSDC	
DOT/UMTA			DOT/UMTA	
CSA			CSA	

Documents normally scheduled for publication on a day that will be a Federal holiday will be published the next work day following the holiday.
Comments on this program are still invited.
Comments should be submitted to the Day-of-the-Week Program Coordinator, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408

NOTE: As of September 2, 1980, documents from the Animal and Plant Health Inspection Service, Department of Agriculture, will no longer be assigned to the Tuesday/Friday publication schedule.

REMINDERS

The "reminders" below identify documents that appeared in issues of the **Federal Register** 15 days or more ago. Inclusion or exclusion from this list has no legal significance.

Rules Going Into Effect Today

AGRICULTURE DEPARTMENT

Agricultural Marketing Service—

82909 12-17-80 / Tomatoes grown in South Texas; production research and marketing promotion, committee membership, penalties for late assessment payments, etc.

ENVIRONMENTAL PROTECTION AGENCY

47832 7-16-80 / Identification and listing of hazardous waste; additions

INTERIOR DEPARTMENT

Indian Affairs Bureau—

82921 12-17-80 / Descendancy rolls of certain Delaware Indians; preparation, certification, and approval

82918 12-17-80 / Membership roll of Delaware Indians of Western Oklahoma; preparation, certification, and approval

Surface Mining Reclamation and Enforcement Office—

83166 12-17-80 / Steep-slope mining; interim variances from requirement to return mined land to original contour

JUSTICE DEPARTMENT

Immigration and Naturalization Service—

83195 12-18-80 / Preliminary examination on petitions for naturalization; designation of examiners

List of Public Laws

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

A complete listing for the second session of the 96th Congress is published in the Reader Aid section of the issue of January 7, 1981

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4034	**Part II—Labor/OSHA:** **Electrical Standards**
4078	**Part III—Labor/OSHA:** **Occupational Noise Exposure; Hearing Conservation Amendment**
4182	**Part IV—Labor/OSHA:** **Marine Terminals**
4254	**Part V—Labor/ESA/W&H:** **Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions**
4270	**Part VI—Architectural and Transportation Barriers Compliance Board:** **Minimum Guidelines and Requirements for Accessible Design**
4306	**Part VII—Labor/ESA/W&H:** **Procedures for Predetermination of Wage Rates**
4320	**Part VIII—Labor/ESA/W&H:** **Service Contract Act; Labor Standards for Federal Service Contracts**

federal register

Friday
January 16, 1981

Part II

Department of Labor

Occupational Safety and Health Administration

Electrical Standards

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Electrical Standards

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Final standard

SUMMARY: In this final standard, the Occupational Safety and Health Administration (OSHA) establishes "Design Safety Standards for Electrical Systems." This standard revises Subpart S of 29 CFR Part 1910 and is intended to simplify and update the former standard. OSHA has determined that electrical hazards in the workplace pose a significant risk of injury or death to employees, and that these regulations which draw heavily on the experience of the National Electrical Code are reasonably necessary to provide protection from these hazards. The final rule places relevant requirements of the National Electrical Code (NEC) into the text of the regulations, making it unnecessary for employers to refer to the NEC to determine their obligations and unnecessary for OSHA to continue to incorporate the NEC by reference. Additionally, the final rule clarifies certain provisions which were misunderstood by certain interested parties.

EFFECTIVE DATE: This revision of 29 CFR Part 1910, Subpart S becomes effective on April 16, 1981.

FOR FURTHER INFORMATION CONTACT: For information on the standard contact: Mr. Jerry Leonard or Mr. David Wallis; Office of Electrical and Electronic Engineering Safety Standards; OSHA; Rm. N3510; 200 Constitution Avenue, NW., Washington, D.C. 20210. (202–523–7207).

For information on compliance contact: Mr. Peter Wasko; Federal Compliance and State Programs; Division of Safety Programming; OSHA; Rm. N3106; 200 Constitution Avenue, NW, Washington, D.C. 20210. (202–523–8124).

For additional copies of this regulation contact: OSHA Office of Publications; U.S. Department of Labor; Room S–1212; Washington, D.C. 20210. (202–523–8677).

SUPPLEMENTARY INFORMATION:

I. Background

(1) Safety Problems of Electric Shock

It is well known that the human body will conduct electricity, and that if direct body contact is made with an electrically energized part while a similar contact is made simultaneously with another conductive surface which is maintained at a different electrical potential, a current will flow, entering the body at one contact point, traversing the body and then exiting at the other contact point, usually the ground. Each year many workers suffer pain, injuries and death from such electric shocks and throughout the past decade the National Center for Health Statistics has reported approximately 1000 accidental electrocutions annually in the United States with about a fourth being industry and farm related.

The effects that electric shock will have on an individual will depend upon the type of circuit, its voltage, resistance, amperage, pathway through the body and the duration of the contact. For example, electric shocks produced by alternating currents of powerline frequency (normally 60 Hertz) passing through the body from hand to foot for an average adult worker for one second can cause various effects on the body. Such effects range from a condition of being barely perceptible at 1 milliampere to involuntary muscular control from 9 to 25 milliamperes. The passage of still higher currents can produce ventricular fibrillation of the heart (cessation of rhythmic pumping action) from 75 milliamperes to 4 amperes and finally immediate cardiac arrest at over 4 amperes. Nearly instantaneous fatalities from electric shock can result from either direct paralysis of the respiratory system (at 20 milliamperes or more), failure of the heart to pump due to ventricular fibrillation (at 75 milliamperes or more), or immediate and complete heart stoppage (at 4 amperes or more). Even if the shocking current does not pass through vital organs or nerve centers, severe injuries such as deep internal burns can still occur. In some cases, injuries caused by electric shock can be a contributory cause of delayed fatalities.

Burns suffered in electrical accidents are of great concern. These burns may be of three basic types: electrical burns, arc burns and thermal contact burns. Electrical burns are the result of the electric current flowing in the tissues and may be either skin deep or may affect deeper layers (muscles, bones, etc.) or both. Tissue damage is caused by the heat generated from the current flow; if the energy delivered by the electrical shock is high, the body cannot dissipate the heat and the tissue is burned. Typically, such electrical burns are slow to heal. Arc burns, on the other hand are the result of high temperatures in close proximity to the body produced by electric arcs or by explosions. These burns are similar to burns and blisters produced by any high temperature source. Finally, thermal contact burns are those normally experienced from the skin contacting hot surfaces of overheated electrical conductors, conduits, or other energized equipment. All types of burns may be produced simultaneously.

Electrical shock currents, even at levels as low as 3 milliamperes, can also cause injuries of an indirect or secondary nature in which involuntary muscular reaction from the electrical shock can cause bruises, bone fractures and even death resulting from collisions or falls.

(2) Hazards Associated With Electricity

Most electrical systems use the earth to establish an electrical voltage reference system with respect to ground. This is done by connecting a portion of the circuit to ground. Since these systems use conductors which have voltages to ground, a shock hazard exists for persons who are in electrical contact with the earth and are exposed to the conductors. If a person comes in contact with an ungrounded conductor while he is in contact with the ground, he becomes part of the circuit and current passes through his body.

In addition to the shock hazard, electricity poses other hazards to employees. For example, when a short circuit occurs or current flow is interrupted, hazards are created from the resultant arcs. If high current is involved, these arcs can cause injury or can start a fire. Fires can also be created by overheating equipment or by conductors carrying too much current. Extremely high-energy arcs can damage equipment causing fragmented metal to fly in all directions. In atmospheres which contain explosive gases or vapors or combustible dusts, even low-energy arcs can cause violent explosions.

(3) Nature of Electrical Accidents

Electrical accidents, when initially studied, often appear to be caused by circumstances which are varied and peculiar to the particular incidents involved. However, further consideration usually reveals the underlying cause to be a combination of three possible factors. These consist of work involving unsafe equipment and installations, workplaces made unsafe

by the environment, and unsafe work performance.

(a) *Basic Contributory Factors.* Some unsafe electrical equipment and installations can be identified, for example, by the presence of faulty insulation, improper grounding, loose connections, defective parts, ground faults in equipment or unguarded live parts. The environment can also be a contributory factor to electrical accidents in a number of ways. Some unsafe environments affecting electrical safety would be, for example, atmospheres containing flammable vapors, liquids or gases, areas containing corrosive atmospheres, and wet and damp locations. Finally, some typical unsafe acts can be recognized as, for example, the failure to deenergize electrical equipment when it is being repaired or inspected, the intentional use of obviously defective and unsafe tools, or the use of tools or equipment too close to energized parts. For purposes of convenience, the first and second accident causing situations are sometimes combined and simply referred to as unsafe conditions. Thus, electrical accidents can be generally considered as being caused by unsafe conditions, unsafe acts, or, what is usually the case, combinations of the two. It should also be noted that inadequate maintenance can cause equipment or installations, which were originally considered safe, to deteriorate, resulting in an unsafe condition.

(b) *Typical Accidents from Unsafe Conditions.* Of the two primary causative factors influencing electrical accidents (i.e., unsafe conditions and unsafe acts) the ones involving unsafe conditions are more directly addressed by the provisions of the National Electrical Code. Since OSHA's revised electrical safety standards are initially directed towards minimizing unsafe conditions, a few typical examples of related accidents are given to illustrate these situations.

(i) California—1972. A nurseryman was electrocuted when he touched a conduit riser in a greenhouse. The greenhouse was wired with overhead open wiring on insulators. A short section of conduit was installed to enclose conductors feeding down to a time clock. A fulty splice in the clock energized the clock frame and conduit.

(ii) Florida—1973. A lead foreman and set-up man for a plastics corporation was installing a new injection molding machine. The employee was electrocuted when he touched a temperature control unit used in conjunction with the molding machine. The temperature control unit had been improperly wired.

(iii) Hawaii—1971. An installer of refrigerators for the retail-wholesale trade was electrocuted using an electric drill. While working on top of a prefabricated walk-in unit, the worker was in continuous ground contact when an electrical fault developed in the drill plug and the accident occurred.

(iv) California—1971. A worker engaged in electroplating was electrocuted when he touched an ungrounded 9 volt D.C. bus on an electroplating tank while in contact with the grounded tank. It was found that a 120-volt terminal on an A.C. timer coil was installed within ⅛ inch of the D.C. bus. A fault path had developed and a leakage current of 70 milliamperes at 120 volts was measured between the electroplating bus and the grounded tank.

(v) Florida—1974. A slag house operator for a slag plant was on a catwalk repairing and replacing guards on belt drives and pulleys. He had gained access to the catwalk by using a wooden ladder, but he descended from the catwalk by means of a power pole erected at the end of the platform. A 440-volt line with deteriorated insulation was anchored to the pole, and metal spikes for climbing and descending had been driven into the pole. As the victim stepped on the first cleat, he grabbed his chest, lost his grip and fell ten feet to the concrete floor. Electric shock was found to be the cause of death.

(vi) Idaho—1974. A lubricator working in the molding department of a plastics manufacturing plant was electrocuted. The accident resulted when the worker contacted a nozzle adaptor which was energized on the molding machine.

(vii) California—1966. An electrician received flash burns on his face when he closed a large 480-volt switch after replacing a blown fuse. The ceramic insulating block holding one end of the fuse was defective and apparently had originally caused the fuse to blow.

(viii) California—1972. A worker was electrocuted when he grasped the metal nozzle of a steam cleaning hose which was metal reinforced. The 120-volt switch in the motor terminal enclosure of the steam cleaning unit had vibrated loose and a terminal was contacting the metal enclosure. The unit was supplied by a three conductor cord; however, the ground prong on the attachment plug had been broken off. Another worker received a severe shock when he attempted to help the first worker.

(ix) Massachusetts—1970. A repairman working in an automobile body shop was electrocuted when the portable grinder which he was using developed a short circuit.

(x) Florida—1973. A carpenter's helper for a boat manufacturing firm was electrocuted when he plugged the router cord into an extension cord outlet box. Examination of the extension cord outlet box showed the ungrounded conductor had separated from its terminal and was touching the metal box.

While these electrical accident descriptions are typical, it must be emphasized that they only represent accidents within the category of unsafe conditions.

(c) Accident References. Although descriptive accident data was reviewed from a variety of sources, the typical representative data presented herein was taken from the following:

(i) Electrical Work Injuries in California, Department of Industrial Relations, Division of Industrial Safety State of California, 455 Golden Gate Avenue, San Francisco, CA 94101.

(ii) "Live and Learn" Publication, Department of Labor and Employment Security, Industrial Safety, State of Florida 1321 Executive Center Drive, East Tallahassee, Florida 32301.

(iii) Publication of Occupational-Related Electrocutions, Department of Labor and Industrial Relations, State of Hawaii, 825 Mililani Street, Honolulu, Hawaii 96813.

(iv) Industrial Accidents, Industrial Commission, State of Idaho, 317 Main Street, Boise, Idaho 83707.

(v) Department of Labor and Industries, Division of Industrial Safety, Commonwealth of Massachusetts, Leverett Saltonstall Bldg., Government Center, 100 Cambridge Street, Boston, MA 02202.

(4) Protective Measures and Present Regulations

There are various general ways of protecting employees from the hazards of electric shock, including insulation and guarding of live parts. Insulation provides an electrical barrier to the flow of current. To be effective, the insulation must be appropriate for the voltage, and the insulating material should be clean and dry. Guarding prevents the employee from coming too close to energized parts. It can be in the form of a physical barricade, or it can be provided by installing the live parts out of reach from the working surface. (This technique is known as "guarding by location.")

Grounding is another method of protecting employees from electric shock; however, it is normally a secondary protective measure. To keep guards or enclosures at a common

potential with earth, they are connected, by means of a grounding conductor, to ground. If a live part accidentally comes in contact with a grounded enclosure, any current flow is directed back to earth and the circuit protective devices (e.g., fuses and circuit breakers) can interrupt the circuit.

When employees are working with electrical equipment, they must use safe work practices. Such safety-related employee work practices include keeping a prescribed distance from exposed energized lines, avoiding the use of electrical equipment while wet, and locking-out and tagging equipment which is deenergized for maintenance.

Another important safety practice involves the use of electrical protective devices, such as rubber gloves and rubber mats for purposes of insulation against live parts, or hot sticks for purposes of both insulation and actuation of energized parts from a distance. However, to assure the protection of the employee, this equipment must be properly manufactured and maintained. With this equipment, regular maintenance becomes an important consideration in order to keep the equipment from deteriorating into an unsafe condition.

The regulations formerly contained in Subpart S of Part 1910 adopted the 1971 National Electrical Code by reference and set forth definitions with respect to some of the terms used by the NEC. The National Electrical Code is the most widely used code to safeguard people and property from the potential hazards associated with electricity. This code had its beginning prior to the turn of the century when the use of electricity was just starting. At this time, the code serves as the cornerstone of electrical safety in the United States. As such, it provides the basis for electrical safety regulations in over 2000 municipalities throughout all 50 States. Thirty-seven States and the District of Columbia have adopted it as their electrical safety law, and it is enforced by over 12,000 governmental electrical inspectors. This national system provides important assistance to OSHA in its mission to afford electrical safety in the workplace.

(5) Reasons for Proposed Revision

As noted earlier, electricity has long been recognized as a serious workplace hazard, exposing employees to such dangers as electric shock, electrocution, fires, and explosions. Indeed, the long history of the National Electrical Code attests to this fact. Since 1896, the NEC has represented the continuing efforts of experts in electrical safety to deal with these recognized hazards and to provide for safety in all electrical installations, including workplaces. OSHA has determined that electrical hazards in the workplace pose a significant risk of injury or death to employees, and that these regulations which draw heavily on the experience of the NEC, are reasonably necessary to provide protection from these hazards.

OSHA recognizes the important role that the NEC has played over the years in defining basic requirements for safety in electrical installations. The revision of Subpart S being promulgated by this document will maintain the protection presently afforded to employees by the 1971 NEC, as incorporated by reference in the present standards. While carrying forward those provisions which are considered necessary for employee safety, OSHA is providing greater flexibility for compliance with these provisions to the extent that employee safety warrants. OSHA has determined, therefore, that this revision of Subpart S contains requirements derived from the NEC which are reasonably necessary to protect employees from electrical hazards in the workplace.

Since the National Electrical Code (NEC) NFPA 70-1971 was adopted as a national consensus standard under Section 6(a) of the Act, three revisions of the NEC have been issued, the most recent being the 1981 edition. Because of the continual process by the National Fire Protection Association (NFPA) of updating the Code every three years, any specific edition which OSHA might adopt would likely be outdated within a few years. In addition, since the rulemaking process can become somewhat lengthy, a complete revision of the OSHA electrical safety standards every three years to keep pace with the NEC changes is not practical. To remedy this problem, OSHA's electrical safety standards should accommodate changes in technology without the need for constant revision and, where possible, be written in performance terms in order to allow alternative installation methods if they provide comparable safety to the employee.

Another difficulty with the current incorporation of the entire NEC by reference is that the NEC contains many details which are not directly related to employee safety. In addition, a further objective of OSHA in revising the standard is to obtain an improved standard which will provide employee safety and will be easier to use and understand, but will still be comprehensive enough to cover all significant electrical hazards.

Finally, since the NEC is an electrical installation design document, it does not generally contain explicit requirements for electricial safety-related work practices, electrical equipment maintenance or safety requirements for special equipment. OSHA, therefore, will also consider the development of regulations in these areas in subsequent rulemaking proceedings.

(6) General Approach

In view of the existing constraints and limitations imposed by the continued use of the 1971 version of the NEC, discussed previously, OSHA concluded that a revised standard tailored to fulfill OSHA's responsibilities and which would extract suitable portions from the NEC and other safety standards applicable to electrical safety was needed.

At the same time, and after discussions with OSHA staff, the NFPA decided that the NEC Correlating Committee, which periodically evaluates the NEC, should examine the feasibility of developing a document to be used as a basis for providing electrical safety in the workplace. In 1976, NFPA established the "70E Committee" to prepare a consensus standard for possible use by OSHA in developing a proposal for subsequent rulemaking. The 70E Committee visualized a standard consisting of four major parts:

Part I—Installation Safety Requirements,

Part II— Safety Related Work Practices,

Part III—Safety-Related Maintenance Requirements,

Part IV—Safety Requirements for Special Equipment.

The name given to this new document became NFPA 70E, "Electrical Safety Requirements for Employee Workplaces."

(7) Criteria for Part I of NFPA 70E

The NFPA 70E Committee derived Part I from the 1978 NEC; however, unlike the NEC, this Part was not intended to be applied as a design, installation, modification, or construction standard for an electrical installation or system. Rather, its content was excerpted from the NEC in order to apply only to electrical utilization systems which were part of the workplace. Although Part I of NFPA 70E is compatible with corresponding provisions of the NEC, it is not intended to be used, nor can it be used, in lieu of the NEC for the design and initial installation of utilization systems and equipment.

Although all of the requirements of the NEC may be related to electrical hazards, for practical purposes the Committee included in Part I of NFPA 70E provisions which are most directly associated with employee safety. In

determining which provisions should be included in Part I, the following guidelines were used by the 70E Committee.

(a) The provisions should give protection to the employee from electrical hazards.

(b) The provisions should be excerpted from the NEC in a manner that will maintain their intent as they apply to employee safety.

(c) The provisions should be selected and written in a manner that will reduce the need for frequent revision and avoid technological obsolescence.

(d) Compliance with the provisions should be determinable by means of an inspection during the normal state of employee occupancy without requiring shutdown of the electrical installation or damage to the building or finish.

(e) The provisions should not be encumbered with unnecessary details.

(f) The provisions should be written so as to enhance their understanding by the employer and employee.

(g) The provisions must not add any requirements not found in the NEC, nor may the intent of the NEC be changed even if the wording is changed.

(8) Source of 70E

The 1978 edition of the NEC was used as a source document for NFPA 70E, instead of the 1971 edition. Part I of 70E reflects a considerable improvement over the present OSHA standards incorporated in Subpart S. Generally, this improvement may be considered as being one achieved more from the elimination of requirements inappropriate to OSHA's needs rather than from the addition of new requirements. Typical examples of this method of simplification in the preparation of Part I of 70E relate to NEC chapters 3, 4, 6, 7, and 9, as discussed below. Although 70E does contain some additional requirements not contained in the 1971 NEC (as in chapters 6 and 7 of the 1978 NEC), such new provisions are relatively few in number.

Major deletions and additions, typical of those made in the preparation of 70E, are given in the following paragraphs:

(a) *Principal Deletions.* Chapters 3 and 4 of the 1971 and 1978 NEC deal with wiring methods and materials (Chapter 3) and equipment for general use (Chapter 4). Tables containing various specialized technical information have been deleted in 70E.

Typical topics of these chapters included insulation characteristics, allowable ampacities, electrical box sizes, flexible cord and motor full load currents. This type of information was deleted because it deals with items not directly related to the electrical hazard. For example, the composition of insulation on a conductor was deleted; however, the actual requirement that the conductor be insulated and that the insulation be approved for its intended purpose was retained. These changes result in a standard which is more performance oriented.

Chapter 6 of the 1971 and 1978 NEC describes special equipment requirements. Requirements from this chapter dealing with electrically operated organs and the installation of equipment and wiring used for sound-recording and reproduction have been deleted in 70E because electrical safety for employees is not directly affected by these items. Any hazard to the employee related to this type of equipment would most likely arise in the supply system which will still be covered.

Chapter 7 of the 1971 and 1978 NEC deals with special conditions. All requirements from this chapter involving stand-by power generation systems permanently installed, other than emergency systems, have been deleted. In these situations, primary electrical hazards to the worker are minimal since the effects of power outage are generally limited to product or process damage.

Chapter 9 of the 1971 and 1978 NEC provides a collection of tables containing technical data, together with a number of sample computations. This entire chapter is not included in 70E because it is solely and instructive guide for the design of certain electrical systems.

(b) *Principal Additions.* Chapter 6 of the 1971 NEC which deals with special equipment, has been supplemented by additional requirements found in the 1978 edition of the NEC. These additions are included in 70E. Specifically, new provisions for workplaces containing electrically driven or controlled irrigation machines and workplaces using electrolytic cells have been added. In the first type of workplace, the related electrical hazard is associated with the presence of an electrically driven or controlled machine, with one or more motors, used primarily to transport and distribute water for agricultural purposes. In the second type of workplace, equipment is installed consisting of electrolytic cells used for the purpose of refining or producing various materials. Such an installation contains electrical hazards because the employee's work is normally performed on or in the vicinity of exposed energized surfaces of the electrolytic cell lines and their attachments. As a consequence, special electrical safety requirements are needed and hence such provisions are included in 70E.

Chapter 7 of the 1971 NEC covers special conditions. An addition contained in the 1978 NEC involves fire protective signaling systems. Inasmuch as the installation of wiring and equipment of fire protective signaling systems, operating at 600 volts or less, has a definite effect on workplace safety, the new provisions have been included in 70E.

II. History of Regulation

The need for an uncomplicated and readily understandable standard, sufficiently general to minimize the need for changes, appeared to be satisfied by Part I of the NFPA 70E recommendations. OSHA carefully reviewed the work product of the 70E Committee and determined that its use as a source document for OSHA's design safety standard for electical utilization systems and equipment was appropriate and offered certain advantages in achieving a more simplified standard. OSHA prepared a notice of proposed rulemaking which contained proposed amendments of the electrical safety standards in Subpart S of 29 CFR Part 1910. The proposal was published in the **Federal Register** (44 FR 55274) on September 25, 1979. On November 20, 1979, OSHA published a notice correcting the proposal and extending the comment period (44 FR 66621).

The proposal represented an attempt to develop a comprehensive standard which would protect employees from recognized electrical hazards in the workplace. This was accomplished by examining the existing standards, the 1975 and 1978 edition of the NEC. The proposal streamlined the existing standard, which incorporated by reference the whole 1971 NEC, by deleting portions of the NEC which were not directly related to employee safety. OSHA's proposed revisions provided more flexibility, allowing employers alternative methods of compliance by phrasing the standard in terms of performance instead of specification.

The notice of proposed rulemaking invited interested persons to submit written comments on the proposed standard, to participate in a public meeting (which was held on November 8, 1979), and to file objections and requests for a public hearing. The original date for the close of the comment period was set for November 30, 1979, but was subsequently extended, at the request of commenters, to December 31, 1979 (44 FR 66621). Over 190 written comments were received, including several requests for a hearing which identified eight major issues:

1. Whether the proposal should be more performance oriented or, on the other hand, should provide greater specification.

2. Whether the scope of the standard is clear with respect to its coverage of public utilities.

3. Whether the proposal would change the existing "grandfathering" and "retroactive" provisions.

4. Whether the marking and approval requirements in proposed §§ 1910.303(a), 1910.303(e), and 1910.307(b)(4) deviate from the existing regulations and whether they relate to employee safety.

5. Whether the impedance and ampacity requirements of National Electrical Code (NEC) Section 250–51 should be included in the standard.

6. Whether the prohibition of the use of structural metal frames of buildings as the equipment grounding conductor (1978 NEC 250–58(a)) should be included in the standard.

7. Whether the definitions for Class II locations and their associated explanatory notes should be changed.

8. Whether installations of electrolytic cells should be covered by the guarding provisons of proposed § 1910.303.

In response to these hearing requests, OSHA published a notice of public hearing, listing these issues (45 FR 10375). The informal rulemaking hearing was convened by Judge Harmon Maxson on May 6, 1980, pursuant to section 6(b)(3) of the Act (29 U.S.C. 655(b)(3)) and 29 CFR Part 1911. The hearing lasted through May 8, 1980, and included testimony from over 50 witnesses. Judge Maxson established a post-hearing period for the submission of additional comments and briefs extending through July 8, 1980.

The entire record, including 73 exhibits, 5 addenda, and 490 transcript pages, was certified by Judge Maxson on August 27, 1980, in accordance with 29 CFR 1911.17. Copies of materials in the record, as well as an index of the record, may be obtained from the OSHA Docket Office, Room S6212, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210

This final standard is based on a full consideration of the entire record of this proceeding including materials discussed or relied on in the proposal, the record of the informal hearing, and all written comments and exhibits received.

III. Issues

The evidence submitted into the record is summarized and evaluated in the following discussions of each issue. The numbers in brackets refer to specific references in the May 6, 7, and 8, 1980, hearing exhibits (Ex.) and hearing transcript page numbers (Tr.).

1. *Whether the proposal should be more performance oriented or, on the other hand, should provide greater specification.*

Most of the language of the proposed standards was taken directly from the National Electrical Code. This was done to maintain continuity with the existing regulations, which incorporated the entire 1971 NEC by reference. Where the NEC language was rewritten emphasis was given to performance oriented terms. As stated by one witness, the criteria used by the NFPA 70E Committee in developing the base document was: "Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performace desired" (Tr. 394). However, some commenters felt that the proposal was still too specific and suggested that the entire standard be more general. One commenter stated:

> Most accidents do not result from lack of or conformance to specification, but are performance failures, such as human and/or environmental failures. Another deficiency of specification standards is that the inflexibility of specification standards leads to specification-type citations which frequently fail to correct accident causes. * * * So long as a standard is specification oriented, it is sterile and freezes in place the state of technology and scientific applications to the industry (Ex. 44).

In a later submission, the same commenter stated, "The standards should allow the employer the use of reasoned judgment in the application of innovative methods, new technology and cost-saving practices so long as worker safety is not jeopardized" (Ex. 61). This commenter had earlier submitted an annotated copy of the proposal with suggested changes for all paragraphs which they felt were too specific (Ex. 2). Another comment contained a suggested revision of the entire standard which would reduce it to two pages of very general terms and stated, "Performance orientation allows for rapid technological improvements, alternative methods of accomplishing employee safety and a reduction of nuisance citations" (Ex. 12). In addition, a witness stated, "When specifications are detailed to this degree, they place a burden on OHSA compliance officers to become unnecessarily proficient in the technical language and application of the National Electrical Code and the proposed regulations" (Tr. 417–418).

In contrast to testimony supporting more general standards, one witness stated, "The most obvious and serious defect is the emphasis on writing the standard in general terms * * * The [Review] Commission and the circuit courts have ruled, in some instances, that standards written in general terms are vague and unenforceable" (Tr. 227).

A certain balance is required in order to make the standard both flexible and at the same time enforceable. OSHA has tried to make the standard as performance oriented as possible. However, it is impossible to express the standard in only performance terms without providing some specifications for employers and compliance officers. The final rule as adopted, therefore, is essentially a performance standard, with specifications included where necessary.

2. *Whether the scope of the standard is clear with respect to its coverage of public utilities.*

The scope of OHSA's former standard was stated in § 1910.308(c). The so-called "utility exemption" was contained in paragraph (c)(2)(v) and was identical to 1971 NEC Section 90–2(b)(5). In the proposal, OHSA continued the "exemption" in § 1910.302(e)(2)(v), which read the same as the earlier version:

> (2) *Not covered.* * * *
>
> (v) Installations under the exclusive control of electric utilities for the purpose of communication or metering; or for the generation, control, transformation, transmission, and distribution of electric energy, located in buildings used exclusively by the utilities for such purposes or located outdoors on property owned or leased by the utility, or on public highways, streets, roads, etc., or outdoors by established rights on priviate property.

OHSA's interpretation of this regulation, as stated at the public hearing, has been that "this provision excludes the *installations* of electric utilities used for such purposes as the generation, control, transformation, transmission and distribution of electric energy. Other codes and standards such as ANSI C–2, National Electrical Safety Code, address the installation design requirements for these facilities. Therefore, the NEC does not address these areas of electric design" (Tr. 25, emphasis added).

As stated by witnesses at the hearing, the scope provision of the standard does not grant exemptions (Tr. 68, 259, 426). Instead, the "utility exemption", as it is referred to, is simply a statement of installations which were never intended to be within the scope of the NEC, or of this standard. In other words the standard, like the NEC, does not contain provisions which are appropriate for dealing with utility installations either for the generation, control, transformation, transmission, and

distribution of electric energy, or for the purpose of communication or metering.

However, other utility installations not of the type noted above are covered. A proposal was submitted to the 1981 code writing panels to clarify the intent of the scope paragraphs. As noted by some witnesses (Tr. 261, 427), this proposal was accepted and a revised fine print note was added to the proposed 1981 NEC, reading as follows:

> It is the intent of this section that this Code covers all premises' wiring or wiring other than utility owned metering equipment, on the load side of the service point of buildings, structures, or any other premises not owned or leased by the utility. Also, it is the intent that this Code cover installations in buildings used by the utility for purposes other than listed in (b–5) above, such as office buildings, warehouses, garages, machine shops, recreational buildings which are not an integral part of a generating plant, substation, or control center.

The language of § 1910.302(a)(2)(v) provides that portions of a utility installation which are not integral parts of a generating plant, substation, or control center are covered by the standard.

The position that all aspects of public utilities operation should be covered by the proposed regulations was raised by two commenters. The first commenter expressed the concern that a large number of workers would not be protected by an electrical standard if the public utility industry were exempted from this standard. He cited a Bureau of Labor Statistics News Release which stated that six of every 10 fatalities from contact with electric current occurred to workers in the construction, transportation and public utilites industries (Ex. 25). However, most of those fatalities were in the construction industry; and, since the causes of those fatalities occurring in the transportation and public utilities industries were not broken down, it is not clear how many may have been caused by conditions covered in the regulations of this Subpart. Expressing the same concern, the other commenter stated, "To excluse the utility industry from Subpart S (electrical) of the Occupational Safety and Health Act is to deny fair and equal safety coverage to the largest number of workers exposed to these hazards on a daily basis." In support of his objection, this witness described several electrical accidents of which he had personal knowledge (Ex. 26). However, it must be noted that the causes of these accidents were related to construction and maintenance of power transmission and distribution lines and equipment; the electrical standards of Part 1910 do not apply to construction activities. (Regulations for the construction of power transmission and distribution lines are contained in OHSA's construction standards (29 CFR Part 1926). Regulations on the maintenance and design of these lines and equipment will be considered in future rulemakings.)

The question of whether other industries should have the same exemption as public utilities in areas where they are performing the same operations was raised by steel industry representatives (Ex. 61). As they noted, the National Electrical Safety Code (ANSI C-2) contains regulations covering the generation, control, transformation, transmission and distribution of electric energy. ANSI C-2 does specifically say in its scope that it is applicable to the systems and equipment operated by utilities, or similar systems and equipment of an industrial establishment or complex under the control of qualified persons. While questioning a witness representing the Edison Electric Institute, a steel industry representative noted that while the NEC and OSHA's Subpart S cover industrial substations, the ANSI C-2 Code says that it, too, covers industrial equipment, thus producing a conflict or overlap (Tr. 350).

The NEC and OSHA's Subpart S do contain provisions which are appropriate for most industrial substations. Such facilities are included in the scope of this standard, because they vary widely in the power and voltage involved and in the type of equipment that is used. While some industrial facilities may only include utility type equipment and operate similarly to a utility, this is not the general case. As a rule utilities operate at much higher voltages and with specially trained employees. In the situations where the industrial operation may be the same as that of an electric utility, there would not be an overlap since ANSI C-2 contains the provisions which would apply and neither the NEC nor OSHA's Subpart S contain provisions which would be applicable. However, since provisions are included in these standards which are appropriate for most industrial substations, these installations have been included in the scope of the final rule.

3. *Whether the proposal would change the existing "grandfathering" and "retroactive" provisions.*

a. *Terminology.*

The term "retroactive" has been used during this rulemaking to refer to provisions which were required by former § 1910.309(a) (and by proposed § 1910.302(b)(1)) to be implemented without regard to when the electrical installation was made. OSHA recognizes that this is an unorthodox use of the term "retroactive," since these provisions do not involve retroactivity in the true sense of the word. The so-called "retroactive" provisions of § 1910.309(a) required certain previously installed equipment to be updated as of the standard's effective date to meet a list of requirements from the 1971 NEC. In that sense, its application to existing installations was no different than that of the other national consensus standards which OSHA adopted under section 6(a) of the Act. In other words, employers who had not voluntarily met these standards before OSHA adopted them were now required to bring their facilities into compliance.

In this preamble, OSHA will refer to the requirements of § 1910.309(a) and proposed § 1910.302(b) as the "retroactive" provisions of Subpart S, in order to avoid further confusion, even though the term is not accurate.

Similarly, § 1910.309(b) (and proposed § 1910.302(b)(2)) which apply the entire electrical standard to installations made after March 15, 1972, are referred to as the "grandfathering" provisions, because they did not require that installations made before March 15, 1972, comply with the entire 1971 NEC (or as stated in § 1910.302(b)(2), comply with all of Subpart S).

b. *Background of the former § 1910.309*

OSHA's former General Industry Electrical Safety Standard included §§ 1910.309 (a) and (b), which read as follows:

> (a) The requirements contained in the following articles and sections of the National Electrical Code, NFPA 70–1971; ANSI C1–1971 (Rev. of C1–1968) shall apply to all electrical installations and utilization equipment: [4 articles and 74 provisions of the 1971 NEC were listed].
>
> (b) Every new electrical installations and all new utilization equipment installed after March 15, 1972, and every replacement, modification, or repair or rehabilitation, after March 15, 1972, of any part of any electrical installation or utilization equipment installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the provisions of the 1971 National Electrical Code, NFPA 70–1971; ANSI C1–1971 (Rev. of C1–1968).

Under these provisions, the 4 articles and 74 provisions of the 1971 NEC, as listed in § 1910.309(a), applied to all electrical installations and utilization equipment, including those installed before the rule was published. If these installations and equipment did not comply with the listed provisions, they were required to be brought into compliance. Paragraph 1910.309(b), then, provided that equipment and

installations made after March 15, 1972, were subject to the entire 1971 NEC.

To the extent that § 1910.302(b) of the proposal was developed directly from these provisions, OSHA believed that it was clear that no new requirements were proposed for installations and equipment installed prior to March 15, 1972. In fact, the list of provisions in proposed § 1910.302(b)(1) was shortened, and the listed provisions were simplified significantly from those in § 1910.309(a).

However, as the rulemaking on Subpart S progressed, it became evident that there was considerable confusion over proposed § 1910.302(b)(1) and its antecedent, § 1910.309(a). Some parties contended that proposed § 1910.302(b)(1) actually added new "retroactive" requirements not found in § 1910.309(a). Others indicated that they did not understand either the proposed or the existing "retroactive" provisions. In this regard, OSHA believes that it will be helpful at this point to discuss the development of § 1910.309 as it has appeared in Subpart S since 1972.

On May 29, 1971, OSHA published, under Section 6(a) of the Act, its first package of national consensus and established Federal standards in 29 CFR Part 1910 (36 FR 10466). Various amendments were made less than three months later, on August 13–14, 1971, (36 FR 15101, 15438). Included in the initial package of standards was Subpart S of Part 1910, entitled "Electrical." Certain substantive provisions from the 1968 NEC were published nearly verbatim in Subpart S as § 1910.308 and §§ 1910.310–1910.328. The August 13, 1971 amendments provided that these sections became effective on August 27, 1971 (36 FR 15101). The remaining provisions of the 1968 NEC were incorporated by reference in § 1910.309, and employers were given an additional 5½ months, until February 15, 1972, to adjust to and come into compliance with these requirements.

However, before the expiration of the two year period established by section 6(a) of the Act for the adoption of national consensus standards as OSHA standards, the NFPA issued its 1971 edition of the NEC. The 1971 NEC thus became the latest edition of the national consensus standards for electrical safety. OSHA reviewed its existing standards and determined that there were potential conflicts between the two consensus standards, namely, the 1968 NEC and 1971 NEC. Under section 6(a) of the Act, the Assistant Secretary eliminated such conflicts by promulgating the standard which assured the greatest protection for employees.

OSHA determined that original §§ 1910.310–1910.328, as originally promulgated, were necessary elements of employee safety in existing installations, and that their coverage should be continued for all electrical installations, regardless of when made. It was also determined that for future installations and modifications of existing installations, the entire 1971 NEC should be applicable.

For existing installations, then, OSHA adopted only the Articles and Sections of the 1971 NEC which, in their 1968 versions, had been the sources for original §§ 1910.310–1910.328 (37 FR 3431, February 16, 1972). Where there was conflict between the 1968 provisions and the 1971 provisions, section 6(a) of the Act required the adoption of the version which "assures the greatest protection of the safety or health of the affected employees." (29 USC 655(a).) The Assistant Secretary selected the 1971 versions as being more protective than those of 1968. (This determination was also congruent with the NFPA's own determination, as stated in a new provision of the 1971 NEC, Section 90–1, that the 1971 Code contained "requirements considered necessary for safety.")

OSHA did not then publish sections 1910.308 and 1910.310–1910.328, taken from the 1971 Code, to replace those sections originally taken from the 1968 Code. Instead of publishing the text of these NEC articles and sections verbatim within Subpart S, OSHA chose to list them and incorporate them by reference in paragraph (a) of § 1910.309 and apply them to all electrical installations. Paragraph (b), on the other hand, incorporated the entire 1971 NEC by reference for application only to installations, modifications, repairs, and renovations made after March 15, 1972 (37 FR 3431, Feb. 16, 1972).

The format and content of § 1910.309, as promulgated in February 1972 has remained unchanged since then, except for the revision of a requirement from the 1971 NEC relating to ground-fault protection on construction sites.

It is clear from this discussion that OSHA's actions in applying only certain provisions of the 1971 NEC to existing installations were well within the authority of the Assistant Secretary under section 6(a) of the Act. Indeed, the promulgation of former § 1910.309 did not constitute the fullest possible exercise of section 6(a) authority, which could have resulted in the entire 1971 NEC being applied to all electrical installations. The Assistant Secretary acted to resolve the conflict between consensus standards in a manner which did not compromise the good faith efforts of employers to comply with the electrical standards as originally promulgated.

c. *Background of proposed § 1910.302(b)*

OSHA proposed to retain most of the requirements of former § 1910.309 in proposed § 1910.302(b). The proposed provision retained the dichotomy between old and new installations as contained in § 1910.309, as follows:

(b) *Extent of application.* (1) The requirements contained in the sections listed below shall apply to all electrical installations and utilization equipment regardless of when they were designed or installed: [28 sections of proposed Subpart S were listed, containing 46 provisions].

(2) Every new electric utilization system and all new utilization equipment installed after March 15, 1972, and every replacement, modification, repair, or rehabilitation, after March 15, 1972, of any part of any electric utilization system or utilization equipment installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the provisions of §§ 1910.302 through 1910.308 of this subpart.

The requirements listed in proposed § 1910.302(b)(1) were all based on the 1971 NEC Articles and Sections contained in the former § 1910.309(a) list. Some of the requirements in the old list were proposed to be deleted (e.g., NEC Section 422–17). Others were written in more performance-oriented terms (e.g., NEC Articles 500, 501, 502, and 503), allowing alternative methods of compliance to those specified in the 1971 NEC. (These changes are noted in detail in section IV of this preamble.) Thus, the proposal provided much greater flexibility for the employer than did the former regulation.

The "retroactive" provisions in proposed § 1910.302(b)(1) related to such critical areas as grounding, guarding live parts, use of flexible cords, overcurrent protection, hazardous locations, identification of equipment and disconnecting means, and inspection of equipment. In evaluating the need for these requirements, OSHA reviewed 1971 and 1972 electrical accident data from the State of California. From this data, OSHA concluded that 70 percent of the electrical accidents which were attributable to unsafe conditions involved hazards addressed by the "retroactive" requirements.

Most of the comments and testimony introduced on the issue of the "retroactive" provisions were submitted by representatives of a single industry, involving feed and grain production (Tr. 168–169, 250–251, 264–269, 420; Ex. 19, 21, 28, 31, 32, 39, 54). Some argued that OSHA's former regulation was not recognized by industry as applying "retroactively" and that OSHA

compliance officers were interpreting it inconsistently (Ex. 31, 44).

However, the record clearly indicates that the "retroactive" provisions of § 1910.309(a) have been uniformly applied by OSHA to installations made prior to March 15, 1972. This fact is indicated by the evidence of citations submitted into the record (Ex. 55G). In addition, testimony of representatives from organizations such as the American Petroleum Institute, Underwriters Laboratories, Inc., and the National Fire Protection Association shows that industry in general has been well aware of the "retroactive" provisions of § 1910.309(a) during the nearly nine years since their original promulgation (Tr. 307, 324, 408–409).

Furthermore, the Occupational Safety and Health Review Commission, in *Delaware and Hudson Railway* (1980 OSHD ¶ 24,422), has ruled definitively that the "retroactive" provisions of § 1910.309(a) do apply to equipment installed before March 15, 1972. As the Commission noted:

> Respondent submits that section 1910.309(b) limits the application of section 1910.309(a) to equipment installed after March 15, 1972.
>
> Sections 1910.309 (a) and (b) must be read together. Section 1910.309(a) incorporates by reference certain specified sections of the NEC as occupational safety and health standards and provides that they "shall apply to *all* electrical installations. . . ." (emphasis added). Section 1910.309(a) contains no clause excluding previously installed equipment from its coverage. Section 1910.309(b), on the other hand, goes further than section 1910.309(a)'s incorporation of only specific sections of the NEC, and requires compliance with the entire electrical code. The terms of section 1910.309(b), however, limit its application to equipment installed, replaced, repaired, or rehabilitated after March 15, 1972. Because Respondent was cited for a failure to comply with an NEC provision specifically incorporated in section 1910.309(a), the date of installation of Respondent's equipment is irrelevant. (1980 OSHD ¶ 24,422, at p. 29787).

Several commenters argued that even if § 1910.309(a) by its terms applies to installations made prior to March 15, 1972, the NEC was not intended by its drafters to be applied "retroactively" in this way, but was only intended to be used prospectively, as an installation standard (Ex. 31, 32, 54, 69). These commenters argued that there was no evidence in the record that any other State or governmental agency had adopted the NEC "retroactively."

The 1971 NEC was totally silent on the question of its application to existing facilities. Had the drafters intended to limit its application to new installations, they could easily have included a statement to that effect in the scope provisions (Section 90–2) of the Code. (In fact, the NEC Code Making Panel which is responsible for the scope and introduction to the NEC rejected a proposal for the 1975 NEC which would have provided an exemption for existing installations. See pp. 1–3, *Preprint of the Proposed Amendments for the 1974 National Electrical Code*, Part II (NFPA, 1973).) Moreover, the 1971 NEC clearly indicated an intention to leave all such questions of application and enforcement to the enforcing authority. For example, section 90–7 provided:

> This Code is intended to be suitable for mandatory application by governmental bodies exercising legal jurisdiction over electrical installations. . . . The administrative authority supervising such enforcement of the Code will have the responsibility for making interpretations of the rules, for deciding upon the approval of equipment and materials, and for granting the special permission contemplated in a number of the rules.

In addition, section 90–1(b) of the 1971 NEC did not distinguish between safety in existing installations and safety in new installations:

> This code contains provisions considered necessary for safety. Compliance therewith and proper maintenance will result in an installation essentially free from hazard. . . .

Thus, the 1971 NEC contained no provisions which indicated an intent for that Code to apply only to new electrical installations. The question of how the Code would be applied was left to the authorities enforcing it, including OSHA.

Section 6(a) of the Act was enacted to provide protection to employees from workplace hazards as soon as possible. The urgency of this action was underscored by Congress' authorization to OSHA to proceed without regard to the rulemaking procedures of the Administrative Procedure Act (5 U.S.C. 553). Had OSHA chosen to apply the 1971 NEC only to new installations, such action would not have resulted in any improvement in employee safety under existing conditions. Furthermore, there would have been no coverage at all for these conditions.

OSHA's selection of provisions from the 1971 NEC to apply to all installations represented a means of complying with the letter and the spirit of section 6(a) of the Act. Virtually all of the "retroactive" provisions in former § 1910.309(a) (and, necessarily, in proposed § 1910.302(b)(1)) had been in the NEC in one form or another for many years prior to the 1971 edition. Hence, although they were now mandatory on a National scale for the first time, these provisions were already well known to employers across the country.

It is important to note that former § 1910.309(a) listed only a small portion of the 1971 NEC for application to installations made before March 15, 1972. Additionally, the overwhelming majority of these provisions originated in editions of the NEC dated 1937 or earlier (see Table following).

Table of "Retroactive" Provisions

"Retroactive" provisions in OSHA's former standards (§ 1910.309(a))		NEC edition and page numbers in which provisions first appeared	Provisions not "retroactive" in OSHA's proposal (§ 1910.302 (b)(1))
Sections:			
250-58 (a) and (b)	Equipment on Structural Metal	1930, p. 125	X
250-59 (a), (b), and (c)	Portable and/or Cord Connected and Plug Connected Equipment, Grounding Method.	1930, p. 132; 1935, p. 138; 1937, p. 65.	X
400-3 (a) and (b)	Flexible Cords and Cable, Uses	1930, p. 132; 1937, p. 127	
400-4	Flexible Cords and Cable Prohibited	1959, p. 206	
400-5	Flexible Cords and Cables, Splices	1947, p. 131	
400-9	Overcurrent Protection and Ampacities of Flexible Cords.	1930, p. 83; 1937, p. 127	
400-10	Pull at Joints and Terminals of Flexible Cords and Cables.	1930, p.82	
422-8	Installation of Appliances with Flexible Cords	1930, p. 70	X
422-9	Installation of Portable Immersion Heaters	1935, p. 182	X
422-10	Installation Appliances Adjacent to Combustible Material.	1935, p. 182	X
422-11	Stands for Portable Appliances	1935, p. 182	X
422-12	Signals for Heated Appliances	1935, p. 182	X
422-14	Water Heaters	1956, pp. 70-181	X
422-15 (a), (b), and (c)	Installation of Infrared Lamp and Industrial Heating Appliances.	1947, p. 144	X
110-14 (a) and (b)	Electric Connection	1930, p. 14; 1935, p. 16	
110-17 (a), (b), and (c)	Guarding of Live Parts	1936, p. 19	
110-18	Arcing Parts	1937, p. 20	
110-21	Marking	1937, p. 20; 1899, pp. 10, 22, 33, 43.	
110-22	Identification	1965, p. 16	
240-16 (a), (b), (c), and (d)	Location in Premises (for Overcurrent Protection Devices).	1930, p. 100	
240-19 (a) and (b)	Guarding of Arcing or Suddenly Moving Parts of Overcurrent Protection Devices.	1930, p. 98	
250-3 (a) and (b)	D.C. System Grounding	1930, p. 137; 1925, p. 85	
250-5 (a), (b), and (c)	A.C. Circuits and Systems. To be Grounded	1930, pp. 127-128; 1925, p. 85.	
250-7	Circuits not to be Grounded	1936, p. 57	X
250-42 (a), (b), (c), and (d)	Fixed Equipment Grounding, General	1930, p 130; 1937, p. 58	
250-43 (a), (b), (c), (d), (e), (f), (g), (h), and (i).	Fixed Equipment, Grounding, Specific	1930, p. 130; 1937, pp. 58-59.	X
250-44 (a), (b), (c), (d), and (e).	Nonelectrical Equipment, Grounding	1930, p. 131; 1937, p. 60	
250-45 (a), (b), (c), and (d)	Equipment Connected by Cord and Plug, Grounding.	1930, p. 132	
430-142 (a), (b), (c), and (d)	Stationary Motor, Grounding	1937, p. 158	X
430-143	Portable Motors, Grounding	1937, p. 159	X
250-50 (a) and (b)	Equipment Grounding Connections	1947, p. 65	
250-51	Effective Grounding	1937, p. 63	
250-57 (a) and (b)	Fixed Equipment, Method of Grounding	1937, p. 65	
422-16	Appliance Grounding	1937, p. 138	X
422-17	Installation of Wall-mounted Ovens and Counter-mounted Cooking Units.	1937, p. 137, 139	X
Articles:			
500	Hazardous Locations		
501	Class I Installations (Hazardous Locations)	1925, 1928; 1930, p. 165	
502	Class II Installations (Hazardous Locations)		
503	Class III Installations (Hazardous Locations)		
"Approval Requirements"[1]		1899, pp. 6, 20, 26, 27, and 29 supplement.	

[1] The general approval requirement is not "retroactive" either in OSHA's present or proposed regulations. It is shown here to indicate its genesis.

Lastly, several commenters claimed that "retroactive" application of OSHA's electrical standards would result in a vast economic burden on employers without being necessary for employee safety (Tr. 169–171; Ex. 31, 56, 61, 62). To support their claim, two organizations submitted economic impact studies on their respective industries (Ex. 55J, 58).

As discussed more fully in the section on regulatory assessment (Section V), the exaggerated cost estimates in these industry studies can be attributed to a lack of clarity and proper organization in § 1910.307 as proposed. During the rulemaking, as is later noted, proposed § 1910.307 was viewed by various parties as imposing an "approval" requirement for electrical equipment in hazardous locations. This section applied to all such equipment, regardless of when installed, by virtue of its inclusion in the "retroactive" list in § 1910.302(b)(1). Thus, based upon this interpretation, the cost estimates in the industry studies included the unnecessary and enormous expense of removing acceptable equipment which was not "approved."

OSHA recognizes that proposed § 1910.307, as drafted, may have been susceptible to such reading. However, as

issue 4 in this section of the preamble makes clear, it was never OSHA's intention to require "approval" or "listing" or "labeling" of equipment in hazardous locations installed before March 15, 1972. Approval of this sort was only one of three alternatives which OSHA intended to allow for these locations. Although approval of equipment is certainly an acceptable means of compliance, § 1910.307 provides that other equipment will also be acceptable if it is intrinsically safe or if the employer can demonstrate that the equipment is of a type and design which provides protection from the hazards of the hazardous location. This performance requirement is, if anything, a less burdensome provision than the requirements from the 1971 NEC which have been enforced under § 1910.309(a).

Thus, many of the costs submitted in the industry studies are not imposed by the revision of Subpart S. The reorganization of § 1910.307 in the final standards will help to clarify the situation and remove the cause of the controversy surrounding both this section and the other "retroactive" provisions of § 1910.302(b)(1).

OSHA has considered the recommendations for eliminating "retroactive" provisions for older electrical installations and has concluded that a total exemption of all existing facilities is unwarranted. "Retroactive" application of the requirements listed in § 1910.302(b)(1) has been shown to be reasonably necessary for employee safety and has not been shown to be an unwarranted or extremely costly burden on employers. Therefore, § 1910.302(b)(1) has been adopted with no change from the proposal.

4. *Whether the marking and approval requirements in proposed §§ 1910.303(a), 1910.303(e), and 1910.307(b)(4) deviate from the existing regulations and whether they relate to employee safety.*

a. *Marking*

OSHA's previous standards on the general marking of electrical equipment were contained in 1971 NEC Sections 110-21 and 500-2(b). In the former standards, both requirements were "retroactive," and they read as follows:

110-21. *Marking.* The manufacturer's name, trademark, or other descriptive marking by which the organization responsible for the product may be identified, shall be placed on all electrical equipment. Other markings shall be provided giving voltage, current, wattage, or other ratings as are prescribed elsewhere in this Code. The marking shall be of sufficient durability to withstand the environment involved.

500-2. *Special Precaution.* * * *

(b) *Marking.* Approved equipment shall be marked to show the Class, Group and operating temperature, or temperature range, based on operation in a 40° C ambient for which it is approved.

The temperature range, if provided, shall be indicated in identification numbers, as shown in Table 500-2(b).

Identification numbers marked on equipment nameplates shall be in accordance with Table 500-2(b).

Exception: Equipment of the nonheat-producing type, such as junction boxes, conduit and fittings, are not required to have a marked operating temperature.

OSHA proposed to retain both provisions, with some minor modifications. Paragraph 1910.303(e) proposed requirements equivalent to NEC Section 110-21, except with the words "as are prescribed elsewhere in this Code" changed to the more performance-oriented "as may be required." In proposed § 1910.307(b)(4), the second and third sentences of NEC Section 500-2(b) were deleted, a related sentence from 1971 NEC Section 500-2(c) was added, and two new exceptions were also added. These changes resulted in no new obligations for employers.

Some commenters were concerned with the "retroactive" application of the general marking requirements, § 1910.303(e) (Tr. 309, 396-397; Ex. 19, 31). However, it must be noted that this requirement was not new to the NEC when the first OSHA electrical standards were promulgated. Indeed, this requirement can be found as far back as the 1918 National Electrical Code,[1] and it has been carried forward in all subsequent editions. More than half a century later, it was reasonable for OSHA to expect that most, if not all workplaces were in compliance with this provision when Subpart S was first promulgated.

The commenters also suggested that marking was not related to employee safety. However, since the required markings provide for proper identification and utilization of equipment, the requirement clearly provides protection for operating and maintenance personnel (Tr. 64, 73-74).

One commenter (Ex. 56) was concerned that otherwise safe equipment would have to be replaced for lack of the required markings and suggested that OSHA allow the employer to mark the equipment. In this regard, the standard does not specify that markings are only acceptable if they are part of the manufacturers' nameplates (though a nameplate would be acceptable). The standard allows the employer to place the required marking on equipment provided that it is done in a manner which ensures sufficient durability.

Many of the comments on OSHA's proposal, as well as some of the hearing exhibits, reflected misinterpretations of OSHA's marking requirements (Exs. 2, 19, 21, 31). The terms "marking", "labeling", and "approval", each of which has its own distinctive meaning within the context of Subpart S, were nonetheless used interchangeably by the commenters and witnesses. In this regard, it may be helpful to discuss the meanings of and relationships between these terms in the context of the standards.

"Marking" means no more than the identification of the key electrical parameters of a piece of electrical equipment. As noted above, § 1910.303(e) does not require that this "marking" take the form of a manufacturer's nameplate. Marking may be accomplished by any means which will provide the necessary information and will be capable of withstanding the operating environment of the equipment.

"Marking" does not mean the same thing as "labeling", as used in both the NEC and Subpart S. "Labeling" refers to the label of a nationally recognized testing laboratory, such as Underwriters Laboratories, Inc. (UL), or Factory Mutual Engineering Corporation, which indicates that the equipment in question has met criteria set by that laboratory for electrical safety. "Labeling," unlike "marking," is not required by Subpart S; however, if equipment is required by the Subpart to be "approved," equipment which is "labeled" is acceptable to OSHA.

The general requirement that all equipment be "approved", which was carried forward in proposed § 1910.303(a), only applies to installations made after March 15, 1972. This requirement was not contained in the list of "retroactive" provisions in former § 1910.309(a) and was also not contained in the list of proposed § 1910.302(b)(1). (See discussion of *Approval* in Section III, Issue 4b of this preamble.)

In brief, the general requirements for marking in § 1910.303(e) apply to all electric equipment; the general approval requirement in § 1910.303(a) applies to equipment installed after March 15, 1972; and there is no labeling requirement. If equipment is required to be "approved", unapproved equipment generally has to be replaced with "approved" equipment. On the other hand, equipment which is not properly marked need not be replaced but need

[1] P. 128 (Class D, Markings) 1918 "National Electrical Code", *Regulations of the National Board of Fire Underwriters for Electric Wiring and Apparatus, as Recommended by the National Fire Protection Association.*

only be marked with the necessary information.

Other commenters addressed § 1910.307(b)(4). They claimed that this paragraph required unnecessary marking of dust-tight equipment, which did not need to be marked for use in Class II, Division 2 locations (Tr. 274–275; Ex. 19, 34, 56). To support their views, they cited the 1981 NEC which has clarified the marking requirement by including an exception to Section 500–2(b) for dust-tight equipment in Class II, Division 2 and Class III locations. So that OSHA's standard would not conflict with the NEC, they suggested that § 1910.307(b)(4) be changed to read as follows:

(4) *Marking.* Approved equipment not covered in paragraphs (b)(4)(i) through (b)(4)(iv) of this section shall be marked to show the class, group, and operating temperature, or temperature range, based on operation in a 40° C ambient, for which it is approved. The temperature marking shall not exceed the ignition temperature of the specific gas or vapor to be encountered.

(i) Equipment of the nonheat-producing type, such as junction boxes, conduit, and fittings and equipment of the heat producing type having a maximum temperature not more than 100°C (212°F), shall not be required to have a marked operating temperature or temperature range.

(ii) Fixed lighting fixtures marked for use in Class I, Division 2 locations only, need not be marked to indicate the Group.

(iii) Fixed general purpose equipment in Class I locations other than fixed lighting fixtures which is acceptable for use in Class I Division 2 locations shall not be required to be marked with the Class, Group, Division or operating temperature.

(iv) Fixed dust tight equipment other than fixed lighting fixtures which are acceptable for use in Class II Division 2 and Class III locations shall not be required to be marked with the Class, Group, Division or operating temperature.

The proposed version allowed general-purpose equipment suitable for any Division 2 location to be unmarked. Since dust-tight equipment was acceptable for installation in Class II, Division 2 locations, proposed § 1910.307(b)(4)(iii) already accepted the use of unmarked, dust-tight equipment in Class II, Division 2 locations. However, in an effort to clarify this point and in agreement with the comments received, the suggested change has been included in the final rule.

b. *Approval*

OSHA's former regulation requiring all equipment to be approved was contained in 1971 NEC Section 110–2, which was not made applicable to equipment installed before March 15, 1972. Definitions and clarifications relating to approval were contained in former § 1910.308(d), and paragraph (d)(1) stated that approved meant "acceptable to the Assistant Secretary of Labor for Occupational Safety and Health." For the purpose of the former regulations, § 1910.308(d)(2) listed the types of installations or equipment which would be acceptable (and therefore "approved"). The definitions applied both to the general approval requirement and to provisions of the 1971 NEC which contained their own specific approval requirements.

In proposed § 1910.303(a), OSHA retained the same approval requirement as that contained in 1971 NEC Section 110–2. The definitions relating to approval were also retained. In keeping with the former standards, § 1910.303(a) was not proposed to be made applicable to equipment installed before March 15, 1972. However, § 1910.307 (dealing with equipment installed in hazardous locations) was proposed to be made applicable to all electric equipment. This proposed section corresponded to Articles 500–503 of the 1971 NEC, which were listed in § 1910.309(a) of the former standards as being "retroactive." Proposed § 1910.307 did contain some requirements relating to approval of equipment. In paragraph (c), this section required equipment to be one or more of the following: (1) intrinsically safe, (2) approved for the hazardous location, or (3) of a type and design which provides protection from the hazards arising from the combustibility and flammability of vapors, liquids, gases, dusts or fibers.

Equipment "approval" was intended to be only one means of compliance. Paragraphs (b)(1) and (b)(2) were not intended to establish substantive requirements unless the employer selected the means of compliance in § 1910.307(c)(2). Since they related only to approval, these paragraphs were not applicable if one of the other two methods of compliance were chosen.

There seemed to be confusion among the commenters about these approval requirements (Tr. 294; Ex. 31, 49). One assumed that the proposal required all equipment in hazardous locations to be approved regardless of when it had been installed and claimed that retrofitting of existing equipment would be required solely because such equipment was not approved (Ex. 56). The extent of the confusion is indicated by the testimony of one witness who believed that U.L. listed motors built between 1973 and 1975 would have to be replaced, because Underwriters Laboratories subsequently changed their standards (Tr. 275–276).

However, OSHA does not intend to require all equipment in hazardous locations to be "approved." Although hazardous locations are required to comply with § 1910.307, the approval requirement contained therein is only one of the three alternate methods by which employers can comply. The standard does not require existing equipment to be "approved," as long as the employer can demonstrate that it is safe for the hazardous location.

OSHA intended the requirements for approved and intrinsically safe equipment, as set forth in proposed paragraph (b) of § 1910.307 to be read totally in the context of the alternatives for compliance under paragraph (c) of that section. Thus, if an employer chose to comply with § 1910.307 by using approved or intrinsically safe equipment in hazardous locations, the requirements applicable to such equipment in paragraph (b) would specify what each compliance option entailed.

The general approval requirements in § 1910.303(a), then, do not apply to installations made before March 15, 1972. Therefore, that section does not require any changes to an employer's equipment if that equipment was installed before March 15, 1972. Additionally, with respect to the approval-related options contained in § 1910.307, OSHA has reorganized the final rule to state the agency's intent more clearly. Section 1910.307 requires that equipment in hazardous locations be one or more of the following: (1) intrinsically safe (§ 1910.307(b)(1)); (2) approved for the hazardous location (§ 1910.307(b)(2)); or (3) of a type and design which provides protection from the hazards arising from the combustibility and flammability of vapors, liquids, gases, dusts, or fibers (§ 1910.307(b)(3)). Requirements addressing each alternative set forth in § 1910.307 have been relocated to show that they apply only to that alternative. For example, if the employer selects to use approved equipment as a means of complying with § 1910.307(b), then new § 1910.307(b)(2)(i) indicates that such equipment must be approved not only for the Class and Division but also for the group of atmosphere involved.

5. *Whether the impedance and ampacity requirements of National Electrical Code (NEC) Section 250–51 should be included in the standard.*

Section 1910.304(f)(4) of the proposed electrical standards, which requires that the path to ground from circuits, equipment, and enclosures be permanent and continuous, was derived from Section 250–51 of the 1978 NEC. However, it does not contain the ampacity and impedance requirements of the grounding path which are in both the 1978 NEC (Section 250–51) and the former OSHA standards.

The proposed requirements of § 1910.304 specify that conductors and equipment be protected in accordance with their ability to safely conduct current, and § 1910.305 requires that wiring methods, components, and equipment for general use be approved for the purpose. It follows that if these two performance requirements are met, then all basic requirements applicable to ampacity and impedance will likewise be satisfied. For this reason, the ampacity and impedance requirements are omitted here without affecting employee safety. These changes reflect the general approach to simplify and clarify the proposed standard.

The record reflects general agreement that deletion of the ampacity requirement was justified (Ex. 22; Tr. 94, 398). The ampacity requirement of NEC Section 250–51 should be satisfied at the time of initial installation of the electrical utilization equipment or systems in which the equipment grounding conductors are a part.

There was considerable testimony plus comment in the record, however, on the proposed deletion of the impedance requirement. It was contended that the omission of this requirement would reduce the protection of employees against shock and electrocution. To achieve employee protection against shock and electrocution, it was argued the equipment grounding conductor must not only have continuity, it must also present a low impedance path which will permit sufficient fault current to flow thus assuring the rapid operation of the overcurrent device protecting the circuit (Ex. 22).

The same commenter, however, further indicated that a return to the impedance requirements of NEC 250–51 would still be inadequate because the quality of the equipment ground is generally an unknown value and requires verification. For example, NEC 250–51 paragraph (c) specifies no quantitative values but requires only that the grounding path have "sufficiently low impedance" to limit the voltage to ground and to facilitate the operation of the circuit protective devices in the circuit. Thus, the NEC specifies the ground path requirements in terms of performance and does not specify values of impedance. The commenter recommended (Ex. 22) that OSHA change the proposed § 1910.304(f)(4) to read as follows: "The path to ground from circuits, equipment and enclosures shall be permanent, continuous and have sufficiently low impedance to limit the voltage to ground and to facilitate the operation of the circuit protective devices in the circuit. The impedance of this path shall not exceed the levels given in Table S–4." (Table S–4 is contained in Exhibit 22 and specifies a maximum equipment ground impedance for different overcurrent device ratings at various circuit voltages.)

Mr. Robert West, an expert in the area of electrical grounding and its relationship to occupational safety standards, stated at the hearing (Tr. 113) that the impedance of equipment grounding conductors for most of the circuits in many operational workplaces cannot be accurately verified by testing. The reason for this is that the test current will flow in unknown conducting paths that are in parallel with the equipment grounding conductors. The witness cited (Tr. 110) examples of test situations which could occur with commercial testers showing the presence of a low impedance equipment grounding conductor when, in fact, the equipment grounding conductor is disconnected. Because of these problems, it was Mr. West's view that the standard should not require impedance testing. Mr. West indicated (Tr. 113) that the requirement for the path to ground from circuits, equipment, and enclosures to be permanent and continuous can be verified in most operational workplaces by visually inspecting grounding conductors and by checking the grounding conductor connections for tightness.

A representative of Monsanto Company (Tr. 337) also agreed with OSHA's deletion of the impedance requirement and submitted the results of a series of field tests performed to evaluate a particular equipment grounding conductor impedance measuring technique (Ex. 36). According to this witness, the tests were conducted to determine whether or not meaningful values of equipment grounding conductor impedance could be obtained through measurements using a commercially available tester designed for this purpose. The test results showed generally how the existence of parallel paths affect the measurement of equipment grounding conductor impedances. One significant test result was that impedance measurements will not always reveal a break (open conductor) in, or the absence of, the equipment grounding conductor.

In one instance, one commenter submitted what appeared to be inconsistent testimony concerning impedance testing. The initial submittal (Ex. 22) stated: "Instrumentation is commercially available that will quickly, easily and accurately measure the impedance of *only the equipment grounding conductor* under live circuit conditions" (emphasis added). However, in his post-hearing comment, the same commenter concluded that the impedance tester would not be able to measure the impedance of the conductor alone, but would only be able to measure the impedance of the total fault path: "The purpose of the impedance tester is to accurately determine the amount of impedance *in the anticipated fault path whether it is called an equipment grounding conductor or anything else*" (Ex. 68A) (emphasis added).

Where non-current-carrying metal parts of electrical equipment are required to be grounded, § 1910.304(f) specifies that only equipment grounding conductors be used and that the equipment grounding conductor must be installed either along with the circuit conductors or enclose the circuit conductors. The reason for keeping the ground return path and the phase legs in close proximity is to minimize the impedance of the fault circuit by placing conductors so their magnetic fields cancel each other and mutual inductance is minimized. This reduces the inductive reactance and allows sufficient current to flow, thus facilitating operation of the circuit protective devices.

Where conduit is used as an equipment grounding conductor, the ground-fault current flows through a conductor inside the conduit and returns through the conduit. When this occurs, practically all of the magnetic field is inside the conduit. This results in practically all of the inductive reactance of the circuit appearing on the inside conductor while the impedance of the conduit becomes approximately equal to its DC resistance.

Low resistance paths in parallel with the equipment grounding conductor will carry some portion of the total ground-fault current. These unknown and undefined parallel paths make it impossible to separate and measure the impedance of only the equipment grounding conductor alone.

Tests have shown that ground path impedance measurements involving extraneous parallel paths can give incorrect indications regarding disconnected or open grounding conductors (Ex. 17, 36). Under these conditions, as noted above, impedance measurements may not detect the presence of serious electrical hazards. They may well give the employee a false sense of security as to the safety of an installation. With limitations of this type, it appears that visual inspection and periodic maintenance are the only practical approach to assure a safe

condition of the equipment grounding conductor.

Additionally, one commenter (Ex. 22) referenced accident data involving electrical work injuries in California (1972) and claimed that a major factor contributing to the injuries was equipment not being grounded or having poor or inadequate grounding connections. A review of the actual accident descriptions, however, indicated the presence of such other causal factors as the total absence of proper equipment grounding means, interruption in the continuity of the equipment grounding conductor, or improper connection of grounding conductors. The data did not, therefore, indicate that the ohmic value of the equipment grounding conductor impedance was a significant factor in the accidents.

Grounding path resistances are usually determined in the design stage of equipment and electrical installations and are not intended to be measured in the field on a routine basis. OSHA's recognition of this fact has previously been incorporated into the OSHA standard on ground-fault protection (§ 1926.400(h) is the cognizant standard), where only a continuity test of the equipment grounding conductor is required. A quantitative test including an ohmic value is not considered necessary or appropriate for determining the presence of the equipment grounding conductor.

It is OSHA's belief that equipment grounding systems, installed in accordance with the requirements of this Subpart, will significantly reduce the chances for personnel injuries provided the continuity and permanence of the equipment grounding conductors and connections are maintained after the systems are placed in operation.

The path to ground from circuits, equipment and enclosures can usually be verified as being permanent and continuous by an inspection of equipment grounding conductors and the grounding conductor connections. In certain special cases, where extraneous parallel paths are not a problem, continuity tests can also be made to verify the presence and integrity of equipment grounding conductors. OSHA recognizes that impedance testing may lead to false assurances of the impedance, or even the very presence of the grounding conductor. Therefore, for this reason and since maintenance requirements are not the subject of this rulemaking, OSHA is not requiring such testing in these standards.

6. *Whether the prohibition of the use of structural metal frames of buildings as the equipment grounding conductor (1978 NEC 250-58(a)) should be included in the standard.*

The comments addressing this issue refer to proposed § 1910.304(f)(6), dealing with methods of grounding fixed equipment. Specifically, the comments concern the use of structural metal frames of buildings as equipment grounding conductors for AC equipment. Such use is permitted in the 1971 NEC and was carried forward in the proposed standard.

One commenter (Ex. 22) cited the 1978 NEC (Section 250–58) which explicitly states that this use is not acceptable, and argued that a similarly explicit statement should be included in the proposed OSHA standard.

It is noted that although the building of structural metal will, in many installations, possess sufficient ampacity to safely conduct ground-fault currents, the NEC no longer considers such a grounding path to be a valid substitute for the required equipment grounding conductor. The code's current position is that there is always the possibility that any path to ground other than the equipment grounding conductor may have insufficient capacity. This can result in a serious hazard in those installations where the presence of large-capacity circuits have the capability of producing thousands of amperes of fault-current. Also, where high-magnitude ground-fault currents are forced to flow in paths that are remote from the circuit conductors, magnetic fields are generated which can induce voltages in adjacent conductors. Such induced voltages may cause failure of components in low energy electric systems. Stray ground currents have also been known to cause arcing in piping systems.

On the other hand, from the standpoint of employee safety, installations where electric equipment is secured to, and in metallic contact with, the grounded structural metal frame of a building are essentially free of electrical shock hazards. This condition occurs because the electric equipment enclosures and the metal building frame will be approximately at the same potential if a ground fault occurs and will provide a measure of employee safety.

Mr. Robert West suggested that the proposed standard be changed to prevent the structural metal frame of a building from being used as an acceptable equipment grounding conductor for installations made after the date of the final rule (Tr. 115–116). However, he contended that the change should be applicable only to new installations. He noted that prior to the 1978 NEC, Section 250–58 of previous editions, including the 1971 NEC incorporated by OSHA, specifically stated that electrical equipment secured to and in electrical contact with the structural frame of a building was acceptably grounded. Therefore, he argued that it would be impractical to require changes to existing installations.

As a result of the testimony, OSHA has concluded that § 1910.304(f)(6)(ii) should be changed to reflect the latest NEC requirements. This change is accomplished by deleting the first sentence of proposed § 1910.304(f)(6)(ii) and adding two sentences as follows: "Electric equipment is considered to be effectively grounded if it is secured to, and in electrical contact with, a metal rack or structure that is provided for its support and the metal rack or structure is grounded by the method specified for the noncurrent-carrying metal parts of fixed equipment in paragraph (f)(6)(i) of this section. For installations made before April 16, 1981 only, electric equipment is considered to be effectively grounded if it is secured to, and in metallic contact with, the grounded structural metal frame of a building."

7. *Whether the definitions for Class II locations and their associated explanatory notes should be changed.*

The proposed definition of a Class II, Division 1 location (§ 1910.399(a)(25)(i)) was identical to the definition in OSHA's previous regulations and read as follows:

> A Class II, Division 1 location is a location: (1) in which conbustible dust is *or may be in suspension* in the air *continuously, intermittently, or periodically* under normal operating conditions, in quantities sufficient to produce explosive or ignitible mixtures; or (2) where mechanical failure or abnormal operation of machinery or equipment might cause such explosive or ignitible mixtures to be produced, and might also provide a source of ignition through simultaneous failure of electric equipment, operation of protection devices, or from other causes; or (3) in which combustible dusts of an electrically conductive nature may be present. (Emphasis added.)

In other words, a location in which a hazardous concentration of combustible dust could be suspended in the air under normal operations was classified as Class II, Division 1.

Contending that the proposed definitions were confusing and would conflict with the 1981 NEC, several grain- and feed-affiliated organizations objected to the proposal (Exs. 18, 19, 21, 31, 32, 39, 49 & 54). Their objections included the following:

(1) The definitions contain vague and improper terminology which requires subjective judgments to be made (Ex. 19).

(2) Code Making Panel 14 of the NEC which is responsible for the content of these definitions in the NEC has changed the definition of Class II hazardous locations in the 1981 National Electrical Code (Ex. 31). Thus, OSHA's proposed definition is inconsistent with the latest NEC.

(3) Hazardous location definitions contained in the proposed 1981 NEC would better identify types of potential hazards through the establishment of performance standards (Ex. 18).

The revised definition as submitted by Panel 14 and accepted for the 1981 NEC reads as follows:

A Class II, Division 1 location is a location: (1) in which combustible dust is *in the air under normal operating conditions, in quantities sufficient* to produce explosive or ignitible mixtures; or (2) where mechanical failure or abnormal operation of machinery or equipment might cause such explosive or ignitible mixtures to be produced, and might also provide a source of ignition through simultaneous failure of electric equipment, operation of protection devices, or from other causes; or (3) in which combustible dusts of an electrically conductive nature may be present. (Emphasis added).

This change would remove the words "or may be in suspension" and "continuously, intermittently, or periodically" from OSHA's former and proposed definitions. However, as stated by an OSHA witness, Dr. Jerry Purswell, Director of Safety Standards, this change "removes the clarification which is needed to realistically describe conditions which are encountered in these locations. Utilizing the proposed 1981 NEC change would permit one to classify a location as a Class II, Division 1 only when dust is actually witnessed, and to disregard the real and frequently existing situations which are presently described in the existing rules" (Tr. 32).

After hearing testimony relative to possible interpretations of the suggested definitions, two members of Code Making Panel 14 who were at the hearing, made the following statements: Mr. Leonard Corey—"After hearing the comments that have been made during this hearing, it would be my recommendation that the panel review this material one more time so that everyone gets a fair hearing on it" (Tr. 410); Mr. Peter J. Schram—"I submit that if the proposed revision of the code is interpreted in this manner [as stated before by Dr. Purswell] the area is not being classified as I intended as a member of Code Panel 14. Had this type of an interpretation been brought up at the meeting or during the voting, I do not believe I would have voted for all of the deletions in Section 500–5(a) of the code for the 1981 edition" (Tr. 464). Since the deadline for commenting on the proposed 1981 NEC had expired, these concerns could not be considered by the NEC Panel before the adoption of the 1981 NEC.

OSHA believes that the deletion of the words "or may be in suspension" would seriously compromise employee safety. It is necessary for the definition to cover not only situations in which explosive or ignitible concentrations of dusts are actually present, but also situations in which such concentrations may arise under normal operating conditions. In this respect, the definition of Class II, Division 1 locations contained in the 1981 NEC represents a potential decrease in employee safety compared to OSHA's former standard, and OSHA has decided not to delete the words "or may be in suspension" from the definitions.

However, based on the comments in the record, the words "continuously, intermittently, or periodically" have been deleted from the definition of Class II, Division 1 locations. For consistency, the language has also been deleted from the definition of Class I, Division 1 locations although most of the comments dealt only with Class II locations. OSHA agrees that these words are possibly confusing and do not enhance the definition.

Therefore, under § 6(b)(8) of the Act, the Assistant Secretary has determined that the 1971 NEC definition of Class II, Division 1 locations, except as noted above, better effectuates the purpose of the Act to provide a safe place of employment than the definition in the 1981 NEC.

The proposed definition of a Class II, Division 2 location (§ 1910.399(a)(25)(ii)) was also identical to the definition in OSHA's previous standards and read as follows:

A Class II, Division 2 location is a location in which combustible dust will not normally be in suspension in the air or will not be likely to be thrown into suspension by the normal operation of equipment or apparatus in quantities sufficient to produce explosive or ignitible mixtures, but: (*a*) Where deposits or accumulations of such combustible dust may be sufficient to interfere with the safe dissipation of heat from electric equipment or apparatus; or (*b*) where such deposits or accumulations of combustible dust on, in, or in the vicinity of electric equipment might be ignited by arcs, sparks, or burning material from such equipment.

Several commenters suggested that OSHA adopt the changes made in the definition of a Class II, Division 2 location in the 1981 NEC (Ex. 19, 32, 55L). They stated that OSHA's adoption of the suggested wording would clarify the difference between Division 1 and Division 2 in Class II locations. The suggested change was as follows:

Class II, Division 2. A Class II, Division 2 location is a location in which (a) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitible mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (b) dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment, and dust accumulations resulting therefrom may be ignitible by abnormal operation or failure of electrical equipment or other apparatus.

OSHA agrees with these comments and, in view of the absence of any opposition to this change, adopts it in the final standard. Although the wording has been revised, the intent of the definition remains the same and is clearer than that of the proposal, by giving specific examples and by better organization.

The proposed "fine print" notes to the definitions of Class II locations were basically the same as those in OSHA's former regulations (Article 500–5(a) and (b) of the 1971 NEC), and the proposal read as follows:

Class II, Division 1

Note.—This classification usually includes the working areas of grain handling and storage plants; rooms containing grinders or pulverizers, cleaners, graders, scalpers, open conveyors or spouts, open bins or hoppers, mixers or blenders, automatic or hopper scales, packing machinery, elevator heads and boots, stock distributors, dust and stock collectors (except all-metal collectors vented to the outside), and all similar dust-producing machinery and equipment in grain-processing plants, starch plants, sugar-pulverizing plants, malting plants, hay-grinding plants, and other occupancies of similar nature; coal-pulverizing plants (except where the pulverizing equipment is essentially dust-tight); all working areas where metal dusts and powders are produced, processed, handled, packed, or stored (except in tight containers); and all other similar locations where combustible dust may, under normal operating conditions, be present in the air in quantities sufficient to produce explosive or ignitible mixtures.

Combustible dusts which are electrically nonconductive include dusts produced in the handling and processing of grain and grain products, pulverized sugar and cocoa, dried egg and milk powders, pulverized spices, starch and pastes, potato and woodflour, oil meal from beans and seed, dried hay, and other organic materials which may produce combustible dust when processed or handled. Electrically conductive nonmetallic dusts include dusts from pulverized coal, coke, carbon black, and charcoal. Dusts containing magnesium or aluminum are particularly hazardous and the use of extreme precaution will be necessary to avoid ignition and explosion.

Several commenters claimed that the proposed fine print note is 25 years old and outmoded and that its emphasis is on types of machinery rather than on types of operation being performed. (Ex. 2, 19, 49, 56). One commenter stated that in many instances, with modern methods of dust control or complete rehandling of the grain or grain product, it is possible that many of the locations noted in the fine print notes would no longer be classified as either Class II, Division 1 or a Class II, Division 2 area (Ex. 49). It was further argued that these notes have been consistently misinterpreted by OSHA compliance officers as firm requirements for classification of locations instead of as guidelines (Ex. 56).

Regarding the explanatory fine print note, OSHA agrees with the comments of the grain and feed industry that the note should reflect the operation being done in the area rather than what equipment is located there. Commenters submitted to the record revised explanatory notes for both Class II, Division 1 and Class II, Division 2 locations (addendum #3). Since these suggested notes more accurately reflect the intent of the definition and describe operations rather than equipment, they have been included, with minor editorial changes, in the final rule. The new notes read as follows:

Class II, Division 1

Note.—This classification may include areas of grain handling and processing plants, starch plants, sugar-pulverizing plants, malting plants, hay-grinding plants, coal-pulverizing plants, areas where metal dusts and powders are produced or processed, and other similar locations which contain dust producing machinery and equipment (except where the equipment is dust-tight or vented to the outside). These areas would have combustible dust in the air, under normal operating conditions, in quantities sufficient to produce explosive or ignitible mixtures.

Combustible dusts which are electrically nonconductive include dusts produced in the handling and processing of grain and grain products, pulverized sugar and cocoa, dried egg and milk powders, pulverized spices, starch and pastes, potato and woodflour, oil meal from beans and seed, dried hay, and other organic materials which may produce combustible dust when processed or handled. Dust containing magnesium or aluminum are particularly hazardous and the use of extreme precaution will be necessary to avoid ignition and explosion.

Class II, Division 2

This classification includes locations where dangerous concentrations of suspended dust would not be likely but where accumulations might form on or in the vicinity of electric equipment. These areas may contain equipment from which appreciable quantities of dust would escape under abnormal operation conditions or be adjacent to a Class II, Division 1 location, as described above, into which an explosive or ignitible concentration of dust may be put into suspension under abnormal operating conditions.

8. *Whether installations of electrolytic cells should be covered by the guarding provisions of proposed § 1910.303.*

Section 110–17 of the 1971 NEC, which is referenced in the former regulations, requires live parts of equipment operating at 50 volts or more to be guarded. The 1978 NEC included a new Article 668 which permits electrolytic cells to operate with live parts exposed, provided that specific alternate safety measures are employed.

Electrolytic cells differ in certain respects from standard electrical installations. In a standard electrical circuit, all live parts are required to be insulated or guarded. One side of the circuit is connected to ground to provide a common reference and to stabilize voltages, and thus a potential exists between any live conductor and any grounded surface. A person coming in contact with both a live conductor and a grounded surface will provide a path for electric current to flow and will receive a shock varying in severity with the amount of current that flows through the body. The purpose of the guarding provisions of the NEC is to prevent contact with live parts since contact with grounded surfaces is very common.

In an electrolytic cell line, however, the actual working parts and some working surfaces are, by necessity, the bare live parts of an electric circuit. Employee contact with these live parts is necessary in normal electrolytic cell working procedures. Therefore, whereas a standard circuit necessitates guarding of live parts, employees working on electrolytic cells must be protected against contact with ground. The provisions of Article 668 of the 1978 NEC recognize the different working conditions of electrolytic cell lines and outline the procedures to be used as an alternative to guarding of live parts. The proposed regulations incorporated these electrolytic cell provisions in § 1910.306(h)(3).

Only one commenter (Ex. 20) objected to the provisions proposed in § 1910.306(h)(3). His position was that leaving the energized portions of the cell line unguarded would result in decreased safety protection for workers. To support his position, he cited an electrocution of a worker who died when he stepped into a floor hold and fell against the energized portion of an electrolytic cell. The commenter also state, "The workers typically wear rubber gloves and rubber boots. But if any other portion of the worker's body touches the cell, the worker is electrocuted" (Ex. 20).

As previously discussed, a worker would have to come in contact with both the energized portion of a cell and a grounded surface in order to be electrocuted. The accident referred to resulted when a floor hole was not covered and an otherwise guarded grounded surface was exposed to contact. However, this accident could have happened with a standard electrical circuit if a guard was left off of an energized portion of a conductor, and a worker came in contact with this conductor and a gounded surface.

Ten witnesses (Ex. 23, 24, 29, 38, 40, 41, 46, 51, 52 and 53) appeared in support of the provisions contained in § 1910.306(h)(3). The witnesses included representatives from the aluminum, chlorine, and copper industries. The operations of these industries differ but each requires the actual physical contact with the energized portion of the cell line for proper operation. Various methods of isolating the cell lines from ground were presented, including the insulation of any structural member with wood or fiberglass, and the guarding of grounding parts by distance. The witnesses contended that the addition of guards for the live parts would not enhance employee safety but would actually hinder cell operation and would create a safety hazard by blocking access and egress in emergency siutations. As pointed out at the hearing, if access to the cell is impeded by guards in an emergency situation such as a dry cell, a shorted cell, or an overflow, employees in the area would be subjected to acid burns, electrical flash burns, or injury from flying molten metal (Ex. 40).

The evidence submitted to the record reflects that the alternative procedures being used in cell line operation will provide a safer workplace for electrolytic cell employees than would guarding line parts of cells. In fact, the evidence in the record indicates that guarding live parts of cells may actually reduce employee safety. Therefore, the final rule incorporates the electrolytic cell provisions of § 1910.306(h)(3) as proposed.

IV. Summary and Explanation of the Final Standard

The final standard revising 29 CFR Part 1910, Subpart S, follows the language and format of the proposal with some changes. Most of the changes are editorial in nature. However, those that are substantive are discussed in

detail below. Where changes have been made concerning areas of the proposal which were major issues at the hearing, reference is made to the discussion of such issues in Section III of this preamble. The resulting final standard, which is based on the record considered as a whole, simplifies and clarifies the former Subpart S. The significance of this simplification is indicated by the reduction from the approximately 250,000 words in the National Electrical Code to the approximately 15,000 words in this final standard. As a consequence, the 1971 NEC (NFPA–70) will no longer be incorporated by reference in the OSHA standards.

Subpart S of Part 1910 as revised provides a systematic format both to satisfy present requirements and to accommodate future growth. Subpart S will eventually contain four major parts covering not only the design safety standards for electrical systems contained in this rulemaking (Part I), but also safety-related work practices (Part II), safety-related maintenance requirements (Part III), and safety requirements for special equipment (Part IV).

Some parts of the former §§ 1910.308 and 1910.309 have been deleted. Other parts of these sections have been incorporated into new sections without substantive change. (Any changes made were only editorial to reflect the change in format of the Subpart.) The following table summarizes the numbering changes from the former Subpart S to the final standard:

Redesignation Table

Former paragraph	New paragraph
§ 1910.308(a)	Deleted—unnecessary.
§ 1910.308(b)	Deleted—unnecessary.
§ 1910.308(c)	§ 1910.302(a).
§ 1910.308(d)(1)	§ 1910.399(a)(7).
§ 1910.308(d)(2)	§ 1910.399(a)(i).
§ 1910.308(d)(3)(i)	§ 1910.399(a)(77).
§ 1910.308(d)(3)(ii)	§ 1910.399(a)(75).
§ 1910.308(d)(3)(iii)	§ 1210.399(a)(2).
§ 1910.308(d)(3)(iv)	§ 1910.399(a)(22).
§ 1910.308(d)(3)(v)	§ 1910.399(a)(127).
§ 1910.309(a)	§ 1910.302(b)(1).
§ 1910.309(b)	§ 1910.302(b)(2).
§ 1910.309(c)	§ 1910.304(b)(f).

The following discussion summarizes the final standard and the effects this rulemaking has on the former provisions of §§ 1910.308 and 1910.309. Any changes made from the proposal are noted; otherwise, the requirements in the proposal have been adopted with no substantive change.

§ 1910.301 Introduction. The former introductory paragraphs, § 1910.308 (a) and (b), which incorporated the 1971 NEC into Subpart S by reference, have been deleted. A new introductory § 1910.301 addresses the new format followed in this Subpart. The basic areas which are or will be included in Subpart S of Part 1910 are set forth as follows:

(a) Design Safety Standards for Electrical Systems. The standards which are the subject to this rulemaking are contained in §§ 1910.302 through 1910.330. (At this time, however, only §§ 1910.302 through 1910.308 are being promulgated; §§ 1910.309 through 1910.330 have been reserved for possible future design safety standards for other electrical systems, such as power generating systems.)

(b) Safety-Related Work Practices. These regulations will be contained in §§ 1910.331 through 1910.360.

(c) Safety-Related Maintenance Requirements. These requirements will be contained in §§ 1910.361 through 1910.380.

(d) Safety Requirements for Special Equipment. These requirements will be contained in §§ 1910.381 through 1910.398.

(e) Definitions applicable to each of these four major divisions are contained in a common § 1910.399.

Since the areas covered by each of these four major divisions represent broadly diverse equipment, installations and practices, it is intended that each division will be further subdivided where appropriate. For example, within the category involving design safety standards for electrical systems, separate subgroupings could include electrical utilization systems, electrical power generation and transformation systems, electrical power transmission and distribution systems, and others, in the future.

The changes to Subpart S contained in the present document are limited to electrical utilization systems, as covered by the former OSHA electrical standards.

This standard places the relevant requirements of the National Electrical Code into the text of the regulations making it unnecessary to incorporate the National Electrical Code by reference. The former incorporation of the entire NEC is therefore being deleted.

§ 1910.302 Electric Utilization Systems (Scope and Extent of Application).

§ 1910.302(a). The provisions formerly in the scope paragraph, § 1910.308(c), have been carried forward in new scope paragraph § 1910.302(a). Additionally, as proposed, § 1910.302(a)(vi) in the final rule includes "industrial substations", which was inadvertently omitted in the adoption of the former OSHA standard.

§ 1910.302(b)(1). The National Electrical Code requirements formerly listed in paragraph § 1910.309(a), which were applicable to all electrical installations and utilization equipment, have been retained in part and deleted in part. The retained part no longer references sections of the NEC, but instead references the corresponding provisions of Subpart S. These requirements are carried forward as § 1910.302(b)(1). The deleted portion consists of the sections of the 1971 NEC which are inappropriate for OSHA's use or otherwise covered in this subpart. The specific sections deleted, along with the reasons for the deletions, and the new paragraph numbers of the retained NEC sections are given in the following distribution table:

Distribution Table

1971 NEC provision referenced in former § 1910.309(a)	New section of subpart S
Articles:	
500	These Articles were rewritten in performance terms and combined into § 1910.307.
501	
502	
503	
Sections:	
110–14(a)	Deleted—Covered by § 1910.303(a).
110–14(b)	§ 1910.303(c).
110–17(a), (b), and (c).	§ 1910.303(g)(2).
110–18	§ 1910.303(d).
110–21	§ 1910.303(e).
110–22	§ 1910.303(f).
240–16	§ 1910.304(e)(1)(iv).
240–19(a) and (b).	§ 1910.304(e)(1)(v).
250–3(a)	§ 1910.304(f)(1)(ii).
250–3(b)	Deleted—Inappropriate; this section is not a requirement but only states that certain systems over 300 volts may be grounded.
250–5 (a), (b), and (c).	§ 1910.304(f)(1) (iii), (iv), and (v).
250–7	Deleted—covered in § 1910.307.
250–42 (a), (b), (c), and (d).	§ 1910.304(f)(5)(iv) (a), (b), (c), and (d).
250–43 (a), (b), (c), (d), (e), (f), (g), (h) and (i).	Deleted—covered in § 1910.304(f)(5)(iv).
250–44 (a), (b), (c), and (d).	§ 1910.304(f)(5)(vi).
250–44(e)	Deleted—covered by § 1910.304(f)(5)(iv).
250–45 (a), (b), and (d).	§ 1910.304(f)(5)(v).
250–45(c)	Deleted—inappropriate; applies only to residences.
250–50 (a) and (b).	§ 1910.304(f)(3).
250–51	§ 1910.304(f)(4).
250–57(a) and (b).	§ 1910.304(f)(6)(i).
250–58 (a) and (b).	Deleted—inappropriate; these are not requirements but optional methods of meeting the grounding requirement.
250–59 (a), (b) and (c).	Deleted—inappropriate; these sections are not requirements but only suggest methods of grounding.
400–3 (a) and (b).	§ 1910.305(g)(1) (i) and (ii).
400–4	§ 1910.305(g)(1)(iii).
400–5	§ 1910.305(g)(2)(ii).
400–9	§ 1910.304(e)(1)(i).
400–10	§ 1910.305(g)(2)(iii).
422–8	Deleted—covered by § 1910.305(g)(1)(i).
422–9	Deleted—covered by § 1910.303(g)(2).
422–10	Deleted—covered by § 1910.303(b).

Distribution Table—Continued

1971 NEC provision referenced in former § 1910.309(a)	New section of subpart S
422-11	Deleted—inappropriate; this section addresses appliance construction detail requirements.
422-12	Deleted—inappropriate; this section addresses appliance construction detail requirements.
422-14	Deleted—inappropriate; this section addresses appliance construction detail requirements.
422-15 (a), (b) and (c).	Deleted—covered by § 1910.303(a).
422-16	Deleted—covered by § 1910.304(f) and the standard procedure for a variance request.
422-17(a)	Deleted—inappropriate; this is not a requirement, but a definition of a term no longer used in the standard.
422-17(b)	Deleted—covered by § 1910.303(a).
430-142	Deleted—covered by § 1910.304(f)(5)(iv).
430-143	Deleted—covered by § 1910.304(f)(5)(v).

The provisions which are listed in § 1910.302(b)(1) apply to all electrical installations and utilization equipment regardless of when they were designed or installed. For discussion of comments on and objections to the application of these provisions, see Issue 3 in Section III of this preamble.

§ 1910.302(b)(2). Proposed § 1910.302(b)(2), as well as former § 1910.309(b), applied the full coverage of Subpart S to "every replacement, modification, repair, or rehabilitation made to an existing installation after March 15, 1972." At the November 8, 1979, public meeting (Meeting Tr. 9–10) and at the public hearing (Tr. 26), OSHA officials interpreted this provision as being limited to "major" replacements, modifications, repairs, or rehabilitations. Other witnesses supported this interpretation but requested that the word "major" be added to § 1910.302(b)(2), to ensure consistent application by compliance personnel (Tr. 170, 269–270, 294).

Concerned that such wording could be ambiguous, OSHA requested the hearing witnesses to supply definitions or clarifications of what would be "major replacement, modifications, repairs, or rehabilitations." The respondents contended that "major" should refer to work which is similar to that involved when a new building or facility is built, a new wing is added, or an entire floor is renovated (Ex. 19, 55K, 62).

There is no objection to the addition of the word "major" to § 1910.302(b)(2) and OSHA agrees that it more accurately reflects the intent of this paragraph. Therefore, § 1910.302(b)(2) has been modified to indicate that "every major replacement, modification, repair, or rehabilitation, after March 15, 1972," must comply with all the requirements of § 1910.302 through 1910.308. Also, a note has been added to indicate that such "major" work includes work of a magnitude similar to that involved when a new building is built, a new wing is added to an existing facility, or an entire floor is renovated.

§ 1910.302(b)(3). A new § 1910.302(b)(3) has been added which contains a list of paragraphs that impose new requirements which were not in the 1971 NEC. Since the requirements in these paragraphs were not in the former standards, they will only apply to installations made after the effective date of these standards. The paragraphs involved are the following:

§§ 1910.303(h)(4)(i) and (ii)—Entrance and access to workspace (over 600 volts).
§ 1910.304(e)(i)(vi)(*b*)—Circuit breakers operated vertically.
§ 1910.304(e)(l)(vi)(*c*)—Circuit breakers used as switches.
§ 1910.304(f)(7)(ii)—Grounding of systems of 1000 volts or more supplying portable or mobile equipment.
§ 1910.305(j)(6)(ii)(*b*)—Switching series capacitors over 600 volts.
§ 1910.306(c)(2)—Warning signs for elevators and escalators.
§ 1910.306(i)—Electrically controlled irrigation machines.
§ 1910.306(j)(5)—Ground-fault circuit interrupters for fountains.
§ 1910.308(a)(1)(ii)—Physical protection of conductors over 600 volts.
§ 1910.308(c)(2)—Marking of Class 2 and Class 3 power supplies.
§ 1910.308(d)—Fire protective signaling circuits.

The effective date for these provisions is discussed and explained in Section VI of this preamble.

General

As was the case with the former provisions of Subpart S, the revised Subpart does not apply to construction and agriculture. It does apply to all other workplaces covered by OSHA, except that for maritime, § 1910.302(a)(2)(i) provides that ships and other watercraft are not covered. Some commenters pointed out that the proposed standard inadvertently contained requirements pertaining to construction, even though (as noted in the preamble to the proposal) 29 CFR Part 1910, Subpart S does not apply to this industry (Ex. 30). Therefore, the final standard reflects the deletion of the following proposed provisions or references which deal exclusively with construction.

§ 1910.305(a)(2)(i)(*a*)—Use of temporary wiring for construction.
§ 1910.305(a)(2)(iii)(*g*)—Splices on construction sites.

§ 1910.303 General Requirements. This section contains general requirements for electrical installations. These requirements address approval and use of equipment, splices, marking and identification, working clearances, and guarding of live parts. Approval and marking requirements were the only regulations in this section which were major issues. For detailed discussion on these topics, see Issue 4 in Section III of this preamble. Specific paragraphs and substantive changes from the proposal are discussed as follows:

Paragraph (a) requires approval of electrical equipment, while paragraph (b) gives provisions for the equipment's inspection and use. These two paragraphs basically require employers to provide equipment which is in safe condition and to ensure that it is used safely.

Paragraph (c) requires splices to be suitably made and insulated. Parts of electric equipment that produce arcs, sparks, or molten metal are required to be appropriately guarded by § 1910.303(d).

Marking and identification are covered in § 1910.303(e) and (f). In paragraph (e), electric equipment is required to be marked to identify who made the equipment and what the necessary electrical ratings are. Paragraph (f) requires branch circuits, feeders, services, and disconnecting means for equipment to be identified. In the proposal, this requirement read as follows:

(f) *Identification of disconnecting means.* Each disconnecting means required by this subpart for motors and appliances shall be legibly marked unless located and arranged so that its purpose is evident; and each disconnecting means required by this subpart for each service, feeder, or branch circuit shall be legibly marked to indicate its purpose at the point where the service, feeder or branch circuit originates. The marking shall be of sufficient durability to withstand the environment involved.

This wording is slightly different from the NEC and NFPA 70E. It was changed in an attempt to clarify the requirement without changing the intent. However, as evidenced by some of the comments received (Ex. 2), the modification created additional confusion regarding marking of service, feeder, and branch circuit disconnects. For example, the proposed subpart contained no requirements for these circuits to have disconnecting means, seemingly making the identification requirement for such disconnecting means superfluous. Therefore, OSHA is again revising the language to clarify the intent of the rule. This paragraph now clearly requires each service, feeder, or branch circuit to be identified, at its disconnecting means or overcurrent device, to indicate the circuit's purpose. However, no marking

is necessary if the purpose of the circuit is evident. This clarification, which is consistent with OSHA's former regulation, the NEC, and NFPA 70E, should clear up any misunderstanding created by the proposed requirement.

Paragraphs (g) and (h) set forth requirements pertaining to guarding of and working clearances around live parts of electric equipment. Regulations applying to equipment 600 volts or less can be found in § 1910.303(g), while paragraph (h) applies over 600 volts. One commenter (Ex. 12) pointed out that OSHA's proposal and NFPA 70-E contained an error in the exception to § 1910.303(h)(3)(i). In the second sentence, it was noted that "energized" should be "de-energized", as it is in 1978 NEC Section 110-34(a) from which the OSHA requirement was derived. The final rule contains this correction.

4. § *1910.304 Wiring Design and Protection.* This section covers the design requirements for wiring systems from the service conductors to the branch circuit conductors. It also covers requirements for the protection of electric conductors from both overcurrent and physical hazards.

Paragraph (a) requires that both the grounded circuit conductor and the equipment grounding conductor be identifiable and distinguishable from other conductors. These regulations have been written in more performance oriented terms than the former requirements which required that those conductors be identified in a specific manner.

A comment was received suggesting the inclusion of a provision which was contained in Section 410-55(c) of the 1971 NEC, but was not carried forward in the proposal on the presumption that it was covered by other proposed provisions. This provision prohibited the use of grounding terminals or grounding-type devices for purposes other than grounding. It was claimed that several fatalities in South Carolina were attributable to the placing of an ungrounded conductor on the grounding terminal of a receptacle, plug, or connector (Ex. 2). Similar accidents have been found in OSHA's records (Ex. 4).

Upon examining proposed provisions relating to grounding, OSHA has determined that the requirement of 1971 NEC Section 410-55(c) was not adequately covered elsewhere in the proposal. Therefore, since this provision is contained in OSHA's former regulations and since fatalities have occurred which are directly attributable to violations of this requirement, the following paragraph has been added to the final standard as new § 1910.304(a)(3):

(3) *Grounding Terminal.* A grounding terminal or grounding-type device on a receptacle, cord connector, or attachment plug may not be used for purposes other than grounding.

Paragraph (b) includes the requirements for sizing of outlet devices and for ground-fault protection for personnel on construction sites.

Paragraph (c) contains location and clearance requirements for low voltage (600 volts or less) conductors and lamps that are located outside. Paragraph (d) of this section requires that a disconnecting means be provided for the service entrance conductors. It also contains the location, marking and operational requirements for that disconnect.

Paragraph (e) contains overcurrent protection requirements for both low voltage and high voltage conductors.

Paragraph (e)(1)(vi) has been broken down into three separate paragraphs. The two provisions dealing with mounting and marking of circuit breakers have been renumbered as (e)(1)(vi)(*b*) and (*c*), and are effective only to equipment installed after the effective date of this standard, as noted in § 1910.303(b)(3).

The grounding requirements for electric systems are contained in paragraph (f) of this section. This paragraph is subdivided into seven categories as follows:

(1) Systems to be grounded.
(2) Conductors to be grounded.
(3) Grounding connections.
(4) Grounding path.
(5) Supports, enclosures, and equipment to be grounded.
(6) Methods of grounding fixed equipment.
(7) Grounding of systems and circuits of 1,000 volts and over (high voltage).

There were two major issues raised on the regulations contained in paragraph (f). One involved new § 1910.304(f)(4) *Grounding path.* This requirement, which is unchanged from the proposal, is discussed in issue number 5 of Section III of this preamble. The other major issue concerned new § 1910.304(f)(6) *Methods of grounding fixed equipment.* Paragraph (f)(6)(i) has been modified to prohibit the use of building steel as the equipment grounding conductor for installations made after the effective date of these standards. This subject is discussed in Issue 6 of Section III of this preamble.

All of the remaining requirements contained in paragraph (f) were contained in the former regulation, and any changes to those requirements are strictly editorial. For example, the word "devices" has been changed to "appliances" in § 1910.304(f)(5)(iv)(*f*)(*2*) because the equipment does not meet the definition of a "device", as set forth in § 1910.399(a)(38), meaning "a unit of an electrical system which is intended to carry but not utilize electric energy." Similarly, the word "portable" as used in § 1910.304(f)(7)(ii) has been changed to "portable or mobile", the equipment referred to in the applicable paragraphs is mobile but not necessarily easily carried. A similar change has also been made in the 1981 NEC.

§ *1910.305 Wiring Methods, Components, and Equipment for General Use.* This section contains installation requirements for equipment (in general), wiring components, and wiring methods. None of the requirements of this section were major issues during the rulemaking proceeding, except as to whether they should be more or less performance-oriented. (The performance vs. specification question is discussed in Issue 1 of Section III of this preamble.)

In response to comments received, OSHA has revised some provisions, and these revisions are discussed along with the requirements of this section:

Paragraph (a) deals with wiring methods. General wiring requirements (electrical continuity and wiring in ducts) are the subject of § 1910.305(a)(1). In this paragraph, continuity of metal raceways and enclosures is required and wiring in certain ducts is prohibited.

Paragraph (a)(2) gives requirements on temporary wiring, including its permitted uses. In general, temporary wiring is permitted to be of a class less than permanent wiring, but must follow most of the rules of permanent installations, except as noted in that paragraph. For the reasons discussed earlier under § 1910.302, the references to construction in §§ 1910.305 (a)(2)(i)(*a*) and (a)(2)(ii) have been deleted. Similarly, the first sentence of proposed § 1910.305(a)(2)(iii)(*g*), which related solely to construction, has been deleted.

Paragraphs (a)(3) and (a)(4) address two wiring methods, namely, cable trays and open wiring. These provisions give general installation and use requirements. In the final rule, proposed § 1910.305(a)(3)(i)(*b*)(*3*) has been renumbered § 1910.305(a)(3)(i)(*c*).

Paragraph (b) requires cabinets, boxes, and fittings to provide a complete enclosure for conductors and to have only smooth surfaces in contact with conductors.

Paragraphs (c) and (d) relate to switches, switchboards, and panelboards, and require protection from live parts.

Weatherproof enclosures are required for wet locations in paragraph (e).

Paragraph (f) requires conductors to have suitable insulation.

Paragraphs (g) and (h) cover the use of flexible cords and portable cables. Uses which are permitted and not permitted are listed in paragraph (g)(1), while paragraph (g)(2) details requirements for identification, splices, and termination of flexible cords. Requirements applicable to portable cables for use over 600 volts are contained in paragraph (h).

Fixture wires are addressed in § 1910.305(i). This paragraph gives permitted uses for fixture wires and does not allow their use for general branch circuit wiring.

Paragraph (j) contains requirements for wiring of equipment for general use. Paragraphs (j)(1) and (2) cover lighting equipment, plugs, and receptacles. Marking, guarding, and disconnection requirements for appliances are given in § 1910.305(j)(3).

Requirements for motors are contained in paragraph (j)(4). Motors are required to have suitable cover current protection and disconnection means. Guarding requirements are also provided in that paragraph.

Paragraph (j)(5) gives safeguarding requirements for transformer installations. Depending on their rating, some transformers must be in a vault. Stated in performance language, § 1910.305(j)(5)(vi) requires such vaults to be able to contain fires and combustible liquids. Although no specific fire rating is given, any vault constructed in accordance with NEC specifications in Article 450 would be acceptable.

Capacitor switching and charge drainage are addressed in § 1910.305(j)(6). Paragraph 1910.305(j)(6)(ii)(*b*), which gives switching specifications for series capacitors over 600 volts, was proposed as a new requirement and will apply only to installations made after the effective date of these standards.

Paragraph (j)(7) requires storage battery installations to have adequate ventilation.

6. § *1910.306 Specific Purpose Equipment and Installations.* This section contains regulations for equipment which is not adequately covered by the general requirement elsewhere in Subpart S.

Paragraph (a) covers electric signs and outline lighting. It includes specific requirements for disconnecting means and a requirement that access doors be interlocked to deenergize any live parts operating at over 600 volts when the sign or outline lighting is accessible to other than qualified persons. Paragraph (b) covers cranes and hoists and includes specific requirements for disconnects, control switches, and required working clearance.

Paragraph (c) includes specific requirements for disconnects and location of control panels associated with elevators, dumbwaiters, escalators, and moving walks.

A new provision requiring that a warning sign be mounted on or adjacent to the disconnecting means under certain conditions was included in § 1910.306(c)(1) of the proposal. This requirement has been renumbered in the final standard as § 1910.306(c)(2) and applies only to installations made after the effective date of these standards.

Specific requirements relating to disconnecting means, controls, guarding, grounding and labeling for electric welders, X-ray equipment for nonmedical and nondental use, and induction and dielectric heating equipment are included in paragraphs (d), (f), and (g).

Paragraph (e) contains disconnect requirements for data processing systems and was divided in the proposal into requirements for data processing rooms and requirements for general building areas. OHSA received comments (Ex. 2) stating that clarification should be made to indicate that disconnection of all equipment, such as typewriters and lights is not addressed by this paragraph. In addition, these same commenters questioned the extent of application to general building areas and requested clarification regarding when additional disconnects were required in those areas. The comments in the record are further supported by the decision of the NFPA 1981 NEC Code Committee to limit this requirement to electronic equipment, and only when installed in a computer room or data processing room. The change was made to avoid requiring associated equipment such as typewriters and even fire warning and fire supression systems to be disconnected with the data processing systems. These machines have nothing to do with protecting employees from hazards associated with data processing systems. Paragraph (e) in the final standard has therefore been modified to reflect these changes.

Paragraph (h) includes specific regulations on electrolytic cells. These requirements were not contained in the former standard but were proposed because of the unique operational requirements of these cells. These provisions, which are discussed in issue number 8 of Section III, have been adopted in the final rule as proposed.

Paragraph (i) contains specific requirements, which were not in the former standard, relating to electrically driven or controlled irrigation machines. This paragraph is applicable only to installations made after the effective date of these standards.

Paragraph (j) contains regulations for swimming pools, fountains, and similar installations other than therapeutic pools in health care facilities. Specific provisions include location requirements for lighting and receptacles and methods for determining which circuits require ground-fault circuit interrupters. Paragraph (j)(2)(c) in the proposal has been renumbered (j)(3) to make it clear that this requirement applies to all cord- and plug-connected equipment and not just to lighting fixtures and lighting outlets. Proposed paragraphs (j)(3) and (j)(4) have also been renumbered as (j)(4) and (j)(5) respectively and a note has been added to new § 1910.306(j)(5) indicating that it is applicable only to installations made after the effective date of these standards.

7. § *1910.307 Hazardous Locations.* Paragraph (a) gives the scope of this section and lists typical hazardous locations.

The remainder of this section was completely rearranged from the proposal to indicate its intent more clearly. The basic requirements for hazardous locations were contained in proposed § 1910.307(c), which read as follows:

(c) *Electrical installations.* Equipment wiring methods, and installations of equipment in classified locations shall be one or more of the following:

(1) Intrinsically safe.

(2) Approved for the classified location.

(3) Of a type and design which provides protection from the hazards arising from the combustibility and flammability of vapors, liquids, gases, dusts, or fibers.

The proposal was confusing to many interested persons in that other requirements or guidelines, which explained the three alternatives of § 1910.307(c), were scattered throughout § 1910.307. Confusion about these provisions appears to have been the cause of many of the misunderstandings discussed in relation to Issues 3 and 4 of Section III of this preamble.

In order to avoid the confusion and clarify the wording, OHSA has reorganized the final standard to combine the basic requirements with their respective related provisions. For example, provisions related to "approved" equipment have been combined under the option which allows the use of equipment which is "approved for the classified location." OHSA believes that this reorganization of § 1910.307 will make the section easier to understand.

Guidelines for determining what equipment and installations are "safe for the hazardous location" and thus meet § 1910.307(b)(3)] of the final standard (proposed § 1910.307(c)(3)] are contained in Chapter 5 of the current National Electrical Code (NFPA 70). However, these guidelines are not the only means of complying with the standard. Any equipment or installation which is shown by the employer to provide protection from the hazards involved will be acceptable. This performance-oriented approach will allow the employer maximum flexibility in providing safety for his employees.

8. § *1910.308 Special Systems.* Paragraph (a) of this section addresses electrical systems over 600 volts, nominal. Requirements are given for wiring methods, interrupting and isolating means, mobile and portable equipment, and tunnel installations. The provision in proposed paragraph (a)(1) requiring conductors emerging from the ground to be enclosed is a new requirement not in OHSA's previous standards. Therefore, in the final standard, this provision has been renumbered as paragraph (a)(1)(ii) and applies only to installations made after the effective date of these standards.

Paragraph (b) covers emergency power systems. Wiring for these systems is required to be separate from the normal supply wiring. Additionally, where emergency lighting is required, no space may be left in total darkness as a result of the failure of a single emergency lighting element.

Requirements for remote control, signaling, and power-limited circuits are contained in paragraph (c). Depending on the voltage, current, and power limitation, these circuits have been designated as Class 1, Class 2, or Class 3. Paragraph (c)(2) requires Class 2 and Class 3 systems to be marked; however, this requirement applies only to systems installed after the effective date of these standards, since this is a new requirement.

Fire protective signaling systems are covered in paragraph (d), which addresses classification, separation, and identification of these systems. Since this entire paragraph was not contained in OSHA's former standards, it applies only to installations made after the effective date of these standards.

Paragraph (e) applies to communications systems and contains provisions on protective devices, conductor and equipment locations, and grounding. Some commenters indicated that the proposal conflicted with both the 1971 and 1978 NEC by not making § 1910.308(e) the only provision in Subpart S covering communications systems (Ex. 45, 48). They suggested that OSHA include a statement in the regulation stating that communications systems were covered only in § 1910.308(e).

The omission of such a statement from the proposal was an oversight on OSHA's part. To correct this, OSHA has added the following sentence in § 1910.308(e):

> These installations need not comply with the provisions of §§ 1910.303 through 1910.308(d).

9. § *1910.399 Definitions.* This section provides definitions for Subpart S. The definitions in the final rule remain as proposed, except as follows:

(a)(24) "Class I locations": The definition of a Class I, Division 1 location has been changed by deleting the words "continuously, intermittently, or periodically." The rationale for this change is discussed in Issue 7 of Section III of this preamble. The note following this section has also been changed to more clearly describe this type of location.

(a)(25) "Class II locations": The definition of a Class II, Division 1 location has been changed by deleting the words "continuously, intermittently, or periodically." The definition of a Class II, Division 2 location (§ 1910.399(a)(25)(ii)) has also been changed to clarify the difference between Division 1 and Division 2 locations. Additionally, the fine print notes following these definitions have been modified to more accurately reflect examples of *locations* which could be classified as Class II locations considering advances in grain handling technology. The rationale for these changes is discussed in Issue 7 of Section III of this preamble.

(a)(128) "Utilization system": One commenter (Ex. 30) questioned this definition, stating that it was redundant with the definition of "premises wiring." However, the terms are not synonymous, and the final rule has been modified to clearly state that the utilization system includes not only the premises wiring system, but its associated utilization equipment as well.

V. Regulatory Assessment

In accordance with Executive Order No. 12044 (43 FR 12661, March 24, 1978), OSHA assessed the potential economic impact of the proposal. Based on the economic identification criteria developed by the Department of Labor (44 FR 5570, January 28, 1979), OSHA concluded that the subject matter of the proposal was not a "major" action which would necessitate further economic impact evaluation and the preparation of a Regulatory Analysis.

The proposal dealt with electrical installation safety requirements and was derived from the National Electrical Code, which was used as OSHA's previous standard. Since the proposal resulted in an overall simplification of OSHA's standards, the estimated cost of compliance was concluded not to be higher than the cost of compliance with the current OSHA standards.

This determination was based on a May 11, 1979, report by JRB Associates, Inc. The major finding of the economic impact assessment was that there would be no significant economic effect resulting from the promulgation of the proposed revisions to 29 CFR Part 1910, Subpart S, Electrical. The rationale for this conclusion was as follows:

—The proposed regulation contained no requirements other than those found in either 29 CFR Part 1910, Subpart S, or the 1978 National Electrical Code.

—Current industry practice for new installation is to conform to the 1978 National Electrical Code.

—Provisions in the proposed Subpart S had an antecedent in the 1978 National Electrical Code.

Several commenters took issue with OSHA's determination that the proposed revisions to Subpart S would not have a major economic impact on the affected industries. Detailed studies were submitted to the record by certain industry groups, notably the grain elevator industry and the feed manufacturing industry, which indicated that the costs of compliance with Subpart S as revised would be far greater than those associated with compliance with the current provisions. (Ex. 55], 58). However, a review of these studies reveals that their findings are based on certain misunderstandings of the scope and application of the former standards and OSHA's proposed revisions. These areas of concern are also discussed in detail in section III of this preamble, which deal with the "retroactive" and hazardous locations provisions of the standard. Nonetheless, OSHA believes that it may also be helpful to discuss these major areas of misunderstanding in the context of the regulatory assessment of the proposed standards.

OSHA's intent in proposing changes to Subpart S was to simplify compliance with the electrical standards, without reducing any of the employee protection currently provided. To that end, the proposed revisions to Subpart S approached the problem in three ways: first, performance language was substituted for the detailed requirements of the 1971 NEC, to provide flexibility for the employer; second, provisions of the 1971 NEC which were directed

primarily at property protection and not at employee protection were deleted; and third, all relevant provisions from the NEC were placed within Subpart S in place of the incorporation by reference of the NEC itself. The net result of the proposed revisions, therefore, was a significant decrease in the regulatory burden imposed by the electrical standards. In the limited circumstances in which the proposed standards imposed obligations not contained in the 1971 NEC as applied in the present standards, OSHA intended that these new obligations only apply to installations made after the effective date of the revised standards. (As noted in section VI of this preamble, OSHA acknowledged that this intention was not implemented totally in the proposal; such new provisions are more carefully and completely distinguished in the final standards.)

Concerning the question of the listed "retroactive" provisions in proposed § 1910.302(b)(1), it should be noted that the proposed revisions did no more than carry forward the provisions of current § 1910.309(a), which presently apply to all electrical installations, regardless of when they were made. Indeed, where the list has been modified, the changes simplify and reduce the compliance burden by eliminating requirements and allowing alternative compliance methods. There is no requirement imposed by the new § 1910.302(b)(1) that is not currently imposed on employers by virtue of § 1910.309(a) of the former standards. Thus, the costs of complying with these requirements cannot be attributed to the proposal.

OSHA based its economic impact analysis on the requirements of Executive Order No. 12044 (43 FR 12661, March 24, 1978), as supplemented by Department of Labor regulations (44 FR 5570, January 26, 1979). The regulatory assessment of the proposed regulations was intended to evaluate the incremental cost impact of the proposal over that of the existing regulations.

Since OSHA's proposal did not increase existing compliance requirements or establish new compliance requirements, it was found not to result in a major impact.

To support their view that OSHA's assessment was inadequate, two trade assocations submitted studies of the economic impact on their respective industries, based upon their interpretations of the proposal. One study claimed that it would cost the feed manufacturing industry about $785,000,000 to comply with OSHA's proposal, the other estimated costs of $825,000,000 for the grain elevator industry (Ex. 55J, 58).

It is difficult to evaluate the industry studies in depth: although specific compliance elements are mentioned in each study, the actual cost data are not adequately broken down to correspond to those elements. Therefore, there is no way to determine how much of their total cost estimates are attributable to which compliance activity. This is particularly troublesome for two reasons: first, when the costs are calculated based on an inaccurate reading of the standards, the magnitude of these unnecessary costs cannot be determined. It is noted, however, that in their other comments and testimony submitted to the record, these parties' primary concerns with the proposal centered on the costs of removal and replacement of unmarked, unlabeled and unapproved equipment in hazardous (classified) locations. As noted earlier, such requirements, and, therefore, their costs, are illusory. Clearly, then, if these costs constitute the greatest share of the total estimated compliance costs in these studies, the studies greatly overestimate the resources necessary for compliance with the standards.

Second, where repair costs are included as costs of compliance, such costs are also not properly attributable to the proposal. The proposal did not add any new requirements for existing installations; thus, where repairs are required for compliance with the proposal, they would also be necessary for compliance with the current standards. In addition, some repair costs may well be directed more towards routine operating repairs for continuing or resuming production in currently idle facilities than they are towards compliance with OSHA standards.

The inaccurate assumptions which appear to be the basis of much of the cost data in the industry studies have been discussed in depth in earlier sections of this preamble. The following discussion, therefore, represents a summation of the relevant issues as they pertain to the regulatory assessment.

Both industry studies assumed that all installations in hazardous locations were required to have "approved" equipment. (See issue 4(b) in section III of this preamble).

The studies also confused the terms "marking", "labeling", and "approval" and assumed that OSHA's standard differed from the NEC as to those terms (See Issue 4(a) in section III of this preamble). Contrary to the implications in the studies, the marking provisions in the standard do not require labeling or approval; they simply require identification of the various parameters of the equipment. This identification may be placed on the equipment using any means that is legible and durable enough to withstand the operating environment. As such, many of the costs indicated by the studies would not be incurred as employers would not be required to affix official manufacturers' labels or replace equipment which does not have such labels. Furthermore, the studies included in their estimates the cost of replacing otherwise acceptable equipment which is not listed or labeled, and hence not "approved." Such replacement of unapproved but otherwise acceptable equipment is not required by the standard if the equipment can be shown to meet one of the other compliance alternatives in § 1910.307.

Should some items of equipment not meet any of the compliance alternatives in § 1910.307, replacement of that equipment would be necessary. Assuming that an item of equipment would need to be replaced, the study did not take into account any possible salvage value of the used equipment. In addition, the studies did not consider the savings that might result from reduction in insurance premiums, property losses, and liability costs as a result of replacing unsafe equipment with safe equipment.

Where costs are imposed by the existing standards, the proposal does not increase these costs; to the contrary, as the assessment points out, the net impact of the proposal is expected to be an overall reduction in compliance costs due to the use of performance language and other reductions in the regulatory burdens imposed by the former standard.

One commenter contended that OSHA should have conducted a field survey to ascertain the present level of compliance with the current "retroactive" provisions in § 1910.309(a). Based on that survey, it was argued, OSHA should then have assessed not only the costs of compliance with new requirements imposed by the proposal, but the added costs of coming into compliance with the existing standards. (Ex. 69).

Because the proposed "retroactive" provision of § 1910.302(b)(1) did not increase compliance requirements over those of § 1910.309(a) (see Issue 3 in section III of this preamble), OSHA determined that the impact of the proposal in this regard was not major. Where industry is not currently in compliance with the existing standards, these costs cannot be attributed to the proposal. The regulatory assessment therefore, properly evaluated the incremental costs to be imposed by the proposed standard.

The regulatory assessment concluded that the only area in which increased costs might be expected is that of new provisions which were taken from the 1978 NEC and which were not in the 1971 NEC. Such costs were determined to be insignificant, particularly if the new provisions were to be applied only to installations made after the effective date of the final standards. This condition has been met by OSHA in the final revisions of Subpart S.

Therefore, after a careful review of the rulemaking record, OSHA has determined that this final standard is not a major action as defined in Executive Order 12044 and the Department economic criteria.

VI. Effective Date and Dates of Application

The scope and application of Subpart S, as set forth in paragraphs (b)(1) and (b)(2) of § 1910.302, essentially carry forward the provisions of § 1910.309 of the former standards. (The background and issues surrounding this section have been discussed at length in both Section III and Section IV of this preamble.) As in the case of previous § 1910.309(a), the provisions of Subpart S which are listed in new § 1910.302(b)(1) apply to all electrical installations, regardless of when they were made. Former § 1910.309(b) provided that the entire 1971 NEC applied to installations and modifications made after March 15, 1972. To be consistent with the former standard, the revision, in § 1910.302(b)(2), provides that the entire Subpart S applies to the same installations and modifications.

However, some of the provisions contained in the proposed regulations differed from or were not found in the previous regulations. These differences resulted from the use of the 1978 National Electrical Code as a base document. Since the previous regulations referenced the 1971 NEC, changes which were made in the subsequent editions of the NEC and which were included in the proposal appeared to impose new requirements.

OSHA had intended that all provisions in the proposal which were more stringent than the OSHA electrical standards in effect at the time would not apply to existing installations. Existing installations would not have to be retrofitted to meet these new requirements.

OSHA has added a new § 1910.302(b)(3) to indicate that the following new provisions apply only to installations made after April 16, 1981, the effective date of these standards.

(1) §§ 1910.303(h)(4)(i) and (ii). These requirements relate to access and entrance to workspace about equipment rated over 600 volts.

(2) § 1910.304(e)(1)(vi)(*b*). This requires the handle of vertically mounted circuit breakers to be in the up position when the breaker is on.

(3) § 1910.304(e)(1)(vi)(*c*). This provision would require circuit breakers used as switches in fluorescent lighting circuits to be marked "SWD."

(4) § 1910.305(j)(6)(ii)(*b*). This regulation addresses proper switching of series capacitors over 600 volts.

(5) § 1910.306(c)(2). This provision requires a warning sign for multicar elevator or escalator installations, under certain conditions.

(6) § 1910.306(i). This paragraph contains requirements for lighting protection and disconnection of electrically controlled or driven irrigation machines.

(7) § 1910.306(j)(4). This provision requires ground-fault circuit interrupters for fountain installations.

(8) § 1910.308(a)(1)(ii). This provision requires conductors over 600 volts emerging from the ground to be enclosed in a raceway.

(9) § 1910.308(c)(2) requires marking on Class 2 and Class 3 power supply units.

(10) § 1910.308(d). This paragraph contains requirements for fire protective signaling circuits.

In summary, § 1910.302(b) provides for three sets of provisions within Subpart S: paragraph (b)(1) contains the list of provisions applicable to all electrical installations; paragraph (b)(3) provides that the new requirements listed in that paragraph are only applicable to installations made after the effective date of these standards; and paragraph (b)(2) provides for the remainder of Subpart S to apply to new installations and major modifications made after March 15, 1972.

The effective date of these standards is (90 days after publication). The 90-day period between the issuance of the standards and their effective date is intended to provide sufficient time for employers and employees to become informed of the existence of the standards and their requirements.

The standards currently found in the existing Subpart S [§§ 1910.308–1910.309] will remain in effect until the standards contained in this document actually go into effect. Should the new standards be stayed, judicially or administratively, or should the standards not sustain legal challenge under section 6(f) of the Act, the current standards in Subpart S will remain in effect.

Any petitions for administrative reconsiderations of these standards or for an administrative stay pending judicial review must be filed with the Assistant Secretary of Labor for Occupational Safety and Health on or before March 2, 1981. Any petitions filed after this date will be considered to be filed untimely. This requirement is considered essential to permit the Agency to give full consideration to each petition and respond in advance of the effective date of the standards.

VII. Appendices

For informational purposes, one Appendix has been provided and two others reserved in this final standard. At this time only Appendix A is being promulgated. It contains a list of references which can provide guidance for employers who wish to know specifically what constitutes compliance with the performance standards. If an employer complies with the specific guidelines (the National Electrical Code, NFPA 70, in particular), that employer will be considered to be in compliance with the performance requirements given in OSHA's standard. At the same time, an employer may be in compliance with the standard although not complying with the specific requirements of the guidelines. In construing the meaning of the performance language in the standards in circumstances where the employer chooses not to comply with the specific provisions of the guidelines, OSHA will look at the specific guidelines among other things to determine whether the employer has complied with the standards' performance requirements. However, nothing contained in the appendices 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. In view of the nature of the appendices, changes in their contents may subsequently be made without rulemaking.

Three documents have been added to the list contained in the proposal. They are:

NMAB 353–1–79 Matrix of Combustion—Relevant Properties and Classifications of Gases, Vapors, and Selected Solids

NMAB 353–2–79 Test Equipment For Use in Determining Classifications of Combustible Dusts

NMAB–353–80 Classification of Combustible Dusts in Accordance with the National Electrical Code

VIII. Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of

Labor, Third Street and Constitution Avenue, NW., Washington, D.C. 20210.

Accordingly, pursuant to sections 4(b)(2) and 6(b) of the Occupational Safety and Health Act of 1970 [84 Stat. 1592, 1593, 29 U.S.C. 653, 655], Secretary of Labor's Order No. 8–76 (41 FR 25059), and 29 CFR Part 1911, Subpart S of 29 CFR Part 1910 is revised as set forth below.

Signed at Washington, D.C. this 8th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

Part 1910 of Title 29 of the Code of Federal Regulations is hereby amended by revising Subpart S, Electrical, to read as follows:

* * * * *

Subpart S—Electrical

General

Sec.

1910.301 Introduction.

Design Safety Standards for Electrical Systems

1910.302 Electric utilization systems.
1910.303 General requirements.
1910.304 Wiring design and protection.
1910.305 Wiring methods, components, and equipment for general use.
1910.306 Specific purpose equipment and installations.
1910.307 Hazardous (classified) locations.
1910.308 Special systems.
1910.309—1910.330 [Reserved]

Safety-Related Work Practices

1910.331—1910.360 [Reserved]

Safety-Related Maintenance Requirements

1910.361—1910.380 [Reserved]

Safety Requirements for Special Equipment

1910.381—1910.398 [Reserved]

Definitions

1910.399 Definitions applicable to this subpart.
Appendix A—Reference Documents.
Appendix B—Explanatory Data [Reserved]
Appendix C—Tables, Notes, and Charts [Reserved]

Authority: Secs. 4(b)(2) and 6(b), 84 Stat. 1592, 1593 (29 U.S.C. 653, 655), Secretary of Labor's Order No. 8–76 (41 FR 25059), 29 CFR Part 1911.

Subpart S—Electrical

General

§ 1910.301 Introduction.

This subpart addresses electrical safety requirements that are necessary for the practical safeguarding of employees in their workplaces and is divided into four major divisions as follows:

(a) *Design safety standards for electrical systems.* These regulations are contained in §§ 1910.302 through 1910.330. Sections 1910.302 through 1910.308 contain design safety standards for electric utilization systems. Included in this category are all electric equipment and installations used to provide electric power and light for employee workplaces. Sections 1910.309 through 1910.330 are reserved for possible future design safety standards for other electrical systems.

(b) *Safety-related work practices.* These regulations will be contained in §§ 1910.331 through 1910.360.

(c) *Safety-related maintenance requirements.* These regulations will be contained in §§ 1910.361 through 1910.380.

(d) *Safety requirements for special equipment.* These regulations will be contained in §§ 1910.381 through 1910.398.

(e) *Definitions* applicable to each division are contained in § 1910.399.

Design Safety Standards for Electrical Systems

§ 1910.302 Electric utilization systems.

Sections 1910.302 through 1910.308 contain design safety standards for electric utilization systems.

(a) *Scope.* (1) *Covered.* The provisions of §§ 1910.302 through 1910.308 of this subpart cover electrical installations and utilization equipment installed or used within or on buildings, structures, and other premises including:

(i) Yards,

(ii) Carnivals,

(iii) Parking and other lots,

(iv) Mobile homes,

(v) Recreational vehicles,

(vi) Industrial substations,

(vii) Conductors that connect the installations to a supply of electricity, and

(viii) Other outside conductors on the premises.

(2) *Not covered.* The provisions of §§ 1910.302 through 1910.308 of this subpart do not cover:

(i) Installations in ships, watercraft, railway rolling stock, aircraft, or automotive vehicles other than mobile homes and recreational vehicles.

(ii) Installations underground in mines.

(iii) Installations of railways for generation, transformation, transmission, or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signaling and communcation purposes.

(iv) Installations of communcation equipment under the exclusive control of communication utilities, located outdoors or in building spaces used exclusively for such installations.

(v) Installations under the exclusive control of electric utilities for the purpose of communication or metering; or for the generation, control, transformation, transmission, and distribution of electric energy located in buildings used exclusively by utilities for such purposes or located outdoors on property owned or leased by the utility or on public highways, streets, roads, etc., or outdoors by established rights on private property.

(b) *Extent of application.* (1) The requirements contained in the sections listed below shall apply to all electrical installations and utilization equipment, regardless of when they were designed or installed:

Sections:

1910.303(b)	Examination, installation, and use of equipment.
1910.303(c)	Splices.
1910.303(d)	Arcing parts.
1910.303(e)	Marking.
1910.303(f)	Identification of disconnecting means.
1910.303(g)(2)	Guarding of live parts.
1910.304(e)(1)(i)	Protection of conductors and equipment.
1910.304(e)(1)(v)	Location in or on premises.
1910.304(e)(1)(vi)	Arcing or suddenly moving parts.
1910.304(f)(1)(ii)	2-Wire DC systems to be grounded.
1910.304(f)(1)(iii) and 1910.304(f)(1)(iv).	AC Systems to be grounded.
1910.304(f)(1)(v)	AC Systems 50 to 1000 volts not required to be grounded.
1910.304(f)(3)	Grounding connections.
1910.304(f)(4)	Grounding path.
1910.304(f)(5)(iv)(a) through 1910.304(f)(5)(iv)(c).	Fixed equipment required to be grounded.
1910.304(f)(5)(v)	Grounding of equipment connected by cord and plug.
1910.304(f)(5)(vi)	Grounding of nonelectrical equipment.
1910.304(f)(6)(i)	Methods of grounding fixed equipment.
1910.305(g)(1)(i) and 1910.305(g)(1)(ii).	Flexible cords and cables, uses.
1910.305(g)(1)(iii)	Flexible cords and cables prohibited.
1910.305(g)(2)(ii)	Flexible cords and cables, splices.
1910.305(g)(2)(iii)	Pull at joints and terminals of flexible cords and cables.
1910.307	Hazardous (classified) location.

(2) Every electric utilization system and all utilization equipment installed after March 15, 1972, and every major replacement, modification, repair, or rehabilitation, after March 15, 1972, of any part of any electric utilization system or utilization equipment installed before March 15, 1972, shall comply with the provisions of §§ 1910.302 through 1910.308.

Note.—"Major replacements, modifications, repairs, or rehabilitations" include work similar to that involved when a new building or facility is built, a new wing is added, or an entire floor is renovated.

(3) The following provisions apply to electric utilization systems and utilization equipment installed after April 16, 1981:

§§ 1910.303(f)(4) (i)-(ii)	Entrance and access to workspace (over 600 volts).
§ 1910.304(e)(1)(v)(b)	Circuit breakers operated vertically.
§ 1910.304(e)(1)(v)(c)	Circuit breakers used as switches.
§ 1910.304(f)(7)(ii)	Grounding of systems of 1000 volts or more supplying portable or mobile equipment.
§ 1910.305(j)(5)(ii)(b)	Switching series capacitors over 600 volts.
§ 1910.306(c)(2)	Warning signs for elevators and escalators.
§ 1910.306(i)	Electrically controlled irrigation machines.
§ 1910.306(j)(5)	Ground-fault circuit interrupters for fountains.
§ 1910.308(a)(1)(ii)	Physical protection of conductors over 600 volts.
§ 1910.308(c)(2)	Marking of Class 2 and Class 3 power supplies.
§ 1910.308(d)	Fire protective signaling circuits.

§ 1910.303 General requirements.

(a) *Approval.* The conductors and equipment required or permitted by this subpart shall be acceptable only if approved.

(b) *Examination, installation, and use of equipment.* (1) *Examination.* Electrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm to employees. Safety of equipment shall be determined using the following considerations:

(i) Suitability for installation and use in conformity with the provisions of this subpart. Suitability of equipment for an identified purpose may be evidenced by listing or labeling for that identified purpose.

(ii) Mechanical strength and durability, including, for parts designed to enclose and protect other equipment, the adequacy of the protection thus provided.

(iii) Electrical insulation.

(iv) Heating effects under conditions of use.

(v) Arcing effects.

(vi) Classification by type, size, voltage, current capacity, specific use.

(vii) Other factors which contribute to the practical safeguarding of employees using or likely to come in contact with the equipment.

(2) *Installation and use.* Listed or labeled equipment shall be used or installed in accordance with any instructions included in the listing or labeling.

(c) *Splices.* Conductors shall be spliced or joined with splicing devices suitable for the use or by brazing, welding, or soldering with a fusible metal or alloy. Soldered splices shall first be so spliced or joined as to be mechanically and electrically secure without solder and then soldered. All splices and joints and the free ends of conductors shall be covered with an insulation equivalent to that of the conductors or with an insulating device suitable for the purpose.

(d) *Arcing parts.* Parts of electric equipment which in ordinary operation produce arcs, sparks, flames, or molten metal shall be enclosed or separated and isolated from all combustible material.

(e) *Marking.* Electrical equipment may not be used unless the manufacturer's name, trademark, or other descriptive marking by which the organization responsible for the product may be identified is placed on the equipment. Other markings shall be provided giving voltage, current, wattage, and other ratings as necessary. The marking shall be of sufficient durability to withstand the environment involved.

(f) *Identification of disconnecting means and circuits.* Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involvement involved.

(g) *600 Volts, nominal, or less.* (1) *Working space about electric equipment.* Sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment.

(i) *Working clearances.* Except as required or permitted elsewhere in this subpart, the dimension of the working space in the direction of access to live parts operating at 600 volts or less and likely to require examination, adjustment, servicing, or maintenance while alive may not be less than indicated in Table S-1. In addition to the dimensions shown in Table S-1, workspace may not be less than 30 inches wide in front of the electric equipment. Distances shall be measured from the live parts if they are exposed, or from the enclosure front or opening if the live parts are enclosed. Concrete, brick, or tile walls are considered to be grounded. Working space is not required in back of assemblies such as dead-front switchboards or motor control centers where there are no renewable or adjustable parts such as fuses or switches on the back and where all connections are accessible from locations other than the back.

Table S-1.—*Working clearances*

Nominal voltage to ground	Minimum clear distance for condition[2] (ft)		
	(a)	(b)	(c)
0-150	[1] 3	[1] 3	3
151-600	[1] 3	3½	4

[1] Minimum clear distances may be 2 feet 6 inches for installations built prior to April 16, 1981.

[2] Conditions (a), (b), and (c), are as follows: (a) Exposed live parts on one side and no live or grounded parts on the othe side of the working space, or exposed live parts on both sides effectively guarded by suitable wood or other insulating material. Insulated wire or insulated busbars operating at not over 300 volts are not considered live parts. (b) Exposed live parts on one side and grounded parts on the other side. (c) Exposed live parts on both sides of the workspace [not guarded as provided in Condition (a)] with the operator between.

(ii) *Clear spaces.* Working space required by this subpart may not be used for storage. When normally enclosed live parts are exposed for inspection or servicing, the working space, if in a passageway or general open space, shall be suitably guarded.

(iii) *Access and entrance to working space.* At least one entrance of sufficient area shall be provided to give access to the working space about electric equipment.

(iv) *Front working space.* Where there are live parts normally exposed on the front of switchboards or motor control centers, the working space in front of such equipment may not be less than 3 feet.

(v) *Illumination.* Illumination shall be provided for all working spaces about service equipment, switchboards, panelboards, and motor control centers installed indoors.

(vi) *Headroom.* The minimum headroom of working spaces about service equipment, switchboards, panelboards, or motor control centers shall be 6 feet 3 inches.

Note.—As used in this section a motor control center is an assembly of one or more enclosed sections having a common power bus and principally containing motor control units.

(2) *Guarding of live parts.* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:

(a) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.

(b) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the live parts or

to bring conducting objects into contact with them.

(c) By location on a suitable balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.

(d) By elevation of 8 feet or more above the floor or other working surface.

(ii) In locations where electric equipment would be exposed to physical damage, enclosures or guards shall be so arranged and of such strength as to prevent such damage.

(iii) Entrances to rooms and other guarded locations containing exposed live parts shall be marked with conspicuous warning signs forbidding unqualified persons to enter.

(h) *Over 600 volts, nominal.* (1) *General.* Conductors and equipment used on circuits exceeding 600 volts, nominal, shall comply with all applicable provisions of paragraphs (a) through (g) of this section and with the following provisions which supplement or modify those requirements. The provisions of paragraphs (h)(2), (h)(3), and (h)(4) of this section do not apply to equipment on the supply side of the service conductors.

(2) *Enclosure for electrical installations.* Electrical installations in a vault, room, closet or in an area surrounded by a wall, screen, or fence, access to which is controlled by lock and key or other approved means, are considered to be accessible to qualified persons only. A wall, screen, or fence less than 8 feet in height is not considered to prevent access unless it has other features that provide a degree of isolation equivalent to an 8 foot fence. The entrances to all buildings, rooms, or enclosures containing exposed live parts or exposed conductors operating at over 600 volts, nominal, shall be kept locked or shall be under the observation of a qualified person at all times.

(i) *Installations accessible to qualified persons only.* Electrical installations having exposed live parts shall be accessible to qualified persons only and shall comply with the applicable provisions of paragraph (h)(3) of this section.

(ii) *Installations accessible to unqualified persons.* Electrical installations that are open to unqualified persons shall be made with metal-enclosed equipment or shall be enclosed in a vault or in an area, access to which is controlled by a lock. If metal-enclosed equipment is installed so that the bottom of the enclosure is less than 8 feet above the floor, the door or cover shall be kept locked. Metal-enclosed switchgear, unit substations, transformers, pull boxes, connection boxes, and other similar associated equipment shall be marked with appropriate caution signs. If equipment is exposed to physical damage from vehicular traffic, suitable guards shall be provided to prevent such damage. Ventilating or similar openings in metal-enclosed equipment shall be designed so that foreign objects inserted through these openings will be deflected from energized parts.

(3) *Workspace about equipment.* Sufficient space shall be provided and maintained about electric equipment to permit ready and safe operation and maintenance of such equipment. Where energized parts are exposed, the minimum clear workspace may not be less than 6 feet 6 inches high (measured vertically from the floor or platform), or less than 3 feet wide (measured parallel to the equipment). The depth shall be as required in Table S-2. The workspace shall be adequate to permit at least a 90-degree opening of doors or hinged panels.

(i) *Working space.* The minimum clear working space in front of electric equipment such as switchboards, control panels, switches, circuit breakers, motor controllers, relays, and similar equipment may not be less than specified in Table S-2 unless otherwise specified in this subpart. Distances shall be measured from the live parts if they are exposed, or from the enclosure front or opening if the live parts are enclosed. However, working space is not required in back of equipment such as deadfront switchboards or control assemblies where there are no renewable or adjustable parts (such as fuses or switches) on the back and where all connections are accessible from locations other than the back. Where rear access is required to work on de-energized parts on the back of enclosed equipment, a minimum working space of 30 inches horizontally shall be provided.

Table S-2.—*Minimum Depth of Clear working Space in Front of Electric Equipment*

Nominal voltage to ground	Conditions[2] (ft)		
	(a)	(b)	(c)
601 to 2,500	3	4	5
2,501 to 9,000	4	5	6
9,001 to 25,000	5	6	9
25,001 to 75kV[1]	6	8	10
Above 75kV[1]	8	10	12

[1] Minimum depth of clear working space in front of electric equipment with a nominal voltage to ground above 25,000 volts may be the same as for 25,000 volts under Conditions (a), (b), and (c) for installations built prior to April 16, 1981.

[2] Conditions (a), (b), and (c) are as follows: (a) Exposed live parts on one side and no live or grounded parts on the other side of the working space, or exposed live parts on both sides effectively guarded by suitable wood or other insulating materials. Insulated wire or insulated busbars operating at not over 300 volts are not considered live parts. (b) Exposed live parts on one side and grounded parts on the other side. Concrete, brick, or tile walls will be considered as grounded surfaces. (c) Exposed live parts on both sides of the workspace not guarded as provided in Condition (a) with the operator between.

(ii) *Illumination.* Adequate illumination shall be provided for all working spaces about electric equipment. The lighting outlets shall be so arranged that persons changing lamps or making repairs on the lighting system will not be endangered by live parts or other equipment. The points of control shall be so located that persons are not likely to come in contact with any live part or moving part of the equipment while turning on the lights.

(iii) *Elevation of unguarded live parts.* Unguarded live parts above working space shall be maintained at elevations not less than specified in Table S-3.

Table S-3.—*Elevation of Unguarded Energized Parts Above Working Space*

Nominal voltage between phases	Minimum elevation
601 to 7,500	*8 feet 6 inches.
7,501 to 35,000	9 feet.
Over 35kV	9 feet + 0.37 inches per kV above 35kV.

*Note.—Minimum elevation may be 8 feet 0 inches for installations built prior to April 16, 1981 if the nominal voltage between phases is in the range of 601–6600 volts.

(4) *Entrance and access to workspace.* (See § 1910.302(b)(3).)

(i) At least one entrance not less than 24 inches wide and 6 feet 6 inches high shall be provided to give access to the working space about electric equipment. On switchboard and control panels exceeding 48 inches in width, there shall be one entrance at each end of such board where practicable. Where bare energized parts at any voltage or insulated energized parts above 600 volts are located adjacent to such entrance, they shall be suitably guarded.

(ii) Permanent ladders or stairways shall be provided to give safe access to the working space around electric equipment installed on platforms, balconies, mezzanine floors, or in attic or roof rooms or spaces.

§ 1910.304 Wiring design and protection.

(a) *Use and identification of grounded and grounding conductors.* (1) *Identification of conductors.* A conductor used as a grounded conductor shall be identifiable and distinguishable from all other conductors. A conductor used as an equipment grounding conductor shall be identifiable and distinguishable from all other conductors.

(2) *Polarity of connections.* No grounded conductor may be attached to any terminal or lead so as to reverse designated polarity.

(3) *Use of grounding terminals and devices.* A grounding terminal or grounding-type device on a receptacle, cord connector, or attachment plug may

not be used for purposes other than grounding.

(b) *Branch circuits.* (1) *Ground-fault protection for personnel on construction sites.* The employer shall use either ground-fault circuit interrupters as specified in paragraph (b)(1)(i) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(ii) of this section, to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

(i) *Ground-fault circuit interrupters.* All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator rated not more than 5 kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground-fault circuit interrupters.

(ii) *Assured equipment grounding conductor program.* The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and equipment connected by cord and plug, which are available for use or used by employees. This program shall comply with the following minimum requirements:

(*a*) A written description of the program, including the specific procedures adopted by the employer, shall be available at the jobsite for inspection and copying by the Assistant Secretary and any affected employee.

(*b*) The employer shall designate one or more competent persons (as defined in 29 CFR 1926.32(f)) to implement the program.

(c) Each cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage, shall be visually inspected before each day's use for external defects, such as deformed or missing pins or insulation damage, and for indication of possible internal damage. Equipment found damaged or defective may not be used until repaired.

(*d*) The following tests shall be performed on all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and cord- and plug-connected equipment required to be grounded:

(*1*) All equipment grounding conductors shall be tested for continuity and shall be electrically continuous.

(*2*) Each receptacle and attachment cap or plug shall be tested for correct attachment of the equipment grounding conductor. The equipment grounding conductor shall be connected to its proper terminal.

(*e*) All required tests shall be performed:

(*1*) Before first use;

(*2*) Before equipment is returned to service following any repairs;

(*3*) Before equipment is used after any incident which can be reasonably suspected to have caused damage (for example, when a cord set is run over); and

(*4*) At intervals not to exceed 3 months, except that cord sets and receptacles which are fixed and not exposed to damage shall be tested at intervals not exceeding 6 months.

(f) The employer may not make available or permit the use by employees of any equipment which has not met the requirements of this paragraph (b)(1)(ii) of this section.

(g) Tests performed as required in this paragraph shall be recorded. This test record shall identify each receptacle, cord set, and cord- and plug-connected equipment that passed the test, and shall indicate the last date it was tested or the interval for which it was tested. This record shall be kept by means of logs, color coding, or other effective means, and shall be maintained until replaced by a more current record. The record shall be made available on the jobsite for inspection by the Assistant Secretary and any affected employee.

(2) *Outlet devices.* Outlet devices shall have an ampere rating not less than the load to be served.

(c) *Outside conductors, 600 volts, nominal, or less.* Paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this section apply to branch circuit, feeder, and service conductors rated 600 volts, nominal, or less and run outdoors as open conductors. Paragraph (c)(5) applies to lamps installed under such conductors.

(1) *Conductors on poles.* Conductors supported on poles shall provide a horizontal climbing space not less than the following:

(i) Power conductors below communication conductors—30 inches.

(ii) Power conductors alone or above communication conductors: 300 volts or less—24 inches; more than 300 volts—30 inches.

(iii) Communication conductors below power conductors with power conductors 300 volts or less—24 inches; more than 300 volts—30 inches.

(2) *Clearance from ground.* Open conductors shall conform to the following minimum clearances:

(i) 10 feet—above finished grade, sidewalks, or from any platform or projection from which they might be reached.

(ii) 12 feet—over areas subject to vehicular traffic other than truck traffic.

(iii) 15 feet—over areas other than those specified in paragraph (c)(2)(iv) of this section that are subject to truck traffic.

(iv) 18 feet—over public streets, alleys, roads, and driveways.

(3) *Clearance from building openings.* Conductors shall have a clearance of at least 3 feet from windows, doors, porches, fire escapes, or similar locations. Conductors run above the top level of a window are considered to be out of reach from that window and, therefore, do not have to be 3 feet away.

(4) *Clearance over roofs.* Conductors shall have a clearance of not less than 8 feet from the highest point of roofs over which they pass, except that

(i) Where the voltage between conductors is 300 volts or less and the roof has a slope of not less than 4 inches in 12, the clearance from roofs shall be at least 3 feet, or

(ii) Where the voltage between conductors is 300 volts or less and the conductors do not pass over more than 4 feet of the overhang portion of the roof and they are terminated at a through-the-roof raceway or approved support, the clearance from roofs shall be at least 18 inches.

(5) *Location of outdoor lamps.* Lamps for outdoor lighting shall be located below all live conductors, transformers, or other electric equipment, unless such equipment is controlled by a disconnecting means that can be locked in the open position or unless adequate clearances or other safeguards are provided for relamping operations.

(d) *Services. (1) Disconnecting means. (i) General.* Means shall be provided to disconnect all conductors in a building or other structure from the service-entrance conductors. The disconnecting means shall plainly indicate whether it is in the open or closed position and shall be installed at a readily accessible location nearest the point of entrance of the service-entrance conductors.

(ii) *Simultaneous opening of poles.* Each service disconnecting means shall simultaneously disconnect all ungrounded conductors.

(2) *Services over 600 volts, nominal.* The following additional requirements apply to services over 600 volts, nominal.

(i) *Guarding.* Service-entrance conductors installed as open wires shall be guarded to make them accessible only to qualified persons.

(ii) *Warning signs.* Signs warning of high voltage shall be posted where other than qualified employees might come in contact with live parts.

(e) *Overcurrent protection. (1) 600 volts, nominal, or less.* The following requirements apply to overcurrent protection of circuits rated 600 volts, nominal, or less.

(i) *Protection of conductors and equipment.* Conductors and equipment shall be protected from overcurrent in accordance with their ability to safely conduct current.

(ii) *Grounded conductors.* Except for motor running overload protection, overcurrent devices may not interrupt the continuity of the grounded conductor unless all conductors of the circuit are opened simultaneously.

(iii) *Disconnection of fuses and thermal cutouts.* Except for service fuses, all cartridge fuses which are accessible to other than qualified persons and all fuses and thermal cutouts on circuits over 150 volts to ground shall be provided with disconnecting means. This disconnecting means shall be installed so that the fuse or thermal cutout can be disconnected from its supply without disrupting service to equipment and circuits unrelated to those protected by the overcurrent device.

(iv) *Location in or on premises.* Overcurrent devices shall be readily accessible to each employee or authorized building management personnel. These overcurrent devices may not be located where they will be exposed to physical damage nor in the vicinity of easily ignitible material.

(v) *Arcing or suddenly moving parts.* Fuses and circuit breakers shall be so located or shielded that employees will not be burned or otherwise injured by their operation.

(vi) *Circuit breakers.* (*a*) Circuit breakers shall clearly indicate whether they are in the open (off) or closed (on) position.

(*b*)Where circuit breaker handles on switchboards are operated vertically rather than horizontally or rotationally, the up position of the handle shall be the closed (on) position. (See § 1910.302(b)(3).)

(*c*) If used as switches in 120-volt, fluorescent lighting circuits, circuit breakers shall be approved for the purpose and marked "SWD." (See § 1910.302(b)(3).)

(2) *Over 600 volts, nominal.* Feeders and branch circuits over 600 volts, nominal, shall have short-circuit protection.

(f) *Grounding.* Paragraphs (f)(1) through (f)(7) of this section contain grounding requirements for systems, circuits, and equipment.

(1) *Systems to be grounded.* The following systems which supply premises wiring shall be grounded:

(i) All 3-wire DC systems shall have their neutral conductor grounded.

(ii) Two-wire DC systems operating at over 50 volts through 300 volts between conductors shall be grounded unless:

(*a*) They supply only industrial equipment in limited areas and are equipped with a ground detector; or

(*b*) They are rectifier-derived from an AC system complying with paragraphs (f)(1)(iii), (f)(1)(v), and (f)(1)(v) of this section; or

(*c*) They are fire-protective signaling circuits having a maximum current of 0.030 amperes.

(iii) AC circuits of less than 50 volts shall be grounded if they are installed as overhead conductors outside of buildings or if they are supplied by transformers and the transformer primary supply system is ungrounded or exceeds 150 volts to ground.

(iv) AC systems of 50 volts to 1000 volts shall be grounded under any of the following conditions, unless exempted by paragraph (f)(1)(v) of this section:

(*a*) If the system can be so grounded that the maximum voltage to ground on the ungrounded conductors does not exceed 150 volts;

(*b*) If the system is nominally rated 480Y/277 volt, 3-phase, 4-wire in which the neutral is used as a circuit conductor;

(*c*) If the system is nominally rated 240/120 volt, 3-phase, 4-wire in which the midpoint of one phase is used as a circuit conductor; or

(*d*) If a service conductor is uninsulated.

(v) AC systems of 50 volts to 1000 volts are not required to be grounded under any of the following conditions:

(*a*) If the system is used exclusively to supply industrial electric furnaces for melting, refining, tempering, and the like.

(*b*) If the system is separately derived and is used exclusively for rectifiers supplying only adjustable speed industrial drives.

(*c*) If the system is separately derived and is supplied by a transformer that has a primary voltage rating less than 1000 volts, provided all of the following conditions are met:

(*1*) The system is used exclusively for control circuits,

(*2*) The conditions of maintenance and supervision assure that only qualified persons will service the installation,

(*3*) Continuity of control power is required, and

(*4*) Ground detectors are installed on the control system.

(*d*) If the system is an isolated power system that supplies circuits in health care facilities.

(2) *Conductors to be grounded.* For AC premises wiring systems the identified conductor shall be grounded.

(3) *Grounding connections.* (i) For a grounded system, a grounding electrode conductor shall be used to connect both the equipment grounding conductor and the grounded circuit conductor to the grounding electrode. Both the equipment grounding conductor and the grounding electrode conductor shall be connected to the grounded circuit conductor on the supply side of the service disconnecting means, or on the supply side of the system disconnecting means or overcurrent devices if the system is separately derived.

(ii) For an ungrounded service-supplied system, the equipment grounding conductor shall be connected to the grounding electrode conductor at the service equipment. For an ungrounded separately derived system, the equipment grounding conductor shall be connected to the grounding electrode conductor at, or ahead of, the system disconnecting means or overcurrent devices.

(iii) On extensions of existing branch circuits which do not have an equipment grounding conductor, grounding-type receptacles may be grounded to a grounded cold water pipe near the equipment.

(4) *Grounding path.* The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

(5) *Supports, enclosures, and equipment to be grounded.*—(i) *Supports and enclosures for conductors.* Metal cable trays, metal raceways, and metal enclosures for conductors shall be grounded, except that:

(*a*) Metal enclosures such as sleeves that are used to protect cable assemblies from physical damage need not be grounded; or

(*b*) Metal enclosures for conductors added to existing installations of open wire, knob-and-tube wiring, and nonmetallic-sheathed cable need not be grounded if all of the following conditions are met: (1) runs are less than 25 feet; (2) enclosures are free from probable contact with ground, grounded metal, metal laths, or other conductive materials; and (3) enclosures are guarded against employee contact.

(ii) *Service equipment enclosures.* Metal enclosures for service equipment shall be grounded.

(iii) *Frames of ranges and clothes dryers.* Frames of electric ranges, wall-mounted ovens, counter-mounted cooking units, clothes dryers, and metal outlet or junction boxes which are part of the circuit for these appliances shall be grounded.

(iv) *Fixed equipment.* Exposed non-current-carrying metal parts of fixed equipment which may become energized shall be grounded under any of the following conditions:

(*a*) If within 8 feet vertically or 5 feet horizontally of ground or grounded metal objects and subject to employee contact.

(*b*) If located in a wet or damp location and not isolated.

(*c*) If in electrical contact with metal.

(*d*) If in a hazardous (classified) location.

(*e*) If supplied by a metal-clad, metal-sheathed, or grounded metal raceway wiring method.

(*f*) If equipment operates with any terminal at over 150 volts to ground; however, the following need not be grounded:

(*1*) Enclosures for switches or circuit breakers used for other than service equipment and accessible to qualified persons only;

(*2*) Metal frames of electrically heated appliances which are permanently and effectively insulated from ground; and

(*3*) The cases of distribution apparatus such as transformers and capacitors mounted on wooden poles at a height exceeding 8 feet above ground or grade level.

(v) *Equipment connected by cord and plug.* Under any of the conditions described in paragraphs (f)(5)(v)(*a*) through (f)(5)(v)(*c*) of this section, exposed non-current-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded.

(*a*) If in hazardous (classified) locations (see § 1910.306).

(*b*) If operated at over 150 volts to ground, except for guarded motors and metal frames of electrically heated appliances if the appliance frames are permanently and effectively insulated from ground.

(*c*) If the equipment is of the following types:

(*1*) Refrigerators, freezers, and air conditioners;

(*2*) Clothes-washing, clothes-drying and dishwashing machines, sump pumps, and electrical aquarium equipment;

(*3*) Hand-held motoroperated tools;

(*4*) Motoroperated appliances of the following types: hedge clippers, lawn mowers, snow blowers, and wet scrubbers;

(*5*) Cord- and plug-connected appliances used in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or boilers;

(*6*) Portable and mobile X-ray and associated equipment;

(*7*) Tools likely to be used in wet and conductive locations; and

(*8*) Portable hand lamps.

Tools likely to be used in wet and conductive locations need not be grounded if supplied through an isolating transformer with an ungrounded secondary of not over 50 volts. Listed or labeled portable tools and appliances protected by an approved system of double insulation, or its equivalent, need not be grounded. If such a system is employed, the equipment shall be distinctively marked to indicate that the tool or appliance utilizes an approved system of double insulation.

(vi) *Nonelectrical equipment.* The metal parts of the following nonelectrical equipment shall be grounded: frames and tracks of electrically operated cranes; frames of nonelectrically driven elevator cars to which electric conductors are attached; hand operated metal shifting ropes or cables of electric elevators, and metal partitions, grill work, and similar metal enclosures around equipment of over 750 volts between conductors.

(6) *Methods of grounding fixed equipment.* (i) Non-current-carrying metal parts of fixed equipment, if required to be grounded by this subpart, shall be grounded by an equipment grounding conductor which is contained within the same raceway, cable, or cord, or runs with or encloses the circuit conductors. For DC circuits only, the equipment grounding conductor may be run separately from the circuit conductors.

(ii) Electric equipment shall be considered to be effectively grounded if it is secured to, and in electrical contact with, a metal rack or structure that is provided for its support and the metal rack or structure is grounded by the method specified for the non-current-carrying metal parts of fixed equipment in paragraph (f)(6)(i) of this section. For installations made before April 16, 1981, only, electric equipment shall be also considered to be effectively grounded if it is secured to, and in metallic contact with, the grounded structural metal frame of a building. Metal car frames supported by metal hoisting cables attached to or running over metal sheaves or drums of grounded elevator machines are also considered to be effectively grounded.

(7) *Grounding of systems and circuits of 1000 volts and over (high voltage.).*— (i) *General.* If high voltage systems are grounded, they shall comply with all applicable provisions of paragraphs (f)(1) through (f)(6) of this section as supplemented and modified by this paragraph (f)(7).

(ii) *Grounding of systems supplying portable or mobile equipment.* (See § 1910.302(b)(3).) Systems supplying portable or mobile high voltage equipment, other than substations installed on a temporary basis, shall comply with the following:

(*a*) Portable and mobile high voltage equipment shall be supplied from a system having its neutral grounded through an impedance. If a delta-connected high voltage system is used to supply the equipment, a system neutral shall be derived.

(*b*) Exposed non-current-carrying metal parts of portable and mobile equipment shall be connected by an equipment grounding conductor to the point at which the system neutral impedance is grounded.

(*c*) Ground-fault detection and relaying shall be provided to automatically de-energize any high voltage system component which has developed a ground fault. The continuity of the equipment grounding conductor shall be continuously monitored so as to de-energize automatically the high voltage feeder to the portable equipment upon loss of continuity of the equipment grounding conductor.

(*d*) The grounding electrode to which the portable or mobile equipment system neutral impedance is connected shall be isolated from and separated in the ground by at least 20 feet from any other system or equipment grounding electrode, and there shall be no direct connection between the grounding electrodes, such as buried pipe, fence, etc.

(iii) *Grounding of equipment.* All non-current-carrying metal parts of portable equipment and fixed equipment including their associated fences, housings, enclosures, and supporting structures shall be grounded. However, equipment which is guarded by location and isolated from ground need not be grounded. Additionally, pole-mounted distribution apparatus at a height exceeding 8 feet above ground or grade level need not be grounded.

§ 1910.305 Wiring methods, components, and equipment for general use.

(a) *Wiring methods.* The provisions of this section do not apply to the conductors that are an integral part of factory-assembled equipment.

(1) *General requirements.*—(i) *Electrical continuity of metal raceways and enclosures.* Metal raceways, cable armor, and othe metal enclosures for conductors shall be metallically joined together into a continuous electric conductor and shall be so connected to all boxes, fittings, and cabinets as to provide effective electrical continuity.

(ii) *Wiring in ducts.* No wiring systems of any type shall be installed in ducts used to transport dust, loose stock or flammable vapors. No wiring system of any type may be installed in any duct used for vapor removal or for ventilation of commercial-type cooking equipment, or in any shaft containing only such ducts.

(2) *Temporary wiring.* Temporary electrical power and lighting wiring methods may be of a class less than would be required for a permanent installation. Except as specifically modified in this paragraph, all other requirements of this subpart for permanent wiring shall apply to temporary wiring installations.

(i) *Uses permitted, 600 volts, nominal, or less.* Temporary electrical power and lighting installations 600 volts, nominal, or less may be used only:

(*a*) During and for remodeling, maintenance, repair, or demolition of buildings, structures, or equipment, and similar activities;

(*b*) For experimental or development work, and

(*c*) For a period not to exceed 90 days for Christmas decorative lighting, carnivals, and similar purposes.

(ii) *Uses permitted, over 600 volts, nominal.* Temporary wiring over 600 volts, nominal, may be used only during periods of tests, experiments, or emergencies.

(iii) *General requirements for temporary wiring.—(a)* Feeders shall originate in an approval distribution center. The conductors shall be run as multiconductor cord or cable assemblies, or, where not subject to physical damage, they may be run as open conductors on insulators not more than 10 feet apart.

(*b*) Branch circuits shall originate in an approved power outlet or panelboard. Conductors shall be multiconductor cord or cable assemblies or open conductors. If run as open conductors they shall be fastened at ceiling height every 10 feet. No branch-circuit conductor may be laid on the floor. Each branch circuit that supplies receptacles or fixed equipment shall contain a separate equipment grounding conductor if run as open conductors.

(*c*) Receptacles shall be of the grounding type. Unless installed in a complete metallic raceway, each branch circuit shall contain a separate equipment grounding conductor and all receptacles shall be electrically connected to the grounding conductor.

(*d*) No bare conductors nor earth returns may be used for the wiring of any temporary circuit.

(*e*) Suitable disconnecting switches or plug connectors shall be installed to permit the disconnection of all ungrounded conductors of each temporary circuit.

(*f*) Lamps for general illumination shall be protected from accidential contact or breakage. Protection shall be provided by elevation of at least 7 feet from normal working surface or by a suitable fixture of lampholder with a guard.

(*g*) Flexible cords and cables shall be protected from accidental damage. Sharp corners and projections shall be avoided. Where passing through doorways or other pinch points, flexible cords and cables shall be provided with protection to avoid damage.

(3) *Cable trays.* (i) *Uses permitted. (a)* Only the following may be installed in cable tray systems:

(*1*) Mineral-insulated metal-sheathed cable (Type MI);

(*2*) Armored cable (Type AC);

(*3*) Metal-clad cable (Type MC);

(*4*) Power-limited tray cable (Type PLTC);

(*5*) Nonmetallic-sheathed cable (Type NM or NMC);

(*6*) Shielded Nonmetallic-sheathed cable (Type SNM);

(*7*) Multiconductor service-entrance cable (Type SE or USE);

(*8*) Multiconductor underground feeder and branch-circuit cable (Type UF);

(*9*) Power and control tray cable (Type TC);

(*10*) Other factory-assembled, multiconductor control, signal, or power cables which are specifically approved for installation in cable trays; or

(*11*) Any approved conduit or raceway with its contained conductors.

(*b*) In industrial establishments only, where conditions of maintenance and supervision assure that only qualified persons will service the installed cable tray system, the following cables may also be installed in ladder, ventilated trough, or 4 inch ventilated channel-type cable trays:

(*1*) Single conductor cables which are 250 MCM or larger and are Types RHH, RHW, MV, USE, or THW, and 250 MCM or larger single conductor cables if specifically approved for installation in cable trays. Where exposed to direct rays of the sun, cables shall be sunlight-resistant.

(*2*) Type MV cables, where exposed to direct rays of the sun, shall be sunlight-resistant.

(*c*) Cable trays in hazardous (classified) locations shall contain only the cable types permitted in such locations.

(ii) *Uses not permitted.* Cable tray systems may not be used in hoistways or where subjected to severe physical damage.

(4) *Open wiring on insulators.*—(i) *Uses permitted.* Open wiring on insulators is only permitted on systems of 600 volts, nominal, or less for industrial or agricultural establishments and for services.

(ii) *Conductor supports.* Conductors shall be rigidly supported on noncombustible, nonabsorbent insulating materials and may not contact any other objects.

(iii) *Flexible nonmetallic tubing.* In dry locations where not exposed to severe physical damage, conductors may be separately enclosed in flexible nonmetallic tubing. The tubing shall be in continuous lengths not exceeding 15 feet and secured to the surface by straps at intervals not exceeding 4 feet 6 inches.

(iv) *Through walls, floors, wood cross members, etc.* Open conductors shall be separated from contact with walls, floors, wood cross members, or partitions through which they pass by tubes or bushings of noncombustible, nonabsorbent insulating material. If the bushing is shorter than the hole, a waterproof sleeve of nonconductive material shall be inserted in the hole and an insulating bushing slipped into the sleeve at each end in such a manner as to keep the conductors absolutely out of contact with the sleeve. Each conductor shall be carried through a separate tube or sleeve.

(v) *Protection from physical damage.* Conductors within 7 feet from the floor are considered exposed to physical damage. Where open conductors cross ceiling joints and wall studs and are exposed to physical damage, they shall be protected.

(b) *Cabinets, boxes, and fittings.*—(1) *Conductors entering boxes, cabinets, or fittings.* Conductors entering boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be also effectively closed.

(2) *Covers and canopies.* All pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose. If metal covers are used they shall be grounded. In completed installations each outlet box shall have

a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

(3) *Pull and junction boxes for systems over 600 volts, nominal.* In addition to other requirements in this section for pull and junction boxes, the following shall apply to these boxes for systems over 600 volts, nominal:

(i) Boxes shall provide a complete enclosure for the contained conductors or cables.

(ii) Boxes shall be closed by suitable covers securely fastened in place. Underground box covers that weigh over 100 pounds meet this requirement. Covers for boxes shall be permanently marked "HIGH VOLTAGE." The marking shall be on the outside of the box cover and shall be readily visible and legible.

(c) *Switches.*—(1) *Knife switches.* Single-throw knife switches shall be so connected that the blades are dead when the switch is in the open position. Single-throw knife switches shall be so placed that gravity will not tend to close them. Single-throw knife switches approved for use in the inverted position shall be provided with a locking device that will ensure that the blades remain in the open position when so set. Double-throw knife switches may be mounted so that the throw will be either vertical or horizontal. However, if the throw is vertical a locking device shall be provided to ensure that the blades remain in the open position when so set.

(2) *Faceplates for flush-mounted snap switches.* Flush snap switches that are mounted in ungrounded metal boxes and located within reach of conducting floors or other conducting surfaces shall be provided with faceplates of nonconducting, noncombustible material.

(d) *Switchboards and panelboards.* Switchboards that have any exposed live parts shall be located in permanently dry locations and accessible only to qualified persons. Panelboards shall be mounted in cabinets, cutout boxes, or enclosures approved for the purpose and shall be dead front. However, panelboards other than the dead front externally-operable type are permitted where accessible only to qualified persons. Exposed blades of knife switches shall be dead when open.

(e) *Enclosures for damp or wet locations.* (1) Cabinets, cutout boxes, fittings, boxes, and panelboard enclosures in damp or wet locations shall be installed so as to prevent moisture or water from entering and accumulating within the enclosures. In wet locations the enclosures shall be weatherproof.

(2) Switches, circuit breakers, and switchboards installed in wet locations shall be enclosed in weatherproof enclosures.

(f) *Conductors for general wiring.* All conductors used for general wiring shall be insulated unless otherwise permitted in this Subpart. The conductor insulation shall be of a type that is approved for the voltage, operating temperature, and location of use. Insulated conductors shall be distinguishable by appropriate color or other suitable means as being grounded conductors, ungrounded conductors, or equipment grounding conductors.

(g) *Flexible cords and cables.*—(1) *Use of flexible cords and cables.* (i) Flexible cords and cables shall be approved and suitable for conditions of use and location. Flexible cords and cables shall be used only for:

(*a*) Pendants;

(*b*) Wiring of fixtures;

(*c*) Connection of portable lamps or appliances;

(*d*) Elevator cables;

(*e*) Wiring of cranes and hoists;

(*f*) Connection of stationary equipment to facilitate their frequent interchange;

(*g*) Prevention of the transmission of noise or vibration;

(*h*) Appliances where the fastening means and mechanical connections are designed to permit removal for maintenance and repair; or

(*i*) Data processing cables approved as a part of the data processing system.

(ii) If used as permitted in paragraphs (g)(1)(i)(*c*), (g)(1)(i)(*f*), or (g)(1)(i)(*h*) of this section, the flexible cord shall be equipped with an attachment plug and shall be energized from an approved receptacle outlet.

(iii) Unless specifically permitted in paragraph (g)(1)(i) of this section, flexible cords and cables may not be used:

(*a*) As a substitute for the fixed wiring of a structure;

(*b*) Where run through holes in walls, ceilings, or floors;

(*c*) Where run through doorways, windows, or similar openings;

(*d*) Where attached to building surfaces; or

(*e*) Where concealed behind building walls, ceilings, or floors.

(iv) Flexible cords used to show windows and showcases shall be Type S, SO, SJ, SJO, ST, STO, SJT, SJTO, or AFS except for the wiring of chain-supported lighting fixtures and supply cords for portable lamps and other merchandise being displayed or exhibited.

(2) *Identification, splices, and terminations.*

(i) A conductor of a flexible cord or cable that is used as a grounded conductor or an equipment grounding conductor shall be distinguishable from other conductors. Types SJ, SJO, SJT, SJTO, S, SO, ST, and STO shall be durably marked on the surface with the type designation, size, and number of conductors.

(ii) Flexible cords shall be used only in continuous lengths without splice or tap. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

(iii) Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

(h) *Portable cables over 600 volts, nominal.* Multiconductor portable cable for use in supplying power to portable or mobile equipment at over 600 volts, nominal, shall consist of No. 8 or larger conductors employing flexible stranding. Cables operated at over 2,000 volts shall be shielded for the purpose of confining the voltage stresses to the insulation. Grounding conductors shall be provided. Connectors for these cables shall be of a locking type with provisions to prevent their opening or closing while energized. Strain relief shall be provided at connections and terminations. Portable cables may not be operated with splices unless the splices are of the permanent molded, vulcanized, or other approved type. Termination enclosures shall be suitably marked with a high voltage hazard warning, and terminations shall be accessible only to authorized and qualified personnel.

(i) *Fixture wires.*—(1) *General.* Fixture wires shall be approved for the voltage, temperature, and location of use. A fixture wire which is used as a grounded conductor shall be identified.

(2) *Uses permitted.* Fixture wires may be used:

(i) For installation in lighting fixtures and in similar equipment where enclosed or protected and not subject to bending or twisting in use; or

(ii) For connecting lighting fixtures to the branch-circuit conductors supplying the fixtures.

(3) *Uses not permitted.* Fixture wires may not be used as branch-circuit conductors except as permitted for Class 1 power limited circuits.

(j) *Equipment for general use.*—(1) *Lighting fixtures, lampholders, lamps, and receptacles.* (i) Fixtures,

lampholders, lamps, rosettes, and receptacles may have no live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 8 feet above the floor may have exposed parts.

(ii) Handlamps of the portable type supplied through flexible cords shall be equipped with a handle of molded composition or other material approved for the purpose, and a substantial guard shall be attached to the lampholder or the handle.

(iii) Lampholders of the screw-shell type shall be installed for use as lampholders only. Lampholders installed in wet or damp locations shall be of the weatherproof type.

(iv) Fixtures installed in wet or damp locations shall be approved for the purpose and shall be so constructed or installed that water cannot enter or accumulate in wireways, lampholders, or other electrical parts.

(2) *Receptacles, cord connectors, and attachment plugs (caps).* (i) Receptacles, cord connectors, and attachment plugs shall be constructed so that no receptacle or cord connector will accept an attachment plug with a different voltage or current rating than that for which the device is intended. However, a 20-ampere T-slot receptacle or cord connector may accept a 15-ampere attachment plug of the same voltage rating.

(ii) A receptacle installed in a wet or damp location shall be suitable for the location.

(3) *Appliances.*—(i) Appliances, other than those in which the current-carrying parts at high temperatures are necessarily exposed, may have no live parts normally exposed to employee contact.

(ii) A means shall be provided to disconnect each appliance.

(iii) Each appliance shall be marked with its rating in volts and amperes or volts and watts.

(4) *Motors.* This paragraph applies to motors, motor circuits, and controllers.

(i) *In sight from.* If specified that one piece of equipment shall be "in sight from" another piece of equipment, one shall be visible and not more than 50 feet from the other.

(ii) *Disconnecting means.* (*a*) A disconnecting means shall be located in sight from the controller location. However, a single disconnecting means may be located adjacent to a group of coordinated controllers mounted adjacent to each other on a multi-motor continuous process machine. The controller disconnecting means for motor branch circuits over 600 volts, nominal, may be out of sight of the controller, if the controller is marked with a warning label giving the location and identification of the disconnecting means which is to be locked in the open position.

(*b*) The disconnecting means shall disconnect the motor and the controller from all ungrounded supply conductors and shall be so designed that no pole can be operated independently.

(*c*) If a motor and the driven machinery are not in sight from the controller location, the installation shall comply with one of the following conditions:

(*1*) The controller disconnecting means shall be capable of being locked in the open position.

(*2*) A manually operable switch that will disconnect the motor from its source of supply shall be placed in sight from the motor location.

(*d*) The disconnecting means shall plainly indicate whether it is in the open (off) or closed (on) position.

(*e*) The disconnecting means shall be readily accessible. If more than one disconnect is provided for the same equipment, only one need be readily accessible.

(*f*) An individual disconnecting means shall be provided for each motor, but a single disconnecting means may be used for a group of motors under any one of the following conditions:

(*1*) If a number of motors drive special parts of a single machine or piece of apparatus, such as metal and woodworking machines, cranes, and hoists;

(*2*) If a group of motors is under the protection of one set of branch-circuit protective devices; or

(*3*) If a group of motors is in a single room in sight from the location of the disconnecting means.

(iii) *Motor overload, short-circuit, and ground-fault protection.* Motors, motor-control apparatus, and motor branch-circuit conductors shall be protected against overheating due to motor overloads or failure to start, and against short-circuits or ground faults. These provisions shall not require overload protection that will stop a motor where a shutdown is likely to introduce additional or increased hazards, as in the case of fire pumps, or where continued operation of a motor is necessary for a safe shutdown of equipment or process and motor overload sensing devices are connected to a supervised alarm.

(iv) *Protection of live parts—all voltages.*—(*a*) Stationary motors having commutators, collectors, and brush rigging located inside of motor end brackets and not conductively connected to supply circuits operating at more than 150 volts to ground need not have such parts guarded. Exposed live parts of motors and controllers operating at 50 volts or more between terminals shall be guarded against accidental contact by any of the following:

(*1*) By installation in a room or enclosure that is accessible only to qualified persons;

(*2*) By installation on a suitable balcony, gallery, or platform, so elevated and arranged as to exclude unqualified persons; or

(*3*) By elevation 8 feet or more above the floor.

(*b*) Where live parts of motors or controllers operating at over 150 volts to ground are guarded against accidental contact only by location, and where adjustment or other attendance may be necessary during the operation of the apparatus, suitable insulating mats or platforms shall be provided so that the attendant cannot readily touch live parts unless standing on the mats or platforms.

(5) *Transformers.*—(i) The following paragraphs cover the installation of all transformers except the following:

(*a*) Current transformers;

(*b*) Dry-type transformers installed as a component part of other apparatus;

(*c*) Transformers which are an integral part of an X-ray, high frequency, or electrostatic-coating apparatus;

(*d*) Transformers used with Class 2 and Class 3 circuits, sign and outline lighting, electric discharge lighting, and power-limited fire-protective signalling circuits; and

(*e*) Liquid-filled or dry-type transformers used for research, development, or testing, where effective safeguard arrangements are provided.

(ii) The operating voltage of exposed live parts of transformer installations shall be indicated by warning signs or visible markings on the equipment or structure.

(iii) Dry-type, high fire point liquid-insulated, and askarel-insulated transformers installed indoors and rated over 35kV shall be in a vault.

(iv) If they present a fire hazard to employees, oil-insulated transformers installed indoors shall be in a vault.

(v) Combustible material, combustible buildings and parts of buildings, fire escapes, and door and window openings shall be safeguarded from fires which may originate in oil-insulated transformers attached to or adjacent to a building or combustible material.

(vi) Transformer vaults shall be constructed so as to contain fire and combustible liquids within the vault and to prevent unauthorized access. Locks and latches shall be so arranged that a

vault door can be readily opened from the inside.

(vii) Any pipe or duct system foreign to the vault installation may not enter or pass through a transformer vault.

(viii) Materials may not be stored in transformer vaults.

(6) *Capacitors.* (i) All capacitors, except surge capacitors or capacitors included as a component part of other apparatus, shall be provided with an automatic means of draining the stored charge after the capacitor is disconnected from its source of supply.

(ii) Capacitors rated over 600 volts, nominal, shall comply with the following additional requirements:

(a) Isolating or disconnecting switches (with no interrupting rating) shall be interlocked with the load interrupting device or shall be provided with prominently displayed caution signs to prevent switching load current.

(b) For series capacitors (see § 1910.302(b)(3)), the proper switching shall be assured by use of at least one of the following:

(1) Mechanically sequenced isolating and bypass switches,

(2) Interlocks, or

(3) Switching procedure prominently displayed at the switching location.

(7) Storage battiers. Provisions shall be made for sufficient diffusion and ventilation of gases from storage batteries to prevent the accumulation of explosive mixtures.

§ 1910.306 Specific purpose equipment and installations.

(a) *Electric signs and outline lighting.* (1) *Disconnecting means.* Signs operated by electronic or electromechanical controllers located outside the sign shall have a disconnecting means located inside the controller enclosure or within sight of the controller location, and it shall be capable of being locked in the open position. Such disconnecting means shall have no pole that can be operated independently, and it shall open all ungrounded conductors that supply the controller and sign. All other signs, except the portable type, and all outline lighting installations shall have an externally operable disconnecting means which can open all underground conductors and is within the sight of the sign or outline lighting it controls.

(2) Doors or covers giving access to uninsulated parts of indoor signs or outline lighting exceeding 600 volts and accessible to other than qualified persons shall either be provided with interlock switches to disconnect the primary circuit or shall be so fastened that the use of other than oridinary tools will be necessary to open them.

(b) *Cranes and hoists.* This paragraph applies to the installation of electric equipment and wiring used in connection with cranes, monorail hoists, hoists, and all runways.

(1) *Disconnecting means.* A readily accessible disconnecting means shall be provided between the runway contact conductors and the power supply.

(ii) Another disconnecting means, capable of being locked in the open position, shall be provided in the leads from the runway contact conductors or other power supply on any crane or monorail hoist.

(a) If this additional disconnecting means is not readily accessible from the crane or monorail hoist operating station, means shall be provided at the operating station to open the power circuit to all motors of the crane or monorail hoist.

(b) The additional disconnect may be omitted if a monorail hoist or hand-propelled crane bridge installation meets all of the following:

(1) The unit is floor controlled;

(2) The unit is within view of the power supply disconnecting means; and

(3) No fixed work platform has been provided for servicing the unit.

(2) *Control.* A limit switch or other device shall be provided to prevent the load block from passing the safe upper limit of travel of any hoisting mechanism.

(3) *Clearance.* The dimension of the working space in the direction of access to live parts which may require examination, adjustment, servicing, or maintenance while alive shall be a minimum of 2 feet 6 inches. Where controls are enclosed in cabinets, the door(s) shall either open at least 90 degrees or be removable.

(c) *Elevators, dumbwaiters, escalators, and moving walks.* (1) *Disconnecting means.* Elevators, dumbwaiters, escalators, and moving walks shall have a single means for disconnecting all underground main power supply conductors for each unit.

(2) *Warning signs.* If interconnections between control panels are necessary for operation of the system on a multicar installation that remains energized from a source other than the disconnecting means, a warning sign shall be mounted on or adjacent to the disconnecting means. The sign shall be clearly legible and shall read "Warning—Parts of the control panel are not de-energized by this switch." (See § 1910.302(b)(3).)

(3) *Control panels.* If control panels are not located in the same space as the drive machine, they shall be located in cabinets with doors or panels capable of being locked closed.

(d) *Electric welders—disconnecting means.* (1) A disconnecting means shall be provided in the supply circuit for each motor-generator arc welder, and for each AC transformer and DC rectifier arc welder which is not equipped with a disconnect mounted as an intergral part of the welder.

(2) A switch or circuit breaker shall be provided by which each resistance welder and its control equipment can be isolated from the supply circuit. The ampere rating of this disconnecting means may not be less than the supply conductor ampacity.

(e) *Data processing systems—disconnecting means.* A disconnecting means shall be provided to disconnect the power to all electronic equipment in data processing or computer rooms. This disconnecting means shall be controlled from locations readily accessible to the operator at the principal exit doors. There shall also be a similar disconnecting means to disconnect the air conditioning system serving this area.

(f) *X-Ray equipment.* This paragraph applies to X-ray equipment for other than medical or dental use.

(1) *Disconnecting means.* (i) A disconnecting means shall be provided in the supply circuit. The disconnecting means shall be operable from a location readily accessible from the X-ray control. For equipment connected to a 120-volt branch circuit of 30 amperes or less, a grounding-type attachment plug cap and receptacle of proper rating may serve as a disconnecting means.

(ii) If more than one piece of equipment is operated from the same high-voltage circuit, each piece or each group of equipment as a unit shall be provided with a high-voltage switch or equivalent disconnecting means. This disconnecting means shall be constructed, enclosed, or located so as to avoid contact by employees with its live parts.

(2) *Control.* (i) *Radiographic and fluoroscopic types.* Radiographic and fluoroscopic-type equipment shall be effectively enclosed or shall have interlocks that de-energize the equipment automatically to prevent ready access to live current-carrying parts.

(ii) *Diffraction and irradiation types.* Diffraction- and irradiation-type equipment shall be provided with a means to indicate when it is energized unless the equipment or installation is effectively enclosed or is provided with interlocks to prevent access to live current-carrying parts during operation.

(g) *Induction and dielectric heating equipment.* (1) *Scope.* Paragraphs (g)(2) and (g)(3) of this section cover induction

and dielectric heating equipment and accessories for industrial and scientific applications, but not for medical or dental applications or for appliances.

(2) *Guarding and grounding.* (i) *Enclosures.* The converting apparatus (including the DC line) and high-frequency electric circuits (excluding the output circuits and remote-control circuits) shall be completely contained within enclosures or noncombustible material.

(ii) *Panel controls.* All panel controls shall be of dead-front construction.

(iii) *Access to internal equipment.* Where doors are used for access to voltages from 500 to 1000 volts AC or DC, either door locks or interlocks shall be provided. Where doors are used for access to voltages of over 1000 volts AC or DC, either mechanical lockouts with a disconnecting means to prevent access until voltage is removed from the cubicle, or both door interlocking and mechanical door locks, shall be provided.

(iv) *Warning labels.* "Danger" labels shall be attached on the equipment and shall be plainly visible even when doors are open or panels are removed from compartments containing voltages of over 250 volts AC or DC.

(v) *Work applicator shielding.* Protective cages or adequate shielding shall be used to guard work applicators other than induction heating coils. Induction heating coils shall be protected by insulation and/or refractory materials. Interlock switches shall be used on all hinged access doors, sliding panels, or other such means of access to the applicator. Interlock switches shall be connected in such a manner as to remove all power from the applicator when any one of the access doors or panels is open. Interlocks on access doors or panels are not required if the applicator is an induction heating coil at DC ground potential or operating at less than 150 volts AC.

(vi) *Disconnecting means.* A readily accessible disconnecting means shall be provided by which each unit of heating equipment can be isolated from its supply circuit.

(3) *Remote control.* If remote controls are used for applying power, a selector switch shall be provided and interlocked to provide power from only one control point at a time. Switches operated by foot pressure shall be provided with a shield over the contact button to avoid accidental closing of the switch.

(h) *Electrolytic cells.* (1) *Scope.* These provisions for electrolytic cells apply to the installation of the electrical components and accessory equipment or electrolytic cells, electrolytic cell lines, and process power supply for the production of aluminum, cadmium, chlorine, copper, fluorine, hydrogen peroxide, magnesium, sodium, sodium chlorate, and zinc. Cells used as a source of electric energy and for electroplating processes and cells used for production of hydrogen are not covered by these provisions.

(2) *Definitions applicable to this paragraph.*

Cell line: An assembly of electrically interconnected electrolytic cells supplied by a source of direct-current power.

Cell line attachments and auxiliary equipment: Cell line attachments and auxiliary equipment include, but are not limited to: auxiliary tanks; process piping; duct work; structural supports; exposed cell line conductors; conduits and other raceways; pumps; positioning equipment and cell cutout or by-pass electrical devices. Auxiliary equipment also includes tools, welding machines, crucibles, and other portable equipment used for operation and maintenance within the electrolytic cell line working zone. In the cell line working zone, auxiliary equipment includes the exposed conductive surfaces of ungrounded cranes and crane-mounted cell-servicing equipment.

Cell line working zone: The cell line working zone is the space envelope wherein operation or maintenance is normally performed on or in the vicinity of exposed energized surfaces of cell lines or their attachments.

Electrolytic Cells: A receptacle or vessel in which electrochemical reactions are caused by applying energy for the purpose of refining or producing usable materials.

(3) *Application.* Installations covered by paragraph (h) of this section shall comply with all applicable provisions of this subpart, except as follows:

(i) Overcurrent protection of electrolytic cell DC process power circuits need not comply with the requirements of § 1910.304(e).

(ii) Equipment located or used within the cell line working associated with the cell line DC power circuits need not comply with the provisions of § 1910.304(f).

(iii) Electrolytic cells, cell line conductors, cell line attachments, and the wiring of auxiliary equipment and devices within the cell line working zone need not comply with the provisions of §§ 1910.303, and 1910.304 (b) and (c).

(4) *Disconnecting means.* (i) If more than one DC cell line process power supply serves the same cell line, a disconnecting means shall be provided on the cell line circuit side of each power supply to disconnect it from the cell line circuit.

(ii) Removable links or removable conductors may be used as the disconnecting means.

(5) *Portable electric equipment.* (i) The frames and enclosures of portable electric equipment used within the cell line working zone may not be grounded. However, these frames and enclosures may be grounded if the cell line circuit voltage does not exceed 200 volts DC or if the frames are guarded.

(ii) Ungrounded portable electric equipment shall be distinctively marked and may not be interchangeable with grounded portable electric equipment.

(6) *Power supply circuits and receptacles for portable electric equipment.* (i) Circuits supplying power to ungrounded receptacles for hand-held, cord- and plug-connected equipment shall be electrically isolated from any distribution system supplying areas other than the cell line working zone and shall be ungrounded. Power for these circuits shall be supplied through isolating transformers.

(ii) Receptacles and their mating plugs for ungrounded equipment may not have provision for a grounding conductor and shall be of a configuration which prevents their use for equipment required to be grounded.

(iii) Receptacles on circuits supplied by an isolating transformer with an ungrounded secondary shall have a distinctive configuration, shall be distinctively marked, and may not be used in any other location in the plant.

(7) *Fixed and portable electric equipment.* (i) AC systems supplying fixed and portable electric equipment within the cell line working zone need not be grounded.

(ii) Exposed conductive surfaces, such as electric equipment housing, cabinets, boxes, motors, raceways and the like that are within the cell line working zone need not be grounded.

(iii) Auxiliary electrical devices, such as motors, transducers, sensors, control devices, and alarms, mounted on an electrolytic cell or other energized surface, shall be connected by any of the following means:

(*a*) Multiconductor hard usage or extra hard usage flexible cord;

(*b*) Wire or cable in suitable raceways; or

(*c*) Exposed metal conduit, cable tray, armored cable, or similar metallic systems installed with insulating breaks such that they will not cause a potentially hazardous electrical condition.

(iv) Fixed electric equipment may be bonded to the energized conductive surfaces of the cell line, its attachments, or auxiliaries. If fixed electric equipment is mounted on an energized conductive

surface, it shall be bonded to that surface.

(8) *Auxiliary nonelectric connections.* Auxiliary nonelectric connections, such as air hoses, water hoses, and the like, to an electrolytic cell, its attachments, or auxiliary equipment may not have continuous conductive reinforcing wire, armor, braids, and the like. Hoses shall be of a nonconductive material.

(9) *Cranes and hoists.* (i) The conductive surfaces of cranes and hoists that enter the cell line working zone need not be grounded. The portion of an overhead crane or hoist which contacts an energized electrolytic cell or energized attachments shall be insulated from ground.

(ii) Remote crane or hoist controls which may introduce hazardous electrical conditions into the cell line working zone shall employ one or more of the following systems:

(*a*) Insulated and ungrounded control circuit;

(*b*) Nonconductive rope operator;

(*c*) Pendant pushbutton with nonconductive supporting means and having nonconductive surfaces or ungrounded exposed conductive surfaces; or

(*d*) Radio.

(i) *Electrically driven or controlled irrigation machines.* (See § 1910.302(b)(3).)

(1) *Lightning protection.* If an electrically driven or controlled irrigation machine has a stationary point, a driven ground rod shall be connected to the machine at the stationary point for lightning protection.

(2) *Disconnecting means.* The main disconnecting means for a center pivot irrigation machine shall be located at the point of connection of electrical power to the machine and shall be readily accessible and capable of being locked in the open position. A disconnecting means shall be provided for each motor and controller.

(j) *Swimming pools, fountains, and similar installations.* (1) *Scope.* Paragraphs (j)(2) through (j)(5) of this section apply to electric wiring for and equipment in or adjacent to all swimming, wading, therapeutic, and decorative pools and fountains, whether permanently installed or storable, and to metallic auxiliary equipment, such as pumps, filters, and similar equipment. Therapeutic pools in health care facilities are exempt from these provisions.

(2) *Lighting and receptacles.* (i) *Receptacles.* A single receptacle of the locking and grounding type that provides power for a permanently installed swimming pool recirculating pump motor may be located not less than 5 feet from the inside walls of a pool. All other receptacles on the property shall be located at least 10 feet from the inside walls of a pool. Receptacles which are located within 15 feet of the inside walls of the pool shall be protected by ground-fault circuit interrupters.

Note.—In determining these dimensions, the distance to be measured is the shortest path the supply cord of an appliance connected to the receptacle would follow without piercing a floor, wall, or ceiling of a building or other effective permanent barrier.

(ii) *Lighting fixtures and lighting outlets.* (*a*) Unless they are 12 feet above the maximum water level, lighting fixtures and lighting outlets may not be installed over a pool or over the area extending 5 feet horizontally from the inside walls of a pool. However, a lighting fixture or lighting outlet which has been installed before April 16, 1981 may be located less than 5 feet measured horizontally from the inside walls of a pool if it is at least 5 feet above the surface of the maximum water level and shall be rigidly attached to the existing structure. It shall also be protected by a ground-fault circuit interrupter installed in the branch circuit supplying the fixture.

(*b*) Unless installed 5 feet above the maximum water level and rigidly attached to the structure adjacent to or enclosing the pool, lighting fixtures and lighting outlets installed in the area extending between 5 feet and 10 feet horizontally from the inside walls of a pool shall be protected by a ground-fault circuit interrupter.

(3) *Cord- and plug-connected equipment.* Flexible cords used with the following equipment may not exceed 3 feet in length and shall have a copper equipment grounding conductor with a grounding-type attachment plug.

(i) Cord- and plug-connected lighting fixtures installed within 16 feet of the water surface of permanently installed pools.

(ii) Other cord- and plug-connected, fixed or stationary equipment used with permanently installed pools.

(4) *Underwater equipment.* (i) A ground-fault circuit interrupter shall be installed in the branch circuit supplying underwater fixtures operating at more than 15 volts. Equipment installed underwater shall be approved for the purpose.

(ii) No underwater lighting fixtures may be installed for operation at over 150 volts between conductors.

(5) *Fountains.* All electric equipment operating at more than 15 volts, including power supply cords, used with fountains shall be protected by ground-fault circuit interrupters. (See § 1910.302(b)(3).)

§ 1910.307 Hazardous (classified) locations.

(a) *Scope.* This section covers the requirements for electric equipment and wiring in locations which are classified depending on the properties of the flammable vapors, liquids or gases, or combustible dusts or fibers which may be present therein and the likelihood that a flammable or combustible concentration or quantity is present. Hazardous (classified) locations may be found in occupancies such as, but not limited to, the following: aircraft hangars, gasoline dispensing and service stations, bulk storage plants for gasoline or other volatile flammable liquids, paint-finishing process plants, health care facilities, agricultural or other facilities where excessive combustible dusts may be present, marinas, boat yards, and petroleum and chemical processing plants. Each room, section or area shall be considered individually in determining its classification. These hazardous (classified) locations are assigned six designations as follows:

Class I, Division 1
Class I, Division 2
Class II, Division 1
Class II, Division 2
Class III, Division 1
Class III, Division 2

For definitions of these locations see § 1910.399(a). All applicable requirements in this subpart shall apply to hazardous (classified) locations, unless modified by provisions of this section.

(b) *Electrical installations.* Equipment, wiring methods, and installations of equipment in classified locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe for the hazardous (classified) location. Requirements for each of these options are as follows:

(1) *Intrinsically safe.* Equipment and associated wiring approved as intrinsically safe shall be permitted in any hazardous (classified) location for which it is approved.

(2) *Approved for the hazardous (classified) location.* (i) Equipment shall be approved not only for the class of location but also for the ignitible or combustible properties of the specific gas, vapor, dust, or fiber that will be present.

Note.—NFPA 70, the National Electrical Code, lists or defines hazardous gases, vapors, and dusts by "Groups" characterized by their ignitible or combustible properties.

(ii) Equipment shall be marked to show the class, group, and operating

temperature or temperature range, based on operation in a 40 degrees C ambient, for which it is approved. The temperature marking shall not exceed the ignition temperature of the specific gas or vapor to be encountered. However, the following provisions modify this marking requirement for specific equipment:

(*a*) Equipment of the non-heat-producing type, such as junction boxes, conduit, and fittings, and equipment of the heat-producting type having a maximum temperature not more than 100 degrees C (212 degrees F), need not have a marked operating temperature or temperature range.

(*b*) Fixed lighting fixtures marked for use in Class I, Division 2 locations only, need not be marked to indicate the group.

(*c*) Fixed general-purpose equipment in Class I locations, other than lighting fixtures, which is acceptable for use in Class I, Division 2 locations need not be marked with the class, group, division, or operating temperature.

(*d*) Fixed dust-tight equipment, other than lighting fixtures, which is acceptable for use in Class II, Division 2 and Class III locations need not be marked with the class, group, division, or operating temperature.

(3) *Safe for the hazardous (classified) location.* Equipment which is safe for the location shall be of a type and design which the employer demonstrates will provide protection from the hazards arising from the combustibility and flammability of vapors, liquids, gases, dusts, or fibers.

Note.—The National Electrical Code, NFPA 70, contains guidelines for determining the type and design of equipment and installations which will meet this requirement. The guidelines of this document address electric wiring, equipment, and systems installed in hazardous (classified) locations and contain specific provisions for the following: wiring methods, wiring connections; conductor insulation, flexible cords, sealing and drainage, transformers, capacitors, switches, circuit breakers, fuses, motor controllers, receptacles, attachment plugs, meters, relays, instruments, resistors, generators, motors, lighting fixtures, storage battery charging equipment, electric cranes, electric hoists and similar equipment, utilization equipment, signaling systems, alarm systems, remote control systems, local loud speaker and communication systems, ventilation piping, live parts, lightning surge protection, and grounding. Compliance with these guidelines will constitute one means, but not the only means, of compliance with this paragraph.

(c) *Conduits.* All conduits shall be threaded and shall be made wrench-tight. Where it is impractical to make a threaded joint tight, a bonding jumper shall be utilized.

(d) *Equipment in Division 2 locations.* Equipment that has been approved for a Division 1 location may be installed in a Division 2 location of the same class and group. General-purpose equipment or equipment in general-purpose enclosures may be installed in Division 2 locations if the equipment does not constitute a source of ignition under normal operating conditions.

§ 1910.308 Special systems.

(a) *Systems over 600 volts, nominal.* Paragraphs (a)(1) through (a)(4) of this section cover the general requirements for all circuits and equipment operated at over 600 volts.

(1) *Wiring methods for fixed installations.* (i) Above-ground conductors shall be installed in rigid metal conduit, in intermediate metal conduit, in cable trays, in cablebus, in other suitable raceways, or as open runs of metal-clad cable suitable for the use and purpose. However, open runs of non-metallic-sheathed cable or of bare conductors or busbars may be installed in locations accessible only to qualified persons. Metallic shielding components, such as tapes, wires, or braids for conductors, shall be grounded. Open runs of insulated wires and cables having a bare lead sheath or a braided outer covering shall be supported in a manner designed to prevent physical damage to the braid or sheath.

(ii) Conductors emerging from the ground shall be enclosed in approved raceways. (See § 1910.302(b)(3).)

(2) *Interrupting and isolating devices.* (i) Circuit breakers located indoors shall consist of metal-enclosed or fire-resistant, cell-mounted units. In locations accessible only to qualified personnel, open mounting of circuit breakers is permitted. A means of indicating the open and closed position of circuit breakers shall be provided.

(ii) Fused cutouts installed in buildings or tranformer vaults shall be of a type approved for the purpose. They shall be readily accessible for fuse replacement.

(iii) A means shall be provided to completely isolate equipment for inspection and repairs. Isolating means which are not designed to interrupt the load curent of the circuit shall be either interlocked with an approved circuit interrupter or provided with a sign warning against opening them under load.

(3) *Mobile and portable equipment.* (i) *Power cable connections to mobile machines.* A metallic enclosure shall be provided on the mobile machine for enclosing the terminals of the power cable. The enclosure shall include provisions for a solid connection for the ground wire(s) terminal to effectively ground the machine frame. The method of cable termination used shall prevent any strain or pull on the cable from stressing the electrical connections. The enclosure shall have provision for locking so only authorized qualified persons may open it and shall be marked with a sign warning of the presence of energized parts.

(ii) *Guarding live parts.* All energized switching and control parts shall be enclosed in effectively grounded metal cabinets or enclosures. Circuit breakers and protective equipment shall have the operating means projecting through the metal cabinet or enclosure so these units can be reset without locked doors being opened. Enclosures and metal cabinets shall be locked so that only authorized qualified persons have access and shall be marked with a sign warning of the presence of energized parts. Collector ring assemblies on revolving-type machines (shovels, draglines, etc.) shall be guarded.

(4) *Tunnel installations.* (i) *Application.* The provisions of this paragraph apply to installation and use of high-voltage power distribution and utilization equipment which is portable and/or mobile, such as substations, trailers, cars, mobile shovels, draglines, hoists, drills, dredges, compressors, pumps, conveyors, and underground excavators.

(ii) *Conductors.* Conductors in tunnels shall be installed in one or more of the following:

(a) Metal conduit or other metal raceway,

(b) Type MC cable, or

(c) Other approved multiconductor cable.

Conductors shall also be so located or guarded as to protect them from physical damage. Multiconductor portable cable may supply mobile equipment. An equipment grounding conductor shall be run with circuit conductors inside the metal raceway or inside the multiconductor cable jacket. The equipment grounding conductor may be insulated or bare.

(iii) *Guarding live parts.* Bare terminals of transformers, switches, motor controllers, and other equipment shall be enclosed to prevent accidental contact with energized parts. Enclosures for use in tunnels shall be drip-proof, weatherproof, or submersible as required by the environmental conditions.

(iv) *Disconnecting means.* A disconnecting means that simultaneously opens all ungrounded conductors shall be installed at each transformer or motor location.

(v) *Grounding and bonding.* All nonenergized metal parts of electric equipment and metal raceways and cable sheaths shall be effectively grounded and bonded to all metal pipes and rails at the portal and at intervals not exceeding 1000 feet throughout the tunnel.

(b) *Emergency power systems.* (1) *Scope.* The provisions for emergency systems apply to circuits, systems, and equipment intended to supply power for illumination and special loads, in the event of failure of the normal supply.

(2) *Wiring methods.* Emergency circuit wiring shall be kept entirely independent of all other wiring and equipment and may not enter the same raceway, cable, box, or cabinet with other wiring except either where common circuit elements suitable for the purpose are required, or for transferring power from the normal to the emergency source.

(3) *Emergency illumination.* Where emergency lighting is necessary, the system shall be so arranged that the failure of any individual lighting element, such as the burning out of a light bulb, cannot leave any space in total darkness.

(c) *Class 1, Class 2, and Class 3 remote control, signaling, and power-limited circuits.* (1) *Classification.* Class 1, Class 2, or Class 3 remote control, signaling, or power-limited circuits are characterized by their usage and electrical power limitation which differentiates them from light and power circuits. These circuits are classified in accordance with their respective voltage and power limitations as summarized in paragraphs (c)(1)(i) through (c)(1)(iii) of this section.

(i) *Class 1 circuits. (a)* A Class 1 power-limited circuit is supplied from a source having a rated output of not more than 30 volts and 1000 volt-amperes.

(b) A Class 1 remote control circuit or a Class 1 signaling circuit has a voltage which does not exceed 600 volts; however, the power output of the source need not be limited.

(ii) *Class 2 and Class 3 circuits. (a)* Power for Class 2 and Class 3 circuits is limited either inherently (in which no overcurrent protection is required) or by a combination of a power source and overcurrent protection.

(b) The maximum circuit voltage is 150 volts AC or DC for a Class 2 inherently limited power source, and 100 volts AC or DC for a Class 3 inherently limited power source.

(c) The maximum circuit voltage is 30 volts AC and 60 volts DC for a Class 2 power source limited by overcurrent protection, and 150 volts AC or DC for a Class 3 power source limited by overcurrent protection.

(iii) The maximum circuit voltages in paragraphs (c)(1)(i) and (c)(1)(ii) of this section apply to sinusoidal AC or continuous DC power sources, and where wet contact occurence is not likely.

(2) *Marking.* A Class 2 or Class 3 power supply unit shall be durably marked where plainly visible to indicate the class of supply and its electrical rating. (See § 1910.302(b)(3).)

(d) *Fire protective signaling systems.* (See § 1910.302(b)(3).)

(1) *Classifications.* Fire protective signaling circuits shall be classified either as non-power limited or power limited.

(2) *Power sources.* The power sources for use with fire protective signaling circuits shall be either power limited or nonlimited as follows:

(i) The power supply of non-power-limited fire protective signaling circuits shall have an output voltage not in excess of 600 volts.

(ii) The power for power-limited fire protective signaling circuits shall be either inherently limited, in which no overcurrent protection is required, or limited by a combination of a power source and overcurrent protection.

(3) *Non-power-limited conductor location.* Non-power-limited fire protective signaling circuits and Class 1 circuits may occupy the same enclosure, cable, or raceway provided all conductors are insulated for maximum voltage of any conductor within the enclosure, cable, or raceway. Power supply and fire protective signaling circuit conductors are permitted in the same enclosure, cable, or raceway only if connected to the same equipment.

(4) *Power-limited conductor location.* Where open conductors are installed, power-limited fire protective signaling circuits shall be separated at least 2 inches from conductors of any light, power, Class 1, and non-power-limited fire protective signaling circuits unless a special and equally protective method of conductor separation is employed. Cables and conductors of two or more power-limited fire protective signaling circuits or Class 3 circuits are permitted in the same cable, enclosure, or raceway. Conductors of one or more Class 2 circuits are permitted within the same cable, enclosure, or raceway with conductors of power-limited fire protective signaling circuits provided that the insulation of Class 2 circuit conductors in the cable, enclosure, or raceway is at least that needed for the power-limited fire protective signaling circuits.

(5) *Identification.* Fire protective signaling circuits shall be identified at terminal and junction locations in a manner which will prevent unintentional interference with the signaling circuit during testing and servicing. Power-limited fire protective signaling circuits shall be durably marked as such where plainly visible at terminations.

(e) *Communications systems.* (1) *Scope.* These provisions for communication systems apply to such systems as central-station-connected and non-central-station-connected telephone circuits, radio and television receiving and transmitting equipment, including community antenna television and radio distribution systems, telegraph, district messenger, and outside wiring for fire and burglar alarm, and similar central station systems. These installations need not comply with the provisions of §§ 1910.303 through 1910.308(d).

(2) *Protective devices.* (i) Communication circuits so located as to be exposed to accidental contact with light or power conductors operating at over 300 volts shall have each circuit so exposed provided with a protector approved for the purpose.

(ii) Each conductor of a lead-in from an outdoor antenna shall be provided with an antenna discharge unit or other suitable means that will drain static charges from the antenna system.

(3) *Conductor location.* (i) *Outside of buildings. (a)* Receiving distribution lead-in or aerial-drop cables attached to buildings and lead-in conductors to radio transmitters shall be so installed as to avoid the possibility of accidental contact with electric light or power conductors.

(b) The clearance between lead-in conductors and any lightning protection conductors may not be less than 6 feet.

(ii) *On poles.* Where practicable, communication conductors on poles shall be located below the light or power conductors. Communications conductors may not be attached to a crossarm that carries light or power conductors.

(iii) *Inside of buildings.* Indoor antennas, lead-ins, and other communication conductors attached as open conductors to the inside of buildings shall be located at least 2 inches from conductors of any light or power or Class 1 circuits unless a special and equally protective method of conductor separation, approved for the purpose, is employed.

(4) *Equipment location.* Outdoor metal structures supporting antennas, as well as self-supporting antennas such as vertical rods or dipole structures, shall be located as far away from overhead

conductors of electric light and power circuits of over 150 volts to ground as necessary to avoid the possibility of the antenna or structure falling into or making accidental contact with such circuits.

(5) *Grounding.* (i) *Lead-in conductors.* If exposed to contact with electric light and power conductors, the metal sheath of aerial cables entering buildings shall be grounded or shall be interrupted close to the entrance to the building by an insulating joint or equivalent device. Where protective devices are used, they shall be grounded in an approved manner.

(ii) *Antenna structures.* Masts and metal structures supporting antennas shall be permanently and effectively grounded without splice or connection in the grounding conductor.

(iii) *Equipment enclosures.* Transmitters shall be enclosed in a metal frame or grill or separated from the operating space by a barrier, all metallic parts of which are effectively connected to ground. All external metal handles and controls accessible to the operating personnel shall be effectively grounded. Unpowered equipment and enclosures shall be considered grounded where connected to an attached coaxial cable with an effectively grounded metallic shield.

§ 1910.309–§ 1910.330. [Reserved]

Safety-Related Work Practices

§ 1910.331–§ 1910.360. [Reserved]

Safety-Related Maintenance Requirements

§ 1910.361–§ 1910.380 [Reserved]

Safety Requirements for Special Equipment

§ 1910.381–§ 1910.398 [Reserved]

Definitions

§ 1910.399 Definitions applicable to this subpart.

(a) *Definitions applicable to §§ 1910.302 through 1910.330.*

(1) *Acceptable.* An installation or equipment is acceptable to the Assistant Secretary of Labor, and approved within the meaning of this Subpart S: (i) If it is accepted, or certified, or listed, or labeled, or otherwise determined to be safe by a nationally recognized testing laboratory, such as, but not limited to, Underwriters' Laboratories, Inc. and Factory Mutual Engineering Corp.; or (ii) with respect to an installation or equipment of a kind which no nationally recognized testing laboratory accepts, certifies, lists, labels, or determines to be safe, if it is inspected or tested by another Federal agency, or by a State, municipal, or other local authority responsible for enforcing occupational safety provisions of the National Electrical Code, and found in compliance with the provisions of the National Electrical Code as applied in this Subpart; or (iii) with respect to custom-made equipment or related installations which are designed, fabricated for, and intended for use by a particular customer, if it is determined to be safe for its intended use by its manufacturer on the basis of test data which the employer keeps and makes available for inspection to the Assistant Secretary and his authorized representatives.

(2) *Accepted.* An installation is "accepted" if it has been inspected and found by a nationally recognized testing laboratory to conform to specified plans or to procedures of applicable codes.

(3) *Accessible.* (As applied to wiring methods.) Capable of being removed or exposed without damaging the building structure or finish, or not permanently closed in by the structure or finish of the building. (See *"concealed"* and *"exposed."*)

(4) *Accessible.* (As applied to equipment.) Admitting close approach; not guarded by locked doors, elevation, or other effective means. (See *"Readily accessible."*)

(5) *Ampacity.* Current-carrying capacity of electric conductors expressed in amperes.

(6) *Appliances.* Utilization equipment, generally other than industrial, normally built in standardized sizes or types, which is installed or connected as a unit to perform one or more functions such as clothes washing, air conditioning, food mixing, deep frying, etc.

(7) *Approved.* Acceptable to the authority enforcing this Subpart. The authority enforcing this Subpart is the Assistant Secretary of Labor for Occupational Safety and Health. The definition of "acceptable" indicates what is acceptable to the Assistant Secretary of Labor, and therefore approved within the meaning of this Subpart.

(8) *Approved for the purpose.* Approved for a specific purpose, environment, or application described in a particular standard requirement.

Suitability of equipment or materials for a specific purpose, environment or application may be determined by a nationally recognized testing laboratory, inspection agency or other organization concerned with product evaluation as part of its listing and labeling program. (See *"Labeled"* or *"Listed."*)

(9) *Armored cable.* Type AC armored cable is a fabricated assembly of insulated conductors in a flexible metallic enclosure.

(10) *Askarel.* A generic term for a group of nonflammable synthetic chlorinated hydrocarbons used as electrical insulating media. Askarels of various compositional types are used. Under arcing conditions the gases produced, while consisting predominantly of noncombustible hydrogen chloride, can include varying amounts of combustible gases depending upon the askarel type.

(11) *Attachment plug (Plug cap) (Cap).* A device which, by insertion in a receptacle, establishes connection between the conductors of the attached flexible cord and the conductors connected permanently to the receptacle.

(12) *Automatic.* Self-acting, operating by its own mechanism when actuated by some impersonal influence, as, for example, a change in current strength, pressure, temperature, or mechanical configuration.

(13) *Bare conductor.* See *"Conductor."*

(14) *Bonding.* The permanent joining of metallic parts to form an electrically conductive path which will assure electrical continuity and the capacity to conduct safely any current likely to be imposed.

(15) *Bonding jumper.* A reliable conductor to assure the required electrical conductivity between metal parts required to be electrically connected.

(16) *Branch circuit.* The circuit conductors between the final overcurrent device protecting the circuit and the outlet(s).

(17) *Building.* A structure which stands alone or which is cut off from adjoining structures by fire walls with all openings therein protected by approved fire doors.

(18) *Cabinet.* An enclosure designed either for surface or flush mounting, and provided with a frame, mat, or trim in which a swinging door or doors are or may be hung.

(19) *Cable tray system.* A cable tray system is a unit or assembly of units or sections, and associated fittings, made of metal or other noncombustible materials forming a rigid structural system used to support cables. Cable tray systems include ladders, troughs, channels, solid bottom trays, and other similar structures.

(20) *Cablebus.* Cablebus is an approved assembly of insulated conductors with fittings and conductor terminations in a completely enclosed, ventilated, protective metal housing.

(21) *Center pivot irrigation machine.* A center pivot irrigation machine is a multi-motored irrigation machine which

revolves around a central pivot and employs alignment switches or similar devices to control individual motors.

(22) *Certified.* Equipment is "certified" if it (a) has been tested and found by a nationally recognized testing laboratory to meet nationally recognized standards or to be safe for use in a specified manner, or (b) is of a kind whose production is periodically inspected by a nationally recognized testing laboratory, and (c) it bears a label, tag, or other record of certification.

(23) *Circuit breaker.* (i) (600 volts nominal, or less). A device designed to open and close a circuit by nonautomatic means and to open the circuit automatically on a predetermined overcurrent without injury to itself when properly applied within its rating.

(ii) (Over 600 volts, nominal). A switching device capable of making, carrying, and breaking currents under normal circuit conditions, and also making, carrying for a specified time, and breaking currents under specified abnormal circuit conditions, such as those of short circuit.

(24) *Class I locations.* Class I locations are those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitible mixtures. Class I locations include the following:

(i) *Class I, Division 1.* A Class I, Division 1 location is a location: (*a*) in which hazardous concentrations of flammable gases or vapors may exist under normal operating conditions; or (*b*) in which hazardous concentrations of such gases or vapors may exist frequently because of repair or maintenance operations or because of leakage; or (*c*) in which breakdown or faulty operation of equipment or processes might release hazardous concentrations of flammable gases or vapors, and might also cause simultaneous failure of electric equipment.

Note.—This classification usually includes locations where volatile flammable liquids or liquefied flammable gases are transferred from one container to another; interiors of spray booths and areas in the vicinity of spraying and painting operations where volatile flammable solvents are used; locations containing open tanks or vats of volatile flammable liquids; drying rooms or compartments for the evaporation of flammable solvents; locations containing fat and oil extraction equipment using volatile flammable solvents; portions of cleaning and dyeing plants where flammable liquids are used; gas generator rooms and other portions of gas manufacturing plants where flammable gas may escape; inadequately ventilated pump rooms for flammable gas or for volatile flammable liquids; the interiors of refrigerators and freezers in which volatile flammable materials are stored in open, lightly stoppered, or easily ruptured containers; and all other locations where ignitible concentrations of flammable vapors or gases are likely to occur in the course of normal operations.

(ii) Class I, Division 2. A Class I, Division 2 location is a location: (*a*) in which volatile flammable liquids or flammable gases are handled, processed, or used, but in which the hazardous liquids, vapors, or gases will normally be confined within closed containers or closed systems from which they can escape only in case of accidental rupture or breakdown of such containers or systems, or in case of abnormal operation of equipment; or (*b*) in which hazardous concentrations of gases or vapors are normally prevented by positive mechanical ventilation, and which might become hazardous through failure or abnormal operations of the ventilating equipment; or (*c*) that is adjacent to a Class I, Division 1 location, and to which hazardous concentrations of gases or vapors might occasionally be communicated unless such communication is prevented by adequate positive-pressure ventilation from a source of clean air, and effective safeguards against ventilation failure are provided.

Note.—This classification usually includes locations where volatile flammable liquids or flammable gases or vapors are used, but which would become hazardous only in case of an accident or of some unusual operating condition. The quantity of flammable material that might escape in case of accident, the adequacy of ventilating equipment, the total area involved, and the record of the industry or business with respect to explosions or fires are all factors to be merit considered in determining the classification and extent of each location.

Piping without valves, checks, meters, and similar devices would not ordinarily introduce a hazardous condition even though used for flammable liquids or gases. Locations used for the storage of flammable liquids or a liquefied or compressed gases in sealed containers would not normally be considered hazardous unless also subject to other hazardous conditions.

Electrical conduits and their associated enclosures separated from process fluids by a single seal or barrier are classed as a Division 2 location if the outside of the conduit and enclosures is a nonhazardous location.

(25) *Class II locations.* Class II locations are those that are hazardous because of the presence of combustible dust. Class II locations include the following:

(i) *Class II, Division 1.* A Class II, Division 1 location is a location: (*a*) in which combustible dust is or may be in suspension in the air under normal operating conditions, in quantities sufficient to produce explosive or ignitible mixtures; or (*b*) where mechanical failure or abnormal operation of machinery or equipment might cause such explosive or ignitible mixtures to be produced, and might also provide a source of ignition through simultaneous failure of electric equipment, operation of protection devices, or from other causes, or (*c*) in which combustible dusts of an electrically conductive nature may be present.

Note.—This classification may include areas of grain handling and processing plants, starch plants, sugar-pulverizing plants, malting plants, hay-grinding plants, coal pulverizing plants, areas where metal dusts and powders are produced or processed, and other similar locations which contain dust producing machinery and equipment (except where the equipment is dust-tight or vented to the outside). These areas would have combustible dust in the air, under normal operating conditions, in quantities sufficient to produce explosive or ignitible mixtures. Combustible dusts which are electrically nonconductive include dusts produced in the handling and processing of grain and grain products, pulverized sugar and cocoa, dried egg and milk powders, pulverized spices, starch and pastes, potato and woodflour, oil meal from beans and seed, dried hay, and other organic materials which may produce combustible dusts when processed or handled. Dusts containing magnesium or aluminum are particularly hazardous and the use of extreme caution is necessary to avoid ignition and explosion.

(ii) *Class II, Division 2.* A Class II, Division 2 location is a location in which, (*a*) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitible mixtures; and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (*b*) Dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment, and dust accumulations resulting therefrom may be ignitible by abnormal operation or failure of electrical equipment or other apparatus.

Note.—This classification includes locations where dangerous concentrations of suspended dust would not be likely but where dust accumulations might form on or in the vicinity of electric equipment. These areas may contain equipment from which appreciable quantities of dust would escape under abnormal operation conditions or be adjacent to a Class II Division 1 location, as described above, into which an explosive or ignitible concentration of dust may be put into suspension under abnormal operating conditions.

(26) *Class III locations.* Class III locations are those that are hazardous because of the presence of easily

ignitible fibers or flyings but in which such fibers or flyings are not likely to be in suspension in the air in quantities sufficient to produce ignitible mixtures. Class III locations include the following:

(i) *Class III, Division 1.* A Class III, Division 1 location is a location in which easily ignitible fibers or materials producing combustible flyings are handled, manufactured, or used.

Note.—Such locations usually include some parts of rayon, cotton, and other textile mills; combustible fiber manufacturing and processing plants; cotton gins and cotton-seed mills; flax-processing plants; clothing manufacturing plants; woodworking plants, and establishments; and industries involving similar hazardous processes or conditions.

Easily ignitible fibers and flyings include rayon, cotton (including cotton linters and cotton waste), sisal or henequen, istle, jute, hemp, tow, cocoa fiber, oakum, baled waste kapok, Spanish moss, excelsior, and other materials of similar nature.

(ii) *Class III, Division 2.* A Class III, Division 2 location is a location in which easily ignitible fibers are stored or handled, except in process of manufacture.

(27) *Collector ring.* A collector ring is an assembly of slip rings for transferring electrical energy from a stationary to a rotating member.

(28) *Concealed.* Rendered inaccessible by the structure or finish of the building. Wires in concealed raceways are considered concealed, even though they may become accessible by withdrawing them. *[See "Accessible. (As applied to wiring methods.)"]*

(29) *Conductor.* (i) *Bare.* A conductor having no covering or electrical insulation whatsoever.

(ii) *Covered.* A conductor encased within material of composition or thickness that is not recognized as electrical insulation.

(iii) *Insulated.* A conductor encased within material of composition and thickness that is recognized as electrical insulation.

(30) *Conduit body.* A separate portion of a conduit or tubing system that provides access through a removable cover(s) to the interior of the system at a junction of two or more sections of the system or at a terminal point of the system. Boxes such as FS and FD or larger cast or sheet metal boxes are not classified as conduit bodies.

(31) *Controller.* A device or group of devices that serves to govern, in some predetermined manner, the electric power delivered to the apparatus to which it is connected.

(32) *Cooking unit, counter-mounted.* A cooking appliance designed for mounting in or on a counter and consisting of one or more heating elements, internal wiring, and built-in or separately mountable controls. (*See "Oven, wall-mounted."*)

(33) *Covered conductor.* See "Conductor."

(34) *Cutout.* (Over 600 volts, nominal.) An assembly of a fuse support with either a fuseholder, fuse carrier, or disconnecting blade. The fuseholder or fuse carrier may include a conducting element (fuse link), or may act as the disconnecting blade by the inclusion of a nonfusible member.

(35) *Cutout box.* An enclosure designed for surface mounting and having swinging doors or covers secured directly to and telescoping with the walls of the box proper. *(See "Cabinet.")*

(36) *Damp location.* See *"Location."*

(37) *Dead front.* Without live parts exposed to a person on the operating side of the equipment.

(38) *Device.* A unit of an electrical system which is intended to carry but not utilize electric energy.

(39) *Dielectric heating.* Dielectric heating is the heating of a nominally insulating material due to its own dielectric losses when the material is placed in a varying electric field.

(40) *Disconnecting means.* A device, or group of devices, or other means by which the conductors of a circuit can be disconnected from their source of supply.

(41) *Disconnecting (or Isolating) switch.* (Over 600 volts, nominal.) A mechanical switching device used for isolating a circuit or equipment from a source of power.

(42) *Dry location.* See *"Location."*

(43) *Electric sign.* A fixed, stationary, or portable self-contained, electrically illuminated utilization equipment with words or symbols designed to convey information or attract attention.

(44) *Enclosed.* Surrounded by a case, housing, fence or walls which will prevent persons from accidentally contacting energized parts.

(45) *Enclosure.* The case or housing of apparatus, or the fence or walls surrounding an installation to prevent personnel from accidentally contacting energized parts, or to protect the equipment from physical damage.

(46) *Equipment.* A general term including material, fittings, devices, appliances, fixtures, apparatus, and the like, used as a part of, or in connection with, an electrical installation.

(47) *Equipment grounding conductor.* See *"Grounding conductor, equipment."*

(48) *Explosion-proof apparatus.* Apparatus enclosed in a case that is capable of withstanding an explosion of a specified gas or vapor which may occur within it and of preventing the ignition of a specified gas or vapor surrounding the enclosure by sparks, flashes, or explosion of the gas or vapor within, and which operates at such an external temperature that it will not ignite a surrounding flammable atmosphere.

(49) *Exposed.* (As applied to live parts.) Capable of being inadvertently touched or approached nearer than a safe distance by a person. It is applied to parts not suitably guarded, isolated, or insulated. (See *"Accessible."* and *"Concealed."*)

(50) *Exposed.* (As applied to wiring methods.) On or attached to the surface or behind panels designed to allow access. [See *"Accessible.* (As applied to wiring methods.)"]

(51) *Exposed.* (For the purposes of § 1910.308(e), *Communications systems.*) Where the circuit is in such a position that in case of failure of supports or insulation, contact with another circuit may result.

(52) *Externally operable.* Capable of being operated without exposing the operator to contact with live parts.

(53) *Feeder.* All circuit conductors between the service equipment, or the generator switchboard of an isolated plant, and the final branch-circuit overcurrent device.

(54) *Fitting.* An accessory such as a locknut, bushing, or other part of a wiring system that is intended primarily to perform a mechanical rather than an electrical function.

(55) *Fuse.* (Over 600 volts, nominal.) An overcurrent protective device with a circuit opening fusible part that is heated and severed by the passage of overcurrent through it. A fuse comprises all the parts that form a unit capable of performing the prescribed functions. It may or may not be the complete device necessary to connect it into an electrical circuit.

(56) *Ground.* A conducting connection, whether intentional or accidental, between an electrical circuit or equipment and the earth, or to some conducting body that serves in place of the earth.

(57) *Grounded.* Connected to earth or to some conducting body that serves in place of the earth.

(58) *Grounded, effectively.* (Over 600 volts, nominal.) Permanently connected to earth through a ground connection of sufficiently low impedance and having sufficient ampacity that ground fault current which may occur cannot build up to voltages dangerous to personnel.

(59) *Grounded conductor.* A system or circuit conductor that is intentionally grounded.

(60) *Grounding conductor.* A conductor used to connect equipment or

the grounded circuit of a wiring system to a grounding electrode or electrodes.

(61) *Grounding conductor, equipment.* The conductor used to connect the non-current-carrying metal parts of equipment, raceways, and other enclosures to the system grounded conductor and/or the grounding electrode conductor at the service equipment or at the source of a separately derived system.

(62) *Grounding electrode conductor.* The conductor used to connect the grounding electrode to the equipment grounding conductor and/or to the grounded conductor of the circuit at the service equipment or at the source of a separately derived system.

(63) *Ground-fault circuit-interrupter.* A device whose function is to interrupt the electric circuit to the load when a fault current to ground exceeds some predetermined value that is less than that required to operate the overcurrent protective device of the supply circuit.

(64) *Guarded.* Covered, shielded, fenced, enclosed, or otherwise protected by means of suitable covers, casings, barriers, rails, screens, mats, or platforms to remove the likelihood of approach to a point of danger or contact by persons or objects.

(65) *Health care facilities.* Buildings or portions of buildings and mobile homes that contain, but are not limited to, hospitals, nursing homes, extended care facilities, clinics, and medical and dental offices, whether fixed or mobile.

(66) *Heating equipment.* For the purposes of § 1910.306(g), the term "heating equipment" includes any equipment used for heating purposes if heat is generated by induction or dielectric methods.

(67) *Hoistway.* Any shaftway, hatchway, well hole, or other vertical opening or space in which an elevator or dumbwaiter is designed to operate.

(68) *Identified.* Identified, as used in reference to a conductor or its terminal, means that such conductor or terminal can be readily recognized as grounded.

(69) *Induction heating.* Induction heating is the heating of a nominally conductive material due to its own I^2R losses when the material is placed in a varying electromagnetic field.

(70) *Insulated conductor.* See under "Conductor."

(71) *Interrupter switch.* (Over 600 volts, nominal.) A switch capable of making, carrying, and interrupting specified currents.

(72) *Irrigation machine.* An irrigation machine is an electrically driven or controlled machine, with one or more motors, not hand portable, and used primarily to transport and distribute water for agricultural purposes.

(73) *Isolated.* Not readily accessible to persons unless special means for access are used.

(74) *Isolated power system.* A system comprising an isolating transformer or its equivalent, a line isolation monitor, and its ungrounded circuit conductors.

(75) *Labeled.* Equipment is "labeled" if there is attached to it a label, symbol, or other identifying mark of a nationally recognized testing laboratory which, (a) makes periodic inspections of the production of such equipment, and (b) whose labeling indicates compliance with nationally recognized standards or tests to determine safe use in a specified manner.

(76) *Lighting outlet.* An outlet intended for the direct connection of a lampholder, a lighting fixture, or a pendant cord terminating in a lampholder.

(77) *Listed.* Equipment is "listed" if it is of a kind mentioned in a list which, (a) is published by a nationally recognized laboratory which makes periodic inspection of the production of such equipment, and (b) states such equipment meets nationally recognized standards or has been tested and found safe for use in a specified manner.

(78) *Location.* (i) *Damp location.* Partially protected locations under canopies, marquees, roofed open porches, and like locations, and interior locations subject to moderate degrees of moisture, such as some basements, some barns, and some cold-storage warehouses.

(ii) *Dry location.* A location not normally subject to dampness or wetness. A location classified as dry may be temporarily subject to dampness or wetness, as in the case of a building under construction.

(iii) *Wet location.* Installations underground or in concrete slabs or masonry in direct contact with the earth, and locations subject to saturation with water or other liquids, such as vehicle-washing areas, and locations exposed to weather and unprotected.

(79) *Medium voltage cable.* Type MV medium voltage cable is a single or multiconductor solid dielectric insulated cable rated 2000 volts or higher.

(80) *Metal-clad cable.* Type MC cable is a factory assembly of one or more conductors, each individually insulated and enclosed in a metallic sheath of interlocking tape, or a smooth or corrugated tube.

(81) *Mineral-insulated metal-sheathed cable.* Type MI mineral-insulated metal-sheathed cable is a factory assembly of one or more conductors insulated with a highly compressed refractory mineral insulation and enclosed in a liquidtight and gastight continuous copper sheath.

(82) *Mobile X-ray.* X-ray equipment mounted on a permanent base with wheels and/or casters for moving while completely assembled.

(83) *Nonmetallic-sheathed cable.* Nonmetallic-sheathed cable is a factory assembly of two or more insulated conductors having an outer sheath of moisture resistant, flame-retardant, nonmetallic material. Nonmetallic sheathed cable is manufactured in the following types:

(i) *Type NM.* The overall covering has a flame-retardant and moisture-resistant finish.

(ii) *Type NMC.* The overall covering is flame-retardant, moisture-resistant, fungus-resistant, and corrosion-resistant.

(84) *Oil (filled) cutout.* (Over 600 volts, nominal.) A cutout in which all or part of the fuse support and its fuse link or disconnecting blade are mounted in oil with complete immersion of the contacts and the fusible portion of the conducting element (fuse link), so that arc interruption by severing of the fuse link or by opening of the contacts will occur under oil.

(85) *Open wiring on insulators.* Open wiring on insulators is an exposed wiring method using cleats, knobs, tubes, and flexible tubing for the protection and support of single insulated conductors run in or on buildings, and not concealed by the building structure.

(86) *Outlet.* A point on the wiring system at which current is taken to supply utilization equipment.

(87) *Outline lighting.* An arrangement of incandescent lamps or electric discharge tubing to outline or call attention to certain features such as the shape of a building or the decoration of a window.

(88) *Oven, wall-mounted.* An oven for cooking purposes designed for mounting in or on a wall or other surface and consisting of one of more heating elements, internal wiring, and built-in or separately mountable controls. (See *"Cooking unit, counter-mounted."*)

(89) *Overcurrent.* Any current in excess of the rated current of equipment or the ampacity of a conductor. It may result from overload (see definition), short circuit, or ground fault. A current in excess of rating may be accommodated by certain equipment and conductors for a given set of conditions. Hence the rules for overcurrent protection are specific for particular situations.

(90) *Overload.* Operation of equipment in excess of normal, full load rating, or of a conductor in excess of rated ampacity which, when it persists for a sufficient length of time, would

cause damage or dangerous overheating. A fault, such as a short circuit or ground fault, is not an overload. (See *"Overcurrent."*)

(91) *Panelboard.* A single panel or group of panel units designed for assembly in the form of a single panel; including buses, automatic overcurrent devices, and with or without switches for the control of light, heat, or power circuits; designed to be placed in a cabinet or cutout box placed in or against a wall or partition and accessible only from the front. (See *"Switchboard."*)

(92) *Permanently installed decorative fountains and reflection pools.* Those that are constructed in the ground, on the ground, or in a building in such a manner that the pool cannot be readily disassembled for storage and are served by electrical circuits of any nature. These units are primarily constructed for their aesthetic value and not intended for swimming or wading.

(93) *Permanently installed swimming pools, wading and therapeutic pools.* Those that are constructed in the ground, on the ground, or in a building in such a manner that the pool cannot be readily disassembled for storage whether or not served by electrical circuits of any nature.

(94) *Portable X-ray.* X-ray equipment designed to be hand-carried.

(95) *Power and control tray cable.* Type TC power and control tray cable is a factory assembly of two or more insulated conductors, with or without associated bare or covered grounding conductors under a nonmetallic sheath, approved for installation in cable trays, in raceways, or where supported by a messenger wire.

(96) *Power fuse.* (Over 600 volts, nominal.) See *"Fuse."*

(97) *Power-limited tray cable.* Type PLTC nonmetallic-sheathed power limited tray cable is a factory assembly of two or more insulated conductors under a nonmetallic jacket.

(98) *Power outlet.* An enclosed assembly which may include receptacles, circuit breakers, fuseholders, fused switches, buses and watt-hour meter mounting means; intended to supply and control power to mobile homes, recreational vehicles or boats, or to serve as a means for distributing power required to operate mobile or temporarily installed equipment.

(99) *Premises wiring system.* That interior and exterior wiring, including power, lighting, control, and signal circuit wiring together with all of its associated hardware, fittings, and wiring devices, both permanently and temporarily installed, which extends from the load end of the service drop, or load end of the service lateral conductors to the outlet(s). Such wiring does not include wiring internal to appliances, fixtures, motors, controllers, motor control centers, and similar equipment.

(100) *Qualified person.* One familiar with the construction and operation of the equipment and the hazards involved.

(101) *Raceway.* A channel designed expressly for holding wires, cables, or busbars, with additional functions as permitted in this subpart. Raceways may be of metal or insulating material, and the term includes rigid metal conduit, rigid nonmetallic conduit, intermediate metal conduit, liquidtight flexible metal conduit, flexible metallic tubing, flexible metal conduit, electrical metallic tubing, underfloor raceways, cellular concrete floor raceways, cellular metal floor raceways, surface raceways, wireways, and busways.

(102) *Readily accessible.* Capable of being reached quickly for operation, renewal, or inspections, without requiring those to whom ready access is requisite to climb over or remove obstacles or to resort to portable ladders, chairs, etc. (*See "Accessible."*)

(103) *Receptacle.* A receptacle is a contact device installed at the outlet for the connection of a single attachment plug. A single receptacle is a single contact device with no other contact device on the same yoke. A multiple receptacle is a single device containing two or more receptacles.

(104) *Receptacle outlet.* An outlet where one or more receptacles are installed.

(105) *Remote-control circuit.* Any electric circuit that controls any other circuit through a relay or an equivalent device.

(106) *Sealable equipment.* Equipment enclosed in a case or cabinet that is provided with a means of sealing or locking so that live parts cannot be made accessible without opening the enclosure. The equipment may or may not be operable without opening the enclosure.

(107) *Separately derived system.* A premises wiring system whose power is derived from generator, transformer, or converter winding and has no direct electrical connection, including a solidly connected grounded circuit conductor, to supply conductors originating in another system.

(108) *Service.* The conductors and equipment for delivering energy from the electricity supply system to the wiring system of the premises served.

(109) *Service cable.* Service conductors made up in the form of a cable.

(110) *Service conductors.* The supply conductors that extend from the street main or from transformers to the service equipment of the premises supplied.

(111) *Service drop.* The overhead service conductors from the last pole or other aerial support to and including the splices, if any, connecting to the service-entrance conductors at the building or other structure.

(112) *Service-entrance cable.* Service-entrance cable is a single conductor or multiconductor assembly provided with or without an overall covering, primarily used for services and of the following types:

(i) *Type SE,* having a flame-retardent, moisture-resistant covering, but not required to have inherent protection against mechanical abuse.

(ii) *Type USE,* recognized for underground use, having a moisture-resistant covering, but not required to have a flame-retardant covering or inherent protection against mechanical abuse. Single-conductor cables having an insulation specifically approved for the purpose do not require an outer covering.

(113) *Service-entrance conductors, overhead system.* The service conductors between the terminals of the service equipment and a point usually outside the building, clear of building walls, where joined by tap or splice to the service drop.

(114) *Service entrance conductors, underground system.* The service conductors between the terminals of the service equipment and the point of connection to the service lateral. Where service equipment is located outside the building walls, there may be no service-entrance conductors, or they may be entirely outside the building.

(115) *Service equipment.* The necessary equipment, usually consisting of a circuit breaker or switch and fuses, and their accessories, located near the point of entrance of supply conductors to a building or other structure, or an otherwise defined area, and intended to consititute the main control and means of cutoff of the supply.

(116) *Service raceway.* The raceway that encloses the service-entrance conductors.

(117) *Shielded nonmetallic-sheathed cable.* Type SNM, shielded nonmetallic-sheathed cable is a factory assembly of two or more insulated conductors in an extruded core of moisture-resistant, flame-resistant nonmetallic material, covered with an overlapping spiral metal tape and wire shield and jacketed with an extruded moisture-, flame-, oil-, corrosion-, fungus-, and sunlight-resistant nonmetallic material.

(118) *Show window.* Any window used or designed to be used for the display of goods or advertising material, whether it is fully or partly enclosed or entirely open at the rear and whether or not it has a platform raised higher than the street floor level.

(119) *Sign.* See *"Electric Sign."*

(120) *Signaling circuit.* Any electric circuit that energizes signaling equipment.

(121) *Special permission.* The written consent of the authority having jurisdiction.

(122) *Storable swimming or wading pool.* A pool with a maximum dimension of 15 feet and a maximum wall height of 3 feet and is so constructed that it may be readily disassembled for storage and reassembled to its original integrity.

(123) *Switchboard.* A large single panel, frame, or assembly of panels which have switches, buses, instruments, overcurrent and other protective devices mounted on the face or back or both. Switchboards are generally accessible from the rear as well as from the front and are not intended to be installed in cabinets. (See *"Panelboard."*)

(124) *Switches.*

(i) *General-use switch.* A Switch intended for use in general distribution and branch circuits. It is rated in amperes, and it is capable of interrupting its rated current at its rated voltage.

(ii) *General-use snap switch.* A form of general-use switch so constructed that it can be installed in flush device boxes or on outlet box covers, or otherwise used in conjunction with wiring systems recognized by this subpart.

(iii) *Isolating switch.* A switch intended for isolating an electric circuit from the source of power. It has no interrupting rating, and it is intended to be operated only after the circuit has been opened by some other means.

(iv) *Motor-circuit switch.* A switch, rated in horsepower, capable of interrupting the maximum operating overload current of a motor of the same horsepower rating as the switch at the rated voltage.

(125) *Switching devices.* (Over 600 volts, nominal.) Devices designed to close and/or open one or more electric circuits. Included in this category are circuit breakers, cutouts, disconnecting (or isolating) switches, disconnecting means, interrupter switches, and oil (filled) cutouts.

(126) *Transportable X-ray.* X-ray equipment installed in a vehicle or that may readily be disassembled for transport in a vehicle.

(127) *Utilization equipment.* Utilization equipment means equipment which utilizes electric energy for mechanical, chemical, heating, lighting, or similar useful purpose.

(128) *Utilization system.* A utilization system is a system which provides electric power and light for employee workplaces, and includes the premises wiring system and utilization equipment.

(129) *Ventilated.* Provided with a means to permit circulation of air sufficient to remove an excess of heat, fumes, or vapors.

(130) *Volatile flammable liquid.* A flammable liquid having a flash point below 38 degrees C (100 degrees F) or whose temperature is above its flash point.

(131) *Voltage (of a circuit).* The greatest root-mean-square (effective) difference of potential between any two conductors of the circuit concerned.

(132) *Voltage, nominal.* A nominal value assigned to a circuit or system for the purpose of conveniently designating its voltage class (as 120/240, 480Y/277, 600, etc.). The actual voltage at which a circuit operates can vary from the nominal within a range that permits satisfactory operation of equipment.

(133) *Voltage to ground.* For grounded circuits, the voltage between the given conductor and that point or conductor of the circuit that is grounded; for ungrounded circuits, the greatest voltage between the given conductor and any other conductor of the circuit.

(134) *Watertight.* So constructed that moisture will not enter the enclosure.

(135) *Weatherproof.* So constructed or protected that exposure to the weather will not interfere with successful operation. Rainproof, raintight, or watertight equipment can fulfill the requirements for weatherproof where varying weather conditions other than wetness, such as snow, ice, dust, or temperature extremes, are not a factor.

(136) *Wet location.* See "Location."

(137) *Wireways.* Wireways are sheet-metal troughs with hinged or removable covers for housing and protecting electric wires and cable and in which conductors are laid in place after the wireway has been installed as a complete system.

(b) *Definitions applicable to §§ 1910.331 through 1910.360 [Reserved].*

(c) *Definitions applicable to §§ 1910.361 through 1910.380 [Reserved].*

(d) *Definitions applicable to §§ 1910.381 through 1910.398 [Reserved].*

Appendix A—Reference Documents

The following references provide information which can be helpful in understanding and complying with the requirements contained in Subpart S:

ANSI A17.1–71 Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks.
ANSI B9.1–71 Safety Code for Mechanical Refrigeration.
ANSI B30.2–76 Safety Code for Overhead and Gantry Cranes.
ANSI B30.3–75 Hammerhead Tower Cranes.
ANSI B30.4–73 Safety Code for Portal, Tower, and Pillar Cranes.
ANSI B30.5–68 Safety Code for Crawler, Locomotive, and Truck Cranes.
ANSI B30.6–77 Derricks.
ANSI B30.7–77 Base Mounted Drum Hoists.
ANSI B30.8–71 Safety Code for Floating Cranes and Floating Derricks.
ANSI B30.11–73 Monorail Systems and Underhung Cranes.
ANSI B30.12–75 Handling Loads Suspended from Rotocraft.
ANSI B30.13–77 Controlled Mechanical Storage Cranes.
ANSI B30.15–73 Safety Code for Mobile Hydraulic Cranes.
ANSI B30.16–73 Overhead Hoists.
ANSI C2–77 National Electrical Safety Code.
ANSI C33.27–74 Safety Standard for Outlet Boxes and Fittings for Use in Hazardous Locations, Class I, Groups A, B, C, and D, and Class II, Groups E, F, and G.
ANSI K61.1–72 Safety Requirements for the Storage and Handling of Anhydrous Ammonia.
ASTM D2155–66 Test Method for Autoignition Temperature of Liquid Petroleum Products.
ASTM D3176–74 Method for Ultimate Analysis of Coal and Coke.
ASTM D3180–74 Method for Calculating Coal and Coke Analyses from As Determined to Different Bases.
IEEE 463–77 Standard for Electrical Safety Practices in Electrolytic Cell Line Working Zones.
NFPA 20–76 Standard for the Installation of Centrifugal Fire Pumps.
NFPA 30–78 Flammable and Combustible Liquids Code.
NFPA 32–74 Standard for Drycleaning Plants.
NFPA 33–73 Standard for Spray Application Using Flammable and Combustible Materials.
NFPA 34–74 Standard for Dip Tanks Containing Flammable or Combustible Liquids.
NFPA 35–76 Standard for the Manufacture of Organic Coatings.
NFPA 36–74 Standard for Solvent Extraction Plants.
NFPA 40–74 Standard for the Storage and Handling of Cellulose Nitrate Motion Picture Film.
NFPA 56A–73 Standard for the Use of Inhalation Anesthetics (Flammable and Nonflammable).
NFPA 56F–74 Standard for Nonflammable Medical Gas Systems.
NFPA 58–76 Standard for the Storage and Handling of Liquefied Petroleum Gases.
NFPA 59–76 Standard for the Storage and Handling of Liquefied Petroleum Gases at Utility Gas Plants.
NFPA 70–78 National Electrical Code.
NFPA 70C–74 Hazardous Locations Classification.

NFPA 70E Standard for the Electrical Safety Requirements for Employee Workplaces.
NFPA 71–77 Standard for the Installation, Maintenance, and Use of Central Station Signaling Systems.
NFPA 72A–75 Standard for the Installation, Maintenance, and Use of Local Protective Signaling Systems for Watchman, Fire Alarm, and Supervisory Service.
NFPA 72B–75 Standard for the Installation, Maintenance, and Use of Auxiliary Protective Signaling Systems for Fire Alarm Service.
NFPA 72C–75 Standard for the Installation, Maintenance, and Use of Remote Station Protective Signaling Systems.
NFPA 72D–75 Standard for the Installation, Maintenance, and Use of Proprietary Protective Signaling Systems for Watchman, Fire Alarm, and Supervisory Service.
NFPA 72E–74 Standard for Automatic Fire Detectors.
NFPA 74–75 Standard for Installation, Maintenance, and Use of Household Fire Warning Equipment.
NFPA 76A–73 Standard for Essential Electrical Systems for Health Care Facilities.
NFPA 77–72 Recommended Practice on Static Electricity.
NFPA 80–77 Standard for Fire Doors and Windows.
NFPA 86A–73 Standard for Ovens and Furnaces; Design, Location and Equipment.
NFPA 88A–73 Standard for Parking Structures.
NFPA 88B–73 Standard for Repair Garages.
NFPA 91–73 Standard for the Installation of Blower and Exhaust Systems for Dust, Stock, and Vapor Removal, or Conveying.
NFPA 101–78 Code for Safety to Life from Fire in Buildings and Structures. (Life Safety Code.)
NFPA 325M–69 Fire-Hazard Properties of Flammable Liquids, Gases, and Volatile Solids.
NFPA 493–75 Standard for Intrinsically Safe Apparatus for Use in Class I Hazardous Locations and Its Associated Apparatus.
NFPA 496–74 Standard for Purged and Pressurized Enclosures for Electrical Equipment in Hazardous Locations.
NFPA 497–75 Recommended Practice for Classification of Class I Hazardous Locations for Electrical Installations in Chemical Plants.
NFPA 505–75 Fire Safety Standard for Powered Industrial Trucks Including Type Designations and Areas of Use.
NMAB 353–1–79 Matrix of Combustion-Relevant Properties and Classification of Gases, Vapors, and Selected Solids.
NMAB 353–2–79 Test Equipment for Use in Determining Classifications of Combustible Dusts.
NMAB 353–3–80 Classification of Combustible Dusts in Accordance with the National Electrical Code.

Appendix B—Explanatory Data [Reserved]

Appendix C—Tables, Notes, and Charts [Reserved]

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Friday
January 16, 1981

Part III

Department of Labor

Occupational Safety and Health Administration

Occupational Noise Exposure; Hearing Conservation Amendment

DEPARTMENT OF LABOR

29 CFR Part 1910

Occupational Noise Exposure; Hearing Conservation Amendment

AGENCY: The Occupational Safety and Health Administration (OSHA) of the United States Department of Labor.

ACTION: Final rule.

SUMMARY: This final rule establishes a hearing conservation program, including exposure monitoring, audiometric testing, and training, for all employees who have occupational noise exposures equal to or exceeding an 8-hour time-weighted average of 85 dBA. This amendment covers all employees except those engaged in construction or agriculture. This rule is the outgrowth of the proposed revision of the occupational noise exposure standard which was proposed in 1974. By its action today, OSHA is deferring final action on two issues raised in the 1974 proposal: the permissible exposure level for occupational noise and the appropriate method of compliance with the permissible exposure level. These two issues will continue to be governed by the existing standard.

OSHA plans to study these two issues further and will in the near future reopen the record for the submission of new evidence on these issues.

EFFECTIVE DATE: This standard will become effective April 15, 1981. Start-up dates: Employee exposure monitoring shall be completed by October 15, 1981. Dosimeters used to measure employee exposures must meet the specifications in the standard by April 15, 1983. Baseline audiograms shall be completed by April 15, 1982.

FOR FURTHER INFORMATION CONTACT: Dr. Alice Suter, Office of Physical Agents Standards, Occupational Safety and Health Administration, Room N-3718, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, Telephone (202) 523-7151.

Copies of any portion of the record including the Final Environmental Impact Statement and Regulatory Analysis may be obtained by contacting: Docket Officer, Docket No. OSH-11, Room S-6212, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone (202) 523-7894.

I. Introduction

Rationale for Amendment

Noise is one of the most pervasive occupational health problems. It is a by-product of many industrial processes. Exposure to high levels of noise causes temporary or permanent hearing loss and may cause other harmful health effects as well. The extent of damage depends primarily on the intensity of the noise and the duration of the exposure.

There is an abundance of epidemiological and laboratory evidence that protracted noise exposure above 90 decibels (dB) causes hearing loss in a substantial portion of the exposed population, and that more susceptible individuals will incur hearing loss at levels below 90 dB (Ex. 11; Ex. 12; Ex. 17; Ex. 26-2). This is discussed more fully in the Health Effects section below. Noise-induced hearing loss in an irreversible condition that progresses with increased exposure, and is exacerbrated by the normal aging process. Although such a loss may be slight at first, continued exposure may result in a loss that is severe enough to affect seriously an individual's ability to understand speech. In some cases, even slight losses in the audiometric frequencies that are critical for the understanding of speech can adversely affect an individual's ability to earn a living and to function in society in general. It constitutes a serious physical, psychological, and social handicap. Such impairment of a critical functional capacity clearly is the type of material impairment of health, which Congress, in Section 6(b)(5) of the Act, directed the Secretary to prevent.

Noise can also cause other adverse effects, such as degraded job performance, increases in accidents and absenteeism, job dissatisfaction, headaches, fatigue, sleeplessness, stress-related illnesses, and other effects that are more difficult to quantify and identify as noise-related than is hearing loss (Ex. 2C-108, p. 2; Ex. 2C-111, p. 1; Ex. 96, pp. 277-281; Ex. 189-8, p. 2; Ex. 28A, pp. 18-24, 27-28, 41-44, 46-49; Ex. 32, App. B, Gulian, pp. 6-11; Ex. 79, p. 2; Ex. 173, pp. 1-2, 7-8; Ex. 84, attach. 2, pp. 1-2).

OSHA's existing standard for occupational exposure to noise (29 CFR 1910.95) specifies a maximum permissible noise exposure level of 90 dB for a duration of 8 hours, with higher levels allowed for shorter durations. (This level is called a time-weighted average sound level, abbreviated TWA.) Employers must use feasible engineering or administrative controls, or combinations of both, whenever employee exposure to noise in the workplace exceeds the permissible exposure level. Personal protective equipment may be used to supplement the engineering and administrative controls where such controls are not able to reduce the employee exposures to within permissible limits. The standard also requires employers to administer a "continuing, effective hearing conservation program" for overexposed employees, but the standard does not define such a program.

OSHA proposed a revised noise standard in 1974, which maintained the current standard's 90 dB time-weighted average exposure limit, but required exposure monitoring, and articulated the requirements for hearing conservation programs. There was a great deal of controversy in the rulemaking proceedings about alternative permissible exposure limits and their technical and economic feasibility, but few challenged the concept or the appropriateness of a hearing conservation program. (Tr. 551-553; Tr. 210; Ex. 306, Secs. J2C, J1C, J4C; Ex. 305; Ex. 2C-16A; Ex. 2C-16B)

Analysis of the hearing record reveals information gaps in the area of extra-auditory physiological effects of noise (adverse health effects other than loss of hearing, such as high blood pressure), and also in the areas of economic and technological feasibility of noise control. The Agency needs to obtain additional material and to perform additional impact analyses before issuing a comprehensive new regulation. Therefore, for the present, OSHA will leave the permissible exposure level and compliance mechanisms of the current noise standard unchanged and continue its enforcement. The Agency will defer the final decision on methods of compliance and the permissible exposure level until it has obtained and evaluated the necessary information. The decision to implement a hearing conservation program is separate and severable from the remaining issues.

While such information is being obtained, employees must be afforded additional protection against the effects of noise. Information in the record indicates that many employees are not receiving the benefits of engineering controls to reduce their exposures to within the permissible exposure limits. In fact, there are some 2.9 million workers in American production industries with TWAs in excess of 90 dB, and an additional 2.3 million whose exposure levels exceed 85 dB. These workers, who face a significant risk or material impairment of health or functional capacity, will receive greatly increased protection from the promulgation and enforcement of these hearing conservation requirements, which amend certain provisions of the present noise standard. The provision of

this protection in the form of a well-defined hearing conservation program does not depend upon a determination of an appropriate exposure level or compliance strategy. These issues were treated separately in the proposal and the decision to implement a hearing conservation program first is consistent with the mandate of the Act that, insofar as possible, workers be protected from any material impairment of health or functional capacity.

Hearing conservation programs constitute commonly accepted industrial hygiene practice. Many companies already have instituted programs for their noise-exposed workforce (Ex. 306; Ex. 147A; Ex. 147C). This amendment clarifies what a hearing conservation program must be, and gives direction to the implementation of such a program.

Hearing conservation includes noise exposure monitoring, audiometric testing, the use of hearing protective devices where necessary, and employee education. All of these elements are reasonably necessary and appropriate for a continuing effective hearing conservation program. These procedures will result in considerable benefits for more than 5.2 million employees. Hearing protective devices will reduce the incidence of noise-induced hearing loss and also the various extra-auditory effects described below. Audiometric tests will enable employers and employees to take proper precautions to prevent further deterioration of hearing. Monitoring and educational programs will increase general awareness of noise problems, and promote the effective use of ear protectors. Another benefit, which was suggested by a National Institute for Occupational Safety and Health study, is a reduction in workplace accidents and absenteeism (Ex. 26–11, pp. ii, 5–2).

At this time the Agency does not believe that a hearing conservation program alone is the solution to the problem of workplace noise. The Agency continues to support the policy, reflected in the existing standard and not affected by this amendment, that engineering control of noise is preferable to the use of personal protective devices. The record contains considerable evidence that hearing protectors do not always provide as much attenuation in practice as the manufacturer indicates (Ex. 319, B–12, p. 4; Ex. 300A, p. 91; Ex. 301, p. 33), that many workers dislike using hearing protectors (Ex. 79, pp. 7–8; Ex. 94, pp. 9–10; Ex. 78, p. 14), and that protectors can be very uncomfortable (Ex. 73, Attach. 4, p. 1; Ex. 79, p. 7; Ex. 321–45A, pp. 1–11; Ex. 94, p. 10; Ex. 78, p. 14). In fact the degree of protection provided by such devices is questionable since they may become unseated through talking or chewing during the course of the workday.

When hearing protectors are relied upon, the adequacy of protection will depend upon the quality of the hearing protector, the tightness of the fit, and its use by employees. Permanent hearing loss can occur before it is identified by audiometric testing and, of course, extra-auditory effects cannot be detected by audiometry. Thus, none of these measures are as effective as controlling the hazard at the source.

Physical Properties of Sound

Sound consists of pressure changes in a medium (usually air), caused by vibration or turbulence. These pressure changes take the form of alternating compression and rarefaction of molecules, producing waves that propagate away from a vibrating or turbulent source. The magnitude and the type of effect on humans depend on three physical parameters of sound: level, frequency, and duration. Sound pressure level is a logarithmic measure of the magnitude of the pressure change, which is perceived as loudness. Sound pressure level is expressed in decibels, abbreviated dB. The magnitude, or intensity, of sound is perceived as loudness. The entire range of audible sound pressure (for individuals with normal hearing a range of more than ten million to one), can be compressed into a practical scale of 0 to 140 dB. Because of the logarithmic scale, a small increase in decibels represents a large increase in sound energy. Technically, each increase of 3 dB represents a doubling of sound energy, an increase of 10 dB represents a tenfold increase, and a 20-dB increase represents a 100-fold increase in sound energy.

The frequency of a sound is the number of times that a complete cycle of compressions and rarefactions occurs in a second. The descriptor, which used to be "cycles per second," is now hertz, abbreviated Hz. Frequency is perceived as pitch. The audible range of frequencies for humans with good hearing is 20 Hz to 20,000 Hz. Most everyday sounds contain a mixture of frequencies generated by a variety of sources. A sound's frequency composition is referred to as the spectrum. Frequency spectrum can be a determinant of the annoyance caused by noise, with high frequency noise being generally more annoying than low frequency noise. Also, narrow frequency bands or pure tones (single frequencies) can be somewhat more harmful to hearing than is broad band noise.

The third important parameter is the way a sound level varies over time. The duration of a sound can be measured in microseconds (the duration of a gunshot) to indefinitely long periods (typical of the hum of an electrical transformer). Industrial noise is usually described as continuous, fluctuating, intermittent, or impulsive. Continuous noise, like the sound of a fan or a motor, remains relatively constant for a long period of time. Fluctuating noise, such as the sound of a vehicle in different gears, rises and falls in intensity over a period of time. Intermittent noise ceases or falls to low levels between "on-times," or periods of much higher levels. Drilling or sawing operations are examples of intermittent noise. Impulse noise is characterized by a sharp rise in sound pressure level to a high peak, followed by a rapid decay. Impulses can occur in quiet conditions, or they can be superimposed on a background of continuous or fluctuating noise, which is typical of the production industries. Sometimes a distinction is made between impulse noise, which is non-reverberant, and impact noise, which is reverberant. Since impulsive noise in industry can be either reverberant or non-reverberant, and since the relevant parameter is pulse duration, only one term, "impulse noise," will be used.

Sound levels are relevant under this standard only as they affect employees. If the employee is not present while high sound levels are being generated, OSHA is not concerned. The Agency is concerned with employee *exposure*, which is the accumulation of noise levels experienced by employees, as these levels are distributed over the workshift. This distinction is important because some comments in the record reflected a misunderstanding of the difference between workplace sound levels and employee levels (Ex. 14–96, p. 1; Ex. 14–79, p. 1). Although the frequency spectrum of a sound may have some effect on hearing loss, it is primarily the combination of level and duration that determines the degree to which noise will cause hearing loss and extra-auditory health effects. The manner in which level and duration are combined, for purposes of predicting adverse effects or calculating noise "dose" or 8-hour time-weighted average sound level, depends upon the "exchange rate." This combination is sometimes referred to as the "doubling rate," or the "time-intensity" tradeoff. A 5-dB exchange rate is used in 29 CFR 1910.95 and in this amendment. Specifically, a 5-dB increase in level is permitted for each halving of duration.

or conversely, a doubling of duration necessitates a 5-dB decrease in level.

Noise exposure can be described either in terms of an 8-hour time-weighted average sound level or a noise dose. For purposes of Section 29 CFR 1910.95 and this amendment the integration is performed according to a 5-dB exchange rate, referenced to a "criterion" level of 90 dB and a criterion duration of 8 hours. A worker's 8-hour time-weighted average sound level (TWA) is obtained from the time integral of the various noise levels experienced over the entire workshift. For example, for purposes of the hearing conservation amendment, the exposure of an individual who works 12 hours in continuous noise of 90 dB would correspond to a TWA of 93 dB.

Noise dose is the same concept expressed in percent. A dose of 50 percent means that one-half of the permitted TWA has been experienced. It could represent 8 hours at 85 dB, 4 hours at 90 dB, 16 hours at 80 dB, or other such combinations.

Hearing and Hearing Loss

The auditory system has three primary components: the outer ear serves to direct sound into the ear, the middle ear mechanically transmits the sound waves from the air to the fluid-filled inner ear, and the inner ear changes the sound waves from mechanical to neural energy. This last process is done in a small organ known as the cochlea, where sensory cells respond to the mechanical vibrations, change them into electrical energy, and transmit the message to the brain via the auditory nerve.

Noise-induced hearing loss can be temporary or permanent. Temporary hearing loss results from short-term exposures to noise, with normal hearing returning after a period of rest. This temporary decrease in hearing ability is called temporary threshold shift (TTS), a person's hearing threshold being the level of sound that he or she can just barely hear. For example, if a person with normal hearing works all day in a noisy environment, measurements at the end of the day would show that he or she could not hear as well as at the beginning of the day. But by the next morning, after a period of quiet, this person's hearing would have returned to normal. Generally, prolonged exposure to noise over a period of several years causes permanent damage to the sensory cells of the cochlea. A person who regularly sustains TTS will eventually suffer permanent hearing loss, which will occur gradually over time. The occurrence of TTS shows that a worker has been affected by noise, and if that individual continues to be exposed to the same levels of noise, it will result in a noise-induced permanent threshold shift (NIPTS).

The ability to hear sounds with clarity is a distinct attribute of normal hearing. Damage to the outer or middle ear can produce a problem with the perception of sound intensity. Damage to the cochlea or the auditory nerve is termed "sensori-neural," and causes impaired perception of intelligibility as well as intensity. Even if sounds are amplified, they still seem indistinct. Sensori-neural hearing loss is irreversible. People with noise-induced hearing loss sometimes can benefit from the use of a hearing aid, but the aid can never "correct" a hearing loss the way eyeglasses usually can correct for impaired vision (Ex. 231, written testimony, p. 5). Hearing aids merely amplify sound, but they do not make it clearer, or less distorted. Also, they amplify the unwanted noise as well as the wanted speech signals.

Noise-induced hearing loss is sensori-neural. It is a permanent condition, and cannot be treated medically. It is characterized by a declining sensitivity to high frequency sounds, usually to frequencies above 2000 Hz. The loss usually appears first and is most severe for the 4000-Hz frequency; the "4000-Hz notch" in the audiogram is typical of noise-induced hearing loss. With continued exposure, the loss spreads to the other audiometric frequencies, 500 through 6000 Hz. This phenomenon results in difficulties in the perception of speech. Most of the sound energy of speech is in the vowel sounds, and yet most of the intelligibility lies in the consonants. People with noise-induced, high-frequency hearing loss typically have difficulty hearing consonant sounds, and therefore have difficulty understanding speech (Ex. 9, p. 18). These problems will be discussed more fully in the Health Effects section below.

The hearing-impaired person is often frustrated by missing information that is vital for social or vocational functioning. Not only will people have to speak louder, but they must speak more clearly in order to be understood. In addition, background noise, such as radio, TV, or other people talking, has a much more disruptive effect on hearing-impaired individuals than on the normal listener because these individuals are less able to differentiate between the wanted signal and the unwanted background noise (Ex. 50, p. 6; Ex. 321–16 B, pp. 9, 10, 14, 49–50). People with noise-induced hearing impairments may be lost when trying to communicate in a group or on a noisy street.

Studies in the record show that some individuals suffer severe hearing losses as a result of noise exposure (Ex. 12, p. 158; Ex. 310, p. 22; Ex. 279, 11–13, p. 443; Ex. 26–2, p. 51). These individuals would rate themselves as hearing very poorly, or even as deaf (Ex. 29, p. 85).

Social relationships become increasingly difficult as the hearing impairment becomes more severe. Audiologist Dr. W. Grady Thomas of the University of North Carolina explains some of the difficulties experienced by the hearing impaired as follows:

> depression, isolation, suspicion and withdrawal from social contacts . . . can be expected in some individuals with moderate hearing loss. . . . Adjustment problems in adults who lose hearing are difficult because habit patterns are firmly established. . . . Also, the evaluation of self, to a great extent is affected by the individual's perceptions of the evaluation of himself by others. Having to continually ask people to repeat misunderstood speech messages can contribute to feelings of inadequacy and insecurity. (Tr. 815–816)

Other Adverse Effects

In addition to hearing loss, noise can cause other harmful effects. Noise can interfere with conversation to the extent that communication is virtually impossible, causing a feeling of isolation among workers. High levels of noise, even though they may be of relatively short duration, can mask warning shouts or signals. Injuries and even fatalities have been reported in conditions where the noise masked danger signals or cries for help (Ex. 26–1, p. 7; Ex. 78, p. 20).

There is increasing evidence that noise can cause adverse effects on general health. Laboratory and field studies implicate noise as a causative factor in stress-related illnesses, such as hypertension, ulcers, and neurological disorders. These effects, as well as more details on noise-induced hearing loss, will be discussed in subsequent sections of this preamble.

Measurement of Noise and Hearing Loss

There are two major types of instruments that are used to measure occupational noise. These are the noise dosimeter and the sound level meter. Noise dosimeters measure noise dose by directly integrating a function of the various sound levels over the entire workshift. For this reason they are quite useful in workplaces where noise levels vary throughout the workshift. The dosimeter gives a reading in terms of percentage of allowable exposure. The person being monitored wears the dosimeter throughout the workshift. Results of the monitoring are obtained after the dosimeter is taken off, either by pressing a button on the dosimeter or by plugging it into a master unit which then

gives a "readout." Since employee noise exposure is expressed either as percentage of allowable dose, or as a TWA, OSHA has included a chart in Appendix A, which presents the relationship between these forms of measurement.

A sound level meter registers the level of sound that occurs at a particular time. It is useful for measuring the noise level due to a given process, or for measuring a worker's exposure to sound that fluctuates relatively little. Sound level meters contain a microphone, an amplifier with a calibrated attenuator, a set of frequency response networks, and an indicator meter.

Most sound level meters and dosimeters are small, "general purpose" (Type 2) instruments, equipped with "weighting networks," which adjust the meter response to predetermined frequency portions of the measured sounds. The A-weighting network is most commonly used in the measurement of industrial and environmental noise. The A-weighting network discriminates against low-frequency sound and, to a lesser extent, against high-frequency sound. The rationale behind A-weighting is that low frequency sound, and some fairly high-frequency sound, is not as damaging or as irritating as sound in the mid-frequency range. Thus, A-weighted sound level appears to be a good predictor of human response to noise. A-weighted sound levels will be assumed throughout the amendment and preamble unless otherwise specified. Most general purpose sound level meters also have a C-weighting network, which basically reflects sound as it occurs in the environment, without any adjustment for human response. The C-weighting network is useful in determining the effectiveness of hearing protectors for particular noise conditions, since it does not discount the presence of low-frequency sound.

The frequency range is sometimes divided into octave bands. By measuring the sound level in each octave-band one can determine the spectrum of the noise. Each band is identified by its center frequency, such as 125, 250, 500, 1000, 2000, 4000 and 8000 Hz. Octave band measurements are necessary when selecting a room in which to perform audiometric testing, and in certain audiometer calibrations. They can also be helpful for assessing engineering control strategies. To determine the level of noise in different frequency bands, a sound level meter with an octave-band filter set is needed. This instrument is somewhat larger and more complex than the general purpose sound level meter that is used for measuring A-weighted and C-weighted sound levels.

The instrument that is used to test hearing is the audiometer. Audiometers produce pure tones at specific frequencies (e.g., 250, 500, 1000, 2000, 3000, 4000, 6000, and 8000 Hz) and at specific sound levels. OSHA has required that employee hearing be tested at the frequencies 500 through 6000 Hz, since these are the most important frequencies for understanding speech, and since they are useful for determining the cause of the hearing loss.

The record of a given individual's hearing sensitivity is an audiogram. An audiogram shows hearing threshold level measured in decibels as a function of frequency in hertz. It indicates how intense or loud a sound at a given frequency must be before it can be perceived, thereby providing a graphic representation of the status of the individual's hearing. With periodic audiometric testing it is possible to trace and document hearing loss, and by doing so, to prevent further loss from occurring. The audiogram is an important indicator of early hearing loss, since losses can occur so gradually that a person may not realize that he or she is becoming impaired until a substantial amount of hearing is lost.

There are two principal types of audiometers, manual and self-recording. When a manual audiometer is used the technician adjusts the level of the tone to the point where the individual being tested can just hear it, and the technician records the level as hearing threshold. A self-recording audiometer allows the test subject to adjust the level of the tone, and the intensity of the tone is constantly recorded by a stylus, which records the results on a moving card.

Hearing threshold levels, as they are recorded from the audiometer, are given in decibels above audiometric zero. Audiometric zero is not the same as 0 dB sound pressure level, the zero reference level to which sound level meters are set. Audiometric zero deviates somewhat from 0 dB sound pressure level at each test frequency. (For example, the deviation is 10 dB at 1000 Hz, and 8.5 dB at 2000 Hz.) Audiometric zero represents the median hearing threshold level of young people with normal hearing. While some individuals may have unusually good hearing sensitivity (as good as −10 dB), others may have hearing thresholds of 10 or 15 dB and still be considered within the range of normal. Therefore, audiometric zero (as opposed to 0 dB sound pressure level) reflects an adjustment to represent normal baseline hearing. Audiometric zero has been standardized for the U.S. population in American National Standard Specification for Audiometers S3.6—1969. This zero reference level is assumed throughout the amendment and preamble unless otherwise specified.

II. Health Effects

The effects of occupational noise can be divided into two principal categories: auditory effects and extra-auditory effects. There is a wealth of information on the relationship between noise exposure and hearing loss. Dose-response relationships have been well established. Numerous studies are available which describe the effects of noise on hearing as a function of level and duration. The effects are stated in terms of the audiometric frequencies at which the loss occurs, degree of hearing loss, anatomical changes (in animal experiments), and differential changes in hearing as variables such as age and sex interact with noise exposure.

The extra-auditory effects of noise involve complex physiological and psychosocial reactions, which are much more difficult to document. Although stress-related illnesses have been associated with noise exposure, isolating all of the factors which contribute to stress confounds efforts to provide a direct "cause and effect" relationship between noise and such stress-related conditions as hypertension or ulcers. Although precise dose-response relationships are lacking at this time, information on the extra-auditory effects is included in this discussion because the data are highly suggestive of adverse effects, and therefore provide added incentive for protecting noise exposed workers.

A. *Hearing Loss.*

There is no doubt that noise exposure causes hearing loss, which grows more severe as exposure continues over the years. Many witnesses spoke with first-hand knowledge of the effect of noise exposure on their hearing, and consequently, on their lives. Ruth Knowles, President of Local 1716 of the Textile Workers Union, testified as follows about her noise-induced hearing loss:

> It has been a gradual loss of hearing for me, so gradual that I never really realized it until a few years ago, when a relative asked me if I did not hear well. After then I started noticing that it was getting worse and that I was having to strain more to hear clearly. I became alarmed and consulted a specialist, only to be told that nothing could be done and that the hearing loss had been caused by high noise exposure.
>
> It is truly a sad, helpless feeling that you have been told that you have lost a significant part of your second most

important sensor. As time has passed, I have been embarassed because I was not able to hear well enough to know what was going on. I have even given an affirmative nod only to find out later that it shoud have been a negative answer. Socially speaking, there have been many, many instances that because of my hearing impairment, I would rather have stayed at home. It is difficult for me to hear and understand most waitresses in restaurants and a few times I have even had to tell them that I did not hear well, after which they speak so loudly that everyone around turns to look. My family has come to realize this problem and usually volunteers their help.

Also, I am never able to hear sales persons in grocery stores or bank tellers. At times it has become so disturbing that I have actually sat down and cried when I would get home. Persons who do not suffer any loss of hearing can't possibly realize the humiliation those of us who have impaired hearing go through. (Tr. 2021–2022).

Material Impairment

Section 6(b)(5) of the Occupational Safety and Health Act indicates that when dealing with a harmful physical agent the Secretary should set a standard which guards against material impairment of health or functional capacity, even if the worker is exposed for a working lifetime. As discussed below, noise is a harmful physical agent. The hearing conservation amendment is reasonably necessary to mitigate the significant risk of noise, which is present in most workplaces. This amendment is necessary to prevent large numbers of workers from suffering material impairment of health and functional capacity resulting from exposure to noise. As shown below, even assuming compliance with the current occupational noise exposure standard, many workers will still be at increased risk of suffering material impairment of functional capacity from noise in the workplace. The hearing conservation program prescribed in this amendment will save at least 189,000 workers from suffering material impairment after the program is fully effective. Accordingly OSHA finds that this amendment is reasonably necessary and appropriate, not only to provide healthful, but to provide safe places of employment.

OSHA defines material impairment of hearing as an average hearing level, with respect to audiometric zero, that exceeds 25 dB for the frequencies 1000, 2000, and 3000 Hz. This hearing level is sometimes called a "fence" in that it provides a demarcation point along the continuum of hearing levels, above which a hearing loss is considered, in the language of the Occupational Safety and Health Act, a "material impairment of health or functional capacity." Most audiologists and acousticians will agree that small amounts of hearing loss can be tolerated. If more than a small amount of loss is suffered, a person cannot function as well as a normally hearing individual. The selection of the point or "fence" beyond which an individual person cannot function as well becomes the definition of material impairment of hearing.

OSHA believes that the capacity to hear and understand speech is the most critical function of human hearing. Therefore the definition of material impairment of hearing is directly related to people's ability to understand speech as it is spoken in everyday social conditions. Assessing this ability can be done by a variety of speech audiometric tests. Since speech audiometry is not well standardized, researchers and administrators have used pure-tone thresholds to estimate hearing for speech. As explained in the introductory section, these thresholds are the lowest levels at which a listener can just barely hear discrete frequency tones.

There is very little debate about the usefulness of pure tones to assess hearing impairment, but there is some disagreement about the hearing level, or fence, at which material impairment begins, and about which audiometric frequencies to use in the assessment. Setting the fence at a high hearing level means that workers are allowed to lose quite a lot of hearing before the loss is considered to be a material impairment to be prevented. Setting the fence at a low hearing level means that relatively little hearing is lost before the loss or impairment is considered material. The lower the fence, the larger will be the number of workers identified as materially impaired. The selection of audiometric frequencies also has an effect on the number of workers that will be identified. Since noise-induced hearing loss affects the high frequencies earlier and more severely than the low frequencies, more workers will be identified as crossing the fence or suffering material impairment when high frequencies are used in the definition. It should be noted that the use of high frequencies in the definition of material impairment more accurately portrays a worker's actual hearing loss, since those frequencies are more severely affected by noise.

The hearing levels and audiometric frequencies that constitute the definition of material impairment of hearing have been identified through studies of the ability to communicate in everyday listening conditions. Some of these studies were submitted to the record, and the issue of material impairment received considerable attention.

Until now, the Agency had not conclusively defined material impairment of hearing. For purposes of the proposal, OSHA had used the definition of hearing handicap developed in 1959 by the American Academy of Ophthalmology and Otolaryngology (AAOO), a subgroup of the American Medical Association (Ex. 3, p. 44; Ex. 6, p. 12337). The AAOO definition, which has been used primarily for workers' compensation purposes, uses a 25-dB fence for average hearing levels at the frequencies 500, 1000, and 2000 Hz. Some comments to the record (Ex. 35, p. 1; Ex. 26–3, p. 5–24; Ex. 26–4, p. 1) favored this definition, because it was thought to describe an individual's ability to communicate under everyday conditions. However, several commenters pointed out that it would not be appropriate to use the same formula for prevention and compensation (Ex. 47, p. 5; Ex. 46, pp. 364–365; Ex. 51, p. 4; Ex. 57, pp. 9–10). Dr. H. E. von Gierke of the U.S. Air Force commented on this subject on behalf of the EPA. He states that: "Formulas developed for assessing hearing handicap for compensation purposes were never intended to be used for purposes of preventive criteria." (Ex. 47, p. 5).

In its criteria document NIOSH recommended that the defintion of material impairment be expanded to include the ability to hear and to understand speech in noisy or difficult listening conditions. NIOSH used an average loss of 1000, 2000, and 3000 Hz in the frequency averaging, still using a 25-dB fence (Ex. 1, pp. VI–11 through VI-14). Various studies and comments supported the 1000, 2000, and 3000 Hz definition as being more realistic than the 500, 1000, and 2000 Hz AAOO defintion, because good hearing in the higher frequencies (2000 and 3000 Hz) is very important for understanding speech especially when there is noise in the background, or when speech is not clear. It was also noted that everyday listening conditions are noisy at least part of the time rather than being completely quiet (Ex. 1, p. VI–13; Ex. 50, p. 16; Ex. 321–16B, pp. 9–10, 61; Ex. 5, p. 43803), which is the assumption in the AAOO formula.

Dr. Aage Moller, Professor of Physiological Acoustics at the Karolinska Institute in Stockholm, commented on the severity of the AAOO definition in his testimony for the AFL–CIO:

> The 26 dB hearing loss average value for frequencies 500, 1000 and 2000 Hz is (by AAOO) assumed to correspond to a beginning loss of ability to understand speech in the quiet. Historically this definition originates from the limit where workmen's

compensation was to be paid for loss of earning power. Such a hearing loss will no doubt by most people be regarded as a rather severe handicap in normal social life. It will with most people make it impossible or at least very difficult to participate in parties where more than one person speaks at a time. People with that degree of hearing loss will also have difficulties to understand novel words and numbers. It is thus somewhat surprising that this *"limit of a handicap"* at present has been accepted as *"the limit of a tolerable"* impairment of the hearing. It has been suggested to exchange 500 Hz with 3000 Hz to give more realistic estimates of beginning loss of intelligibility of speech. (Ex. 88, pp. 3–4).

William C. Sperry, a private individual whose hearing impairment was very close to the AAOO-identified point of beginning handicap, filed a comment (Ex. 184). He believed that his hearing loss was sufficient to warrant buying a hearing aid. Although the hearing aid sometimes helped, there were other times when hearing was extremely difficult. He stated:

In a situation where there is a high ambient noise level, such as parties, I might as well leave my hearing aid at home, and very often, I go home after a short while since the multitude of speakers and all of the noise frequently makes it impossible to follow conversations. In any situation, where there is background noise, such as an air-conditioner, I find that communication is difficult, with or without the hearing aid. . . . I submit to you that people with my hearing loss are considerably more than just barely impaired. A standard that allows an average of 25 dB hearing loss at 500, 1000 and 2000 Hz very definitely allows material impairment to occur, and does not prevent people from losing one of their most valuable abilities, namely the ability to communicate effectively with each other. (Ex. 184, pp. 4–5).

Finally it was pointed out that the AAOO formula does not distinguish between a person who has a noise-induced hearing loss and a person who has a conductive hearing loss since it includes 500 Hz and excludes the frequencies above 2000 Hz (Ex. 1, pp. VI–12 and VI–13). Conductive hearing loss (which can be the result of many nonoccupational factors such as ear infections) tends to be of the same magnitude across all frequencies so that the loss has a flat appearance on the audiogram. Noise-induced hearing loss produces a sloping configuration, the loss being much more severe in the high frequencies than in the low frequencies, especially in the early stages. Since 500 Hz is the last and least severely affected of the test frequencies, it is not nearly so important as 3000 Hz in characterizing the audiogram of the individual with noise-induced hearing loss.

In 1979 the American Medical Association (AMA) (Ex. 321–10, p. 2058) changed its formula for hearing handicap, and now advocates a low fence of 25 dB for hearing levels averaged at the frequencies 500, 1000, 2000, and 3000 Hz. The AMA has chosen to include 3000 Hz because it now recognizes the value of high-frequency hearing in more realistic listening situations (Ex. 321–10, p. 2058). However, the primary use of the AMA formula for "medico-legal" (compensation) purposes remains unchanged.

Another method for describing material impairment, developed by the Committee on Hearing, Bioacoustics and Biomechanics of the National Academy of Sciences (CHABA), was discussed by Dr. W. Dixon Ward (Ex. 222C, pp. 12–13) and Dr. Thomas (Ex. 51, pp. 7, 8). The CHABA report specified that a fence of 35 dB should be used if hearing levels at 1000, 2000, and 3000 Hz were averaged (Ex. 222C, pp. 12–13). CHABA's charge was to find a low fence for the frequencies 1000, 2000, and 3000 Hz that would yield the same compensation as a 25-dB fence at 500, 1000, and 2000 Hz (Ex. 51, pp. 7–8). Since this formula was specifically concerned with compensation, rather than with prevention, OSHA does not consider it appropriate for use in a standard to prevent material impairment of hearing. The CHABA committee made no attempt to define material impairment of hearing by examining research results on the ability to understand speech and to function in everyday life.

EPA (Ex. 189–5, p. 11) recommended a 25-dB fence for hearing levels averaged at the frequencies 1000, 2000, and 4000 Hz, and later submitted a study (Ex. 321–16B, pp. 60, 61) to support the same frequencies but using an even lower fence.

Other witnesses also recommended lower fences or higher frequencies than those employed by the AAOO. Dr. Karl Kryter of the Stanford Research Institute, testifying on behalf of EPA (Ex. 50, p. 6; Tr. 776–778) criticized the AAOO formula, and suggested a fence at least as low as 15 dB if the frequencies 500, 1000, and 2000 Hz were used. Joseph Hafkenschiel of the Communications Workers of America, recommended a 15-dB fence for the frequencies 500, 1000, and 2000 Hz (Ex. 82, p. 4), and others also argued that a 25-dB fence allows too much hearing loss (Ex. 189–5, p. 7; Ex. 184, p. 5; Ex. 50, p. 4). A fence of 15 dB at 500, 1000, and 2000 Hz would be equivalent to a hearing level of 25 dB if the frequencies 1000, 2000, and 3000 Hz were used (Ex. 50, p. 19).

A report submitted by the Center for Policy Alternatives at the Massachusetts Institute of Technology (Ex. 138A, pp. 2–2 to 2–3) recommended using a variety of fences to describe different degrees of hearing loss experienced by a noise exposed population.

Dr. William Burns, professor of physiology at the University of London, pointed out (Tr. 851) that the British Standard, Method of Test for Estimating the Risk of Hearing Handicap due to Noise Exposure (in draft form at the time of his testimony), estimated risk data for the frequencies 1000, 2000, and 3000 Hz, although the standard used a fence of 30 dB. This fence and frequency combination were also recommended by the British to the International Organization for Standardization (Proposal from the UK-Member Body of ISO/TC 43/SC 1 for a revision of ISO 1999—Acoustics—Assessment of Occupational Noise Exposure for Hearing Conservation Purposes). These two documents later were submitted to the record by EPA as Exhibits 266E (p. 15) and 279, 11–10 (p. 1).

Following the original recommendation of NIOSH, OSHA will consider as material impairment a 25-dB fence for the frequencies 1000, 2000, and 3000 Hz. The agency agrees with the many comments and studies cited to show that high-frequency hearing is critically important for the understanding of speech (Ex. 46, p. 363; Ex. 26–1, p. 3; Ex. 26–6, p. 830; Ex. 228, p. 8; Ex. 5, p. 43803; Ex. 51, pp. 6–7), and that everyday speech is sometimes distorted and often takes place in noisy conditions. Therefore, the Agency believes that 3000 Hz should be included in the definition of material impairment, and 500 Hz, since it is not so important for understanding speech (Ex. 1, p. VI–16; Ex. 26–6, p. 830; Ex. 26–7, p. 1217; Ex. 321–16B, pp. 42–44) and since it is last and least affected by noise, should be excluded from the definition.

OSHA has considered including the 4000-Hz frequency in the definition of material impairment as recommended by EPA, since hearing at this frequency appears to be particularly valuable at times when listening conditions are noisy and distorted (Ex. 26–6, p. 830; Ex. 26–7, p. 1217; Ex. 321–16B, pp. 34–45). However, OSHA recognizes that listening conditions are favorable at least part of the time, and until data become available to show the typical proportion of favorable to unfavorable listening conditions, or the average amount of distortion that occurs in everyday speech, OSHA will continue to use the 25-dB fence at 1000, 2000, and 3000 Hz as recommended by NIOSH (Ex. 1, p. VI–11) and others (Ex. 88, pp. 3–4, Ex. 26–7, pp. 1217, 1223; Ex. 50, pp. 6,

19). This is not to say that the 4000-Hz frequency has no importance for the understanding of speech and that unlimited loss should be allowed in that frequency, but only that it is not included in the definition of material impairment at this time. In the typical noise-induced hearing loss pattern, severe losses at 4000 Hz are almost always accompanied by losses at 3000 Hz which are nearly as severe (Ex. 12, p. 136, fig. 10.19; Ex. 26–2, pp. 36–47; Ex. 1, fig. 7). Therefore, losses at 4000 Hz would not be unaccounted for.

The Agency has accepted the recommendation of the Center for Policy Alternatives to examine the effects of noise on hearing by means of a variety of fences. In the discussion of the anticipated benefits of hearing conservation programs, the Agency uses fences at 15 dB, 25 dB, and 40 dB for the frequencies 1000, 2000, and 3000 Hz. The 25-dB fence, however, is considered the point at which impairment may be considered material.

Quantifying the Effects of Noise

The two most useful concepts for describing dose-response relationships for noise-induced hearing loss are the "percentage risk" and the "noise-induced permanent threshold shift" (NIPTS) concepts. The first concept involves predicting the percentage of a population that will develop material impairment of hearing as a result of given levels and durations of noise. The second concept is used to predict the amount of hearing loss in decibels that will occur as a result of given levels and durations of noise after subtracting for presbycusis (hearing loss from aging).

In order to better understand the methods of describing the effects of noise, the concept of presbycusis should first be discussed. Presbycusis is a natural phenomenon that affects most individuals if they live to be old enough. Some people will lose some hearing by the age of 40 or 50, while others will have normal hearing well into their 70s. Mature adults will seldom have hearing levels as low as 0 dB for all audiometric frequencies. As people age, their hearing levels become higher, and most individuals accept some hearing loss as a natural occurrence (Ex. 29, p. 84). However, when even a minor noise-induced hearing loss is added to presbycusis, the resulting loss can be sufficient to cross the fence into material impairment. Whether a hearing loss is one-third presbycusis and two-thirds noise-induced, or the other way around, the loss of functional capacity is the same. In most cases, people will not be materially impaired by presbycusis alone unless they live to be very old. When noise exposure is added, usually from an occupational source, many will become materially impaired when they are young or middle-aged, and the impairments will grow more severe as age increases. In addition, occupational noise exposures have the effect of making some people suffer more hearing loss at a younger age than they would if not exposed to occupational noise.

Since presbycusis, when it occurs, is a natural and inevitable condition, it is only reasonable to examine the impact of noise exposure on a population that includes some amount of presbycusis. After a working lifetime most individuals will be at least 60 years old, and will have experienced some amount of presbycusis. It is also useful to know the extent of damage produced by noise alone, so as to judge the magnitude of the effect at each audiometric frequency as a function of exposure level and duration. Therefore the Agency has quantified the effects of noise on hearing using both the percentage risk and the NIPTS methods.

The percentage risk method allows the inclusion of presbycusis in that the procedure estimates numbers of people whose hearing levels (including presbycusis or any other impairment) will exceed a certain fence due to noise exposure. It does not include people who will exceed a certain fence because of a hearing loss *only* from aging, since the calculation subtracts the percentage of a non-noise-exposed population who would cross the fence anyway from "natural" causes. The remainder is the population at risk of developing material impairment of hearing due to noise exposure.

OSHA believes that the data in Table 1 provide reliable and consistent estimates of the percentages of the population at risk of developing material impairment due to exposure to daily average noise levels of 80, 85 and 90 dB for a working lifetime.

Table 1

[Estimated percentages of the population at risk of exceeding a 25-dB fence at 500, 1000, and 2000 Hz as a function of average noise exposure level for 40 years. (EPA, Ex. 5, p. 43805)]

Organization	Noise exposure in dB	Risk (percent)
ISO	90	21
	85	10
	80	0
EPA	90	22
	85	12
	80	5
NIOSH	90	29
	85	15
	80	3

This table, which was submitted by EPA (Ex. 5, p. 43805), shows the percentage of the exposed population expected to exceed a 25-dB fence at the frequencies 500, 1000, and 2000 Hz. The risk figures were developed by the International Organization for Standardization (ISO) (based on the data for Baughn), EPA, and NIOSH. These organizations estimated percentage risk for the 500, 1000, and 2000 Hz combination since the AAOO definition of hearing handicap still was used widely at the time these percentage risk estimates were developed (ISO in 1975, Ex. 26–4; EPA in 1973, Ex. 31; and NIOSH in 1972, Ex. 1). Two of the three organizations have now advocated the inclusion of frequencies above 2000 Hz in the definition of material impairment (Ex. 5, pp. 43803, 43805; Ex. 1, pp. VI–11, VI–14). The ISO–1980 proposal, which still is in draft form at this time, does not prescribe a specific formula for risk assessment but provides an array of formulas that can be used for predictive purposes (Ex. 321–43A, p. 3).

It can be seen that the risk of material impairment at an average exposure level of 90 dB is a substantial 21 to 29 percent. The risk of incurring material impairment after a working lifetime of 85 dB is 10 to 15 percent, and at 80 dB is 0 to 5 percent. The inclusion of 3000 or 4000 Hz in the definition of material impairment would tend to make the percentages at risk somewhat higher, since hearing loss at these frequencies from noise exposure is almost always greater than it is at 500 and 1000 Hz.

Because these risk figures were developed virtually independently [1] by the three organizations, the percentages for each exposure level are slightly different. These differences are to be expected when using the percentage risk concept because the estimates can be influenced by the extent to which a noise-exposed population is screened to exclude people with nonoccupational hearing loss, and also by the extent to which the population includes hearing loss from aging (Ex. 5, p. 43806). For example, NIOSH suggested that its percentage risk estimates might be slightly higher than those derived from the "severely" screened population (Ex. 1, p. VI–31). (An exposed population that includes some amount of nonoccupational hearing loss and some presbycusis would be representative of the U.S. population, and thus the risk figures should not be unrealistic.)

[1] As mentioned above, the ISO risk estimates were derived from data collected by Dr. W. L. Baughn. The EPA also used Baughn's data, and averaged them with data collected by Drs. Burns and Robinson, and Dr. Passchier-Vermeer. All of these studies will be discussed in further detail below. Since EPA's estimates are based in part on the same data that were used by ISO, the relationship between the EPA and ISO risk estimates is not entirely independent.

Although Table 1 shows small differences, the risk estimates for the same exposure level are very similar.

The percentage risk concept, while easy to understand, is in some ways a limited descriptor of noise-induced hearing loss (Ex. 5, p. 43806; Ex. 47, pp. 9–10; Ex. 231, written testimony, p. 1). First, the use of a single fence such as 25 dB does not adequately describe the effects of noise on all of the impaired workers in that it does not quantify the amount of loss (Ex. 5, p. 43805; Ex. 231, p. 7). Everyone whose hearing threshold has exceeded the 25-dB fence is considered to have the same amount of hearing loss. The single fence conveys nothing about the people who start with excellent hearing and lose up to 25 dB from noise exposure, nor does it indicate how many people suffer severe losses, greater than 40 or 50 dB, for example (Ex. 5, p. 43806; Ex. 231, p. 7; Ex. 47, pp. 9–10). In an attempt to overcome these limitations, OSHA uses three fences to discuss the benefits anticipated from hearing conservation programs.

Noise-induced permanent threshold shift (NIPTS) is the actual shift in hearing level due to noise exposure, after corrections have been made for aging. NIPTS values may be designated for combinations of frequencies, but they are usually given for each audiometric frequency separately, and it can be helpful to examine hearing loss at individual frequencies. (The percentage risk method nearly always averages hearing levels at three or more frequencies.) The NIPTS method allows examination of the effects of noise on hearing level at 4000 and 6000 Hz, which, although they are not usually included in the definition of material impairment, are the frequencies where hearing is earliest and most severely affected by noise. NIPTS usually is presented for certain percentages of the exposed population, such as the median, the 90th and the 10th percentiles, the lower percentiles representing the more severely affected members.

The disadvantage in presenting the data only as NIPTS is that the full impact of noise exposure is not as easily comprehended as it is with percentage risk. Since NIPTS values do not include any hearing loss from nonoccupational causes, they do not reflect actual hearing levels. However, for comparing the effects of one exposure level against another they are very useful.

Table 2 shows NIPTS as a function of exposure level and exposure duration in years (see Johnson's Table 3, Ex. 310, pp. 27–28). NIPTS values are given for each audiometric frequency from 500 Hz to 6000 Hz, and are shown for the less sensitive 90th percentile, the median, and the more sensitive 10th percentile. When added to presbycusis values from a "normal" non-noise exposed population, these resulting hearing levels would reflect realistic hearing levels to be expected in noise exposed populations.

Table 2 is taken from a report by Col. Daniel Johnson of the U.S. Air Force, entitled "Derivation of Presbycusis and Noise Induced Permanent Threshold Shift (NIPTS) to be used for the Basis of a Standard on the Effects of Noise on Hearing" (Ex. 310, pp. 27–28). As in a previous report, which Col. Johnson had prepared for the EPA (Ex. 17), he averaged the hearing loss data from some well-known studies. While in the earlier report Col. Johnson used the data of Baughn, Burns and Robinson, and Passchier-Vermeer, in the more recent report he combined only the data of Burns and Robinson with those of Passchier-Vermeer. Details of these studies will be discussed further below.

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TABLE 2

Noise-induced permanent threshold shift in decibels as a function of audiometric frequency, resulting from 8-hour daily average sound levels of 75 dB to 100 dB, for durations of 10 to 40 years. Data are presented for the 90th, 50th and 10th population centiles. From Johnson, Ex. 310, pp. 27-28, using the combined date of Burns/Robinson and Passchier-Vermeer.

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	500	0	0	0	0	0	0	0	0	0	0	0	0
80	500	0	.1	.6	.1	.1	.3	.4	.1	.4	.8	.2	.4
85	500	.1	.2	1.4	.1	.3	1.2	.5	.7	1.5	.9	.4	1.1
90	500	.2	.5	2.3	.2	.7	2.4	.6	.8	2.5	1.1	1.0	2.4
95	500	.3	.9	3.5	.5	1.3	4.0	.6	1.7	4.5	1.0	1.9	4.6
100	500	1.7	3.9	7.6	2.8	5.1	9.2	3.9	6.2	10.6	4.9	7.2	11.4

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	1000	0	0	0	0	0	0	0	0	0	0	0	0
80	1000	.1	.1	.7	.1	.2	.4	.4	.2	.6	.8	.2	.6
85	1000	.1	.3	2.0	.2	.5	1.9	.5	.6	1.9	.9	.7	1.7
90	1000	.3	.7	2.9	.4	1.0	3.3	.8	1.3	3.6	1.3	1.5	3.6
95	1000	.5	2.7	5.9	.8	3.7	7.2	3.3	4.6	8.4	4.3	5.3	8.9
100	1000	3.1	6.1	11.0	4.8	8.1	13.5	6.4	9.9	15.6	8.3	11.3	16.9

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	2000	0	0	0	0	0	0	0	0	0	0	0	0
80	2000	.1	.3	1.6	.1	.4	.9	1.1	.5	1.2	1.8	.6	1.3
85	2000	.3	.9	4.9	.7	1.3	4.8	1.8	1.8	4.6	2.8	2.1	3.9
90	2000	.6	2.4	8.0	1.6	3.9	9.3	3.6	5.4	11.8	5.3	6.6	10.6
95	2000	1.2	5.5	14.2	3.7	8.7	17.4	7.4	12.0	20.1	10.6	14.8	21.9
100	2000	2.3	9.2	21.5	6.5	14.6	26.6	12.0	19.9	35.9	16.7	24.1	33.9

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	3000	0	0	0	0	0	0	0	0	0	0	0	0
80	3000	.2	2.0	4.1	1.9	2.4	3.4	3.5	2.7	2.7	5.1	3.0	2.3
85	3000	1.6	4.4	7.7	3.6	5.3	7.8	5.5	6.2	7.6	7.4	6.7	7.2
90	3000	3.9	9.2	16.9	6.6	11.0	17.9	8.5	12.6	18.4	11.3	13.7	18.4
95	3000	8.1	16.0	26.8	11.6	18.9	29.1	14.9	21.4	30.1	17.8	23.1	30.5
100	3000	15.8	25.4	37.5	20.6	29.5	39.7	24.8	32.7	41.0	28.6	35.0	41.6

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	4000	0	0	0	0	0	0	0	0	0	0	0	0
80	4000	.3	3.1	1.9	.3	3.4	2.1	1.8	3.7	6.3	3.3	3.8	5.3
85	4000	1.6	6.7	12.3	3.4	7.4	12.2	5.0	8.0	11.9	6.7	8.3	11.0
90	4000	6.3	11.9	19.1	8.4	13.3	19.5	10.3	14.4	19.4	12.1	14.9	18.6
95	4000	13.7	20.4	28.2	16.4	22.5	28.7	18.7	23.9	28.5	20.7	24.6	27.6
100	4000	22.3	30.2	37.8	25.6	32.6	37.8	28.4	34.1	37.2	30.6	34.8	36.1

Sound Level	Freq.	10 yrs.			20 yrs.			30 yrs.			40 yrs.		
		.9	.5	.1	.9	.5	.1	.9	.5	.1	.9	.5	.1
[dB]	[Hz]												
75	6000	0	0	0	0	0	0	0	0	0	0	0	0
80	6000	.3	2.0	4.0	1.8	2.2	3.1	3.2	2.4	2.2	4.6	2.5	2.1
85	6000	1.1	4.8	8.9	2.8	5.3	8.6	4.3	5.8	8.2	5.8	6.1	7.3
90	6000	1.9	8.5	15.6	3.8	9.5	16.0	5.6	10.4	16.0	7.3	10.9	15.3
95	6000	4.3	13.7	23.5	6.7	15.5	24.4	8.9	16.8	24.5	10.8	17.6	23.8
100	6000	9.2	20.3	32.2	13.3	23.7	33.9	17.0	26.5	34.9	20.2	28.4	35.1

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Studies of Noise and Hearing Loss

Numerous studies of the effects of noise on hearing were submitted to the record. For purposes of this discussion, the studies have been divided into the categories of continuous and impulsive noise. The word "continuous" refers here to time-varying exposures as well, since in most of the studies noise levels varied somewhat throughout the day (Ex. 11, p. 2–3; Ex. 12, pp. 93–99; Ex. 26–2, p. 10).

Exposure to intermittent (on and off) noise will not be treated separately since the same methods for predicting hearing loss from continuous noise apply to losses resulting from intermittent noise (Ex. 279, 11–3, p. 447; Ex. 54, pp. 16–17; Ex. 29, p. 217). There was some disagreement as to whether the 5-dB or the 3-dB exchange rate should be used in calculating the time-weighted average exposure level from noncontinuous noise. But since the current noise standard (29 CFR 1910.95) uses the 5-dB exchange rate, and since the permissible exposure level remains unchanged at this time, the debate over the exchange rate will not be treated extensively at this time.

OSHA has examined the many studies and reports in the record that describe the effects of continuous noise on hearing (Ex. 11; Ex. 17; Ex. 310; Ex. 12; Ex. 26–2; Ex. 36; Ex. 266 A; Ex. 304), and the Agency believes that they comprise the best available data on the subject. The results of the various studies are relatively consistent, both in terms of the population at risk, and the extent of NIPTS as a function of noise exposure. The various studies, if considered together, contain data on more than 10,000 subjects.

As stated above, Col. Johnson averaged the data of different researchers in the preparation of a report for EPA. Later, the EPA used Col. Johnson's analysis of those data in the development of criteria for the effects of noise (Ex. 31, p. 5–17) and for the identification of safe levels of noise (Ex. 30, p. C–5). The three studies that were used in the EPA reports were the subject of much discussion during the hearings. Although some criticisms were raised, they were also widely supported (Tr. 734, 738, 779, 785, 834). The three studies were the following:

"Relationship between Daily Noise Exposure and hearing loss based on the evaluation of 6,835 industrial noise exposure cases" by W. L. Baughn (Ex. 11).

"Hearing and Noise in Industry" by W. Burns and D. W. Robinson (Ex. 12).

"Hearing Loss Due to Exposure to Steady-state Broadband Noise" by W. Passchier-Vermeer (as displayed and used in "Prediction of NIPTS due to continuous noise exposure" by D. L. Johnson (Ex. 17).

The study by Dr. William L. Baughn of the General Motors Corporation was performed between 1960 and 1965 (Ex. 11). These data have been used in the development of the Air Force report "Hazardous Noise Exposure" (Ex. 48) and for the current ISO standard 1999, "Assessment of Occupational Noise Exposure for Hearing Conservation Purposes" (Ex. 11, p. iii). The data were published in 1973 as an Air Force technical report (Ex. 11). Dr. Baughn studied the effects of average noise exposures of 78 dB, 86 dB, and 92dB on 6,835 industrial workers employed in midwestern plants producing automobile parts. Approximately 20,000 subjects had been excluded from the study because there was insufficient information about their exposure histories, or because they had "mixed" exposures (including nonoccupational sources). Subjects with anatomical abnormalities (such as ear infections) were not screened from the noise-exposed or control groups. Noise measurements had been taken over a period of 14 years, and through interviews, exposure histories were estimated as far back as 40 years (Ex. 11, p. 2. Dr. Baughn "smoothed" the data and presented families of curves showing the numbers of people exceeding a 15-dB fence at 500, 1000, and 2000 Hz referenced to the ASA 1951 audiometric zero, which is the equivalent of a 25-dB fence referenced to the ANSI 1969 zero level. He also provided data for fences of 5 dB to 40 dB (ASA), which would translate to 15 dB to 50 dB (ANSI). Since the exposure categories were for 78 dB, 86 dB and 92 dB, Dr. Baughn interpolated so as to provide estimates for exposures to 80 dB, 85 dB and 92 dB. He also extrapolated to exposure levels up to 115 dB, but the data above 95 dB were not used in Col. Johnson's report or the comparisons shown earlier.

Figure 1 shows Baughn's estimates of the percentages of the exposed population that will cross a 25-dB fence as a result of exposure to daily average noise levels of 80 dB to 115 dB. Since these estimates use the frequencies 500, 1000, and 2000 Hz, the numbers of people crossing a 25-dB fence at 1000, 2000, and 3000 Hz would be expected to be greater.

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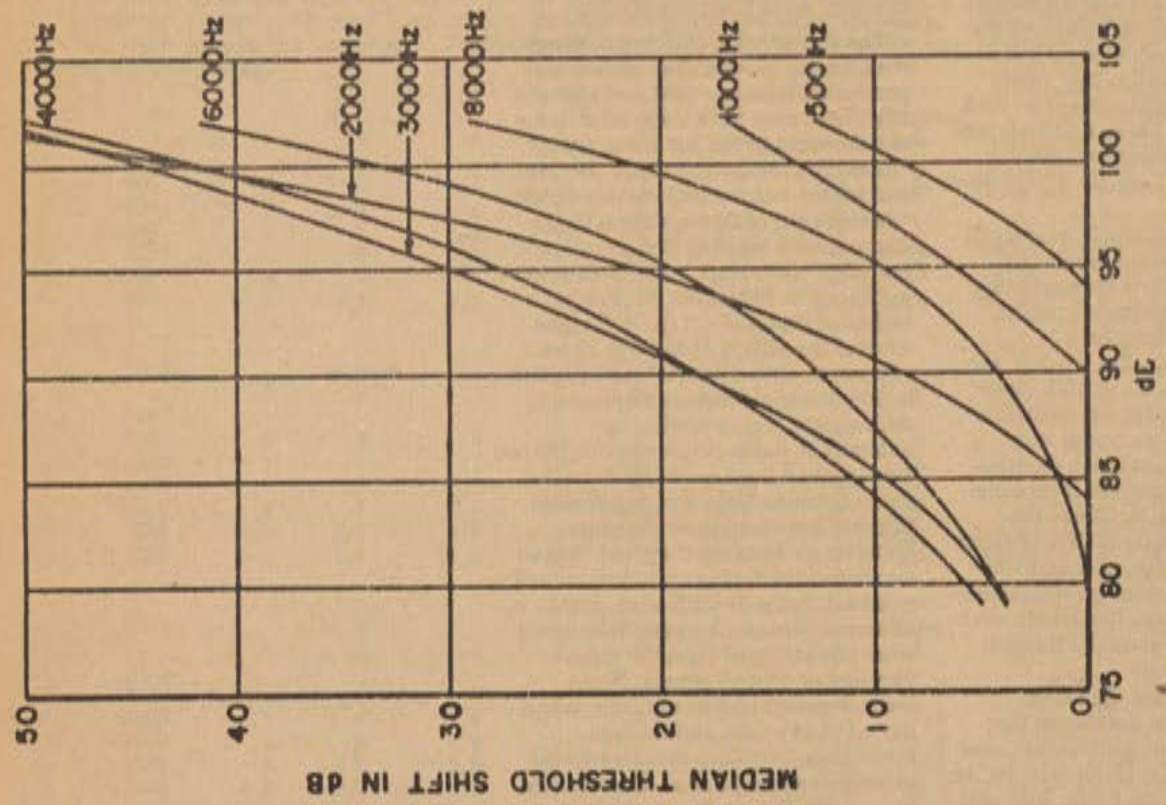

Figure 3. Median noise-induced threshold shift for various audiometric frequencies as a function of average daily noise exposure level for 40 years. Data are from Passchier-Vermeer (in Ex. 5, p. 43803).

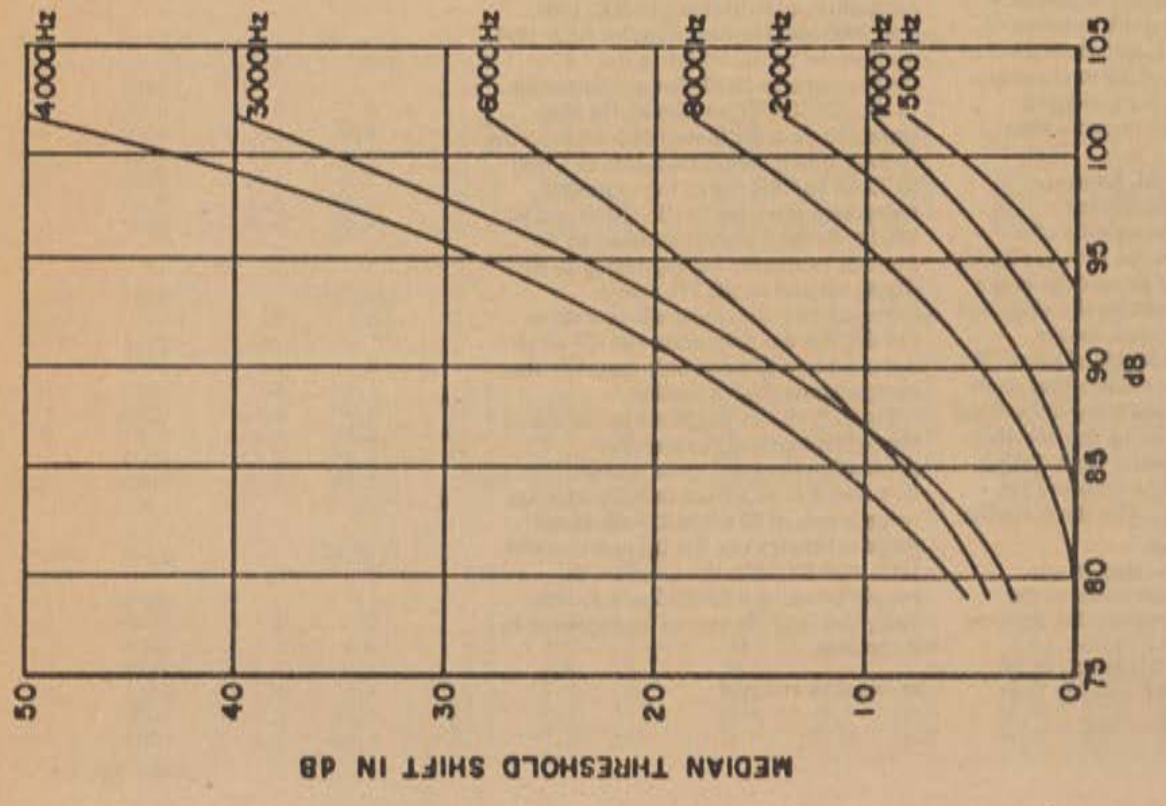

Figure 2. Median noise-induced threshold shift for various audiometric frequencies as a function of average daily noise exposure level for 10 years. Data are from Passchier-Vermeer (in Ex. 5, p. 43803).

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Baughn's study was criticized because in some cases as little as 20 minutes of recovery time was allowed prior to audiometric testing (Ex. 17, p. 2; Ex. 3, p. 39; Ex. 26–3, p. 5–15; Ex. 138A, p. 2–17). As a result the data may have been influenced to some extent by temporary threshold shift, which would have the effect of making the noise-exposed group's hearing threshold levels appear worse than they should. The study was also criticized because the control group may have had average exposures as high as 78 dB so that they may also have had a small amount of occupational hearing loss (Ex. 17, p. 2; Ex. 138A, p. 2–17). If the control group's hearing levels were slightly inflated, this would tend to reduce the difference between the hearing levels of the exposed and control groups. These potential flaws would have the tendency to offset each other when NIPTS is calculated. In addition, Dr. Kryter (Ex. 50, pp. 9–12) pointed out that any residual TTS after 20 minutes would be quite small (only 1 to 2 dB) for those subjects who had already incurred a noise-induced hearing loss. (TTS tends to become smaller after significant permanent loss is incurred.)

One practical limitation of the Baughn study is that the author did not provide hearing loss data at separate frequencies, but only at the combined frequencies of 50, 1000, and 2000 Hz, and then separately for 4000 Hz (Ex. 11, pp. 4, 30; Ex. 5, p. 43804). Thus, it is not possible to estimate hearing loss, for example, at only 2000 Hz, or for the combined frequencies 1000, 2000, and 3000 Hz. While this may result in some procedural problems for researchers and administrators, it does not detract from the validity of the study. The sample size appears to be the largest in any single hearing loss study, and the study has received support from other scientists and organizations. The results are not incompatible with other data in the record. Therefore, OSHA believes that the Baughn study represents a valuable contribution to the public record.

Dr. W. Passchier-Vermeer's data on steady-state noise exposure do not appear in the hearing record except as they are presented by Col. Johnson (Ex. 17 and Ex. 310). Dr. Passchier-Vermeer presented in 1968 an exhaustive review of hearing loss as a function of exposure to average noise levels of about 80 dB to 102 dB, having summed, analyzed, and correlated data from any sources (Ex. 17, pp. 2, 3, 12–14). The data consisted of laboratory and field studies conducted by British, Dutch, Swedish, and U.S. investigators.

Figure 2 shows median NIPTS at various frequencies as a function of noise exposure for a period of 10 years. Figure 3 shows median NIPTS after 40 years of noise exposure. These figures, which were submitted by EPA (Ex. 5, p. 43803), are taken from Dr. Passchier-Vermeer's reports. Of course the noise-induced permanent threshold shift would be expected to be more severe for the more susceptible individuals in the higher centiles of the population, such as the 19th or the 95th centiles.

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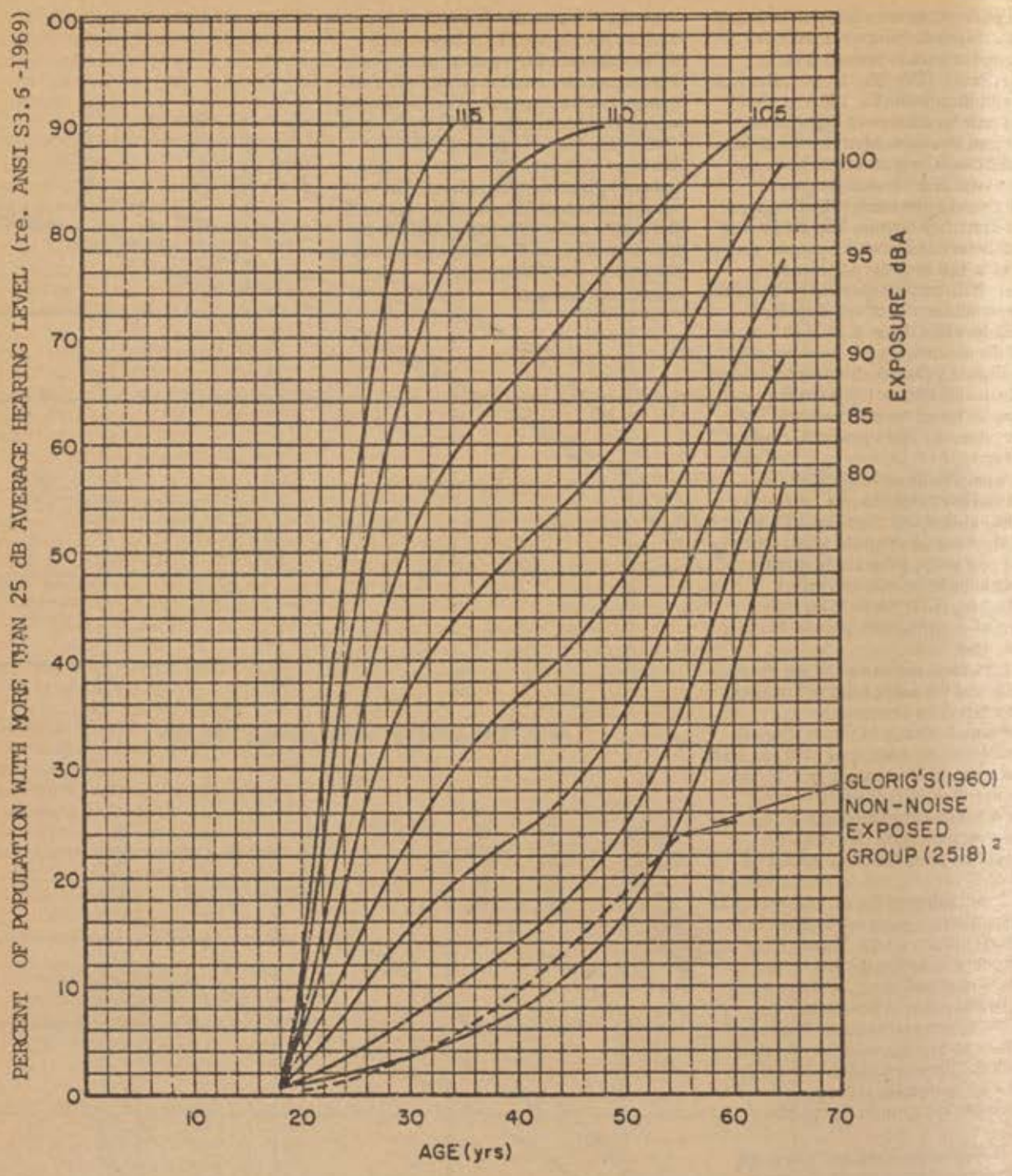

Figure 1. Percent of the population with more than 25 dB average hearing level for the frequencies 500, 1000, and 2000 Hz as a function of noise exposure level. From Baughn (Ex. 11, p. 41).

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Four of the 10 studies analyzed by Dr. Passchier-Vermeer were discussed briefly in documents prepared by NIOSH (Ex. 1), EPA (Ex. 31), and Drs. Burns and Robinson (Ex. 12). The NIOSH criteria document reported that Drs. Taylor, Pearson, Mair, and Burns studied 251 working and retired jute weavers who were exposed to average overall sound pressure levels of 99 to 102 dB. The investigators found the greatest deterioration of hearing occurred in the first 10 to 15 years of exposure (Ex. 1, p. 5 Table IV). NIOSH also reported on a study by Drs. Burns, Hinchcliffe, and Littler of 174 textile spinners and weavers exposed to average overall (unweighted) sound pressure levels of 100 to 101 dB. Hearing losses were found to be greater for the weavers than the spinners (Ex. 1, p. 6 of Table IV).

EPA's document entitled Public Health and Welfare Criteria for Noise described a study by Gallo and Glorig, which also was used by Dr. Passchier-Vermeer, as well as the study by Taylor et al., mentioned above. According to EPA (Ex. 31, p. 5–5), Drs. Gallo and Glorig measured the hearing levels of 400 men aged 18–65, and 90 women, aged 18–35, exposed to an average overall sound pressure level of 102 dB. The population had been screened to exclude nonoccupational noise exposure and otological abnormalities. The results showed that high-frequency hearing loss rose rapidly during the first 15 years of exposure, but that hearing loss in the mid-frequencies continued to rise in a linear manner up to 40 years of exposure.

Drs. Burns and Robinson (Ex. 12, pp. 220–228) also discussed the studies of Gallo and Glorig, and Taylor et al. In addition, they described a study by Dr. B. Kylin, which also was used by Dr. Passchier-Vermeer, of 89 men exposed for durations of 10 to 15 years, and 29 male controls. Neither population was screened for military noise exposure or for ear disease. (These factors should not have influenced the actual NIPTS since they were distributed evenly among the noise exposed and control populations (Ex. 12, p. 226).) Drs. Burns and Robinson compared the results of their study with those of the three selected studies (Gallo and Glorig, Taylor et al., and Kylin), and with the results predicted by Dr. Passchier-Vermeer on the basis of all of the studies she analyzed. They found, using median hearing loss values, that agreement among all of the results was good for the mid-frequencies (500, 1000, and 2000 Hz), but that their own data and method of prediction showed somewhat lower values (less hearing loss) for the higher frequencies (3000, 4000, and 6000 Hz) (Ex. 12, p. 227). The authors suggested that this finding might be due to differences in noise monitoring and subject selection techniques used by the various investigators (Ex. 12, p. 228).

Because the Passchier-Vermeer data resulted from a synthesis of many studies, some people argued that their quality was difficult to judge (Ex. 50, p. 8). Others noted that the original report only presented data for quartile groups (25th, 50th and 75th centiles) and neglected to address the more variant hearing levels found in the extremes of the population (Fx. 3, p. 39; Ex. 17, p. 2; Ex. 26–3, p. 5–14). Col. Johnson has extrapolated the data to the 10th and 90th centiles so that it would be averaged with those of the other studies (Ex. 17, p. 14 and Ex. 310, p. 7). Col. Johnson reported (Ex. 17, p. 14) that in a paper published in 1971, Dr. Passchier-Vermeer did publish the data for the 10th and 90th centiles, and these data were in agreement with Johnson's extrapolations.

The Passchier-Vermeer data are useful in that hearing levels are given for the discrete audiometric frequencies 500, 1000, 2000, 3000, 4000, 6000, and 8000 Hz, resulting from exposure levels of 80 dB, 85 dB, and 90 dB. Also, the Agency believes that averaging the results from a number of studies may be considered an advantage in that it ought to minimize any anomalies that might occur as a result of any one study. The Passchier-Vermeer data also were supported by various witnesses and comments to the record, (Ex. 47, p. 8; Ex. 216 A, p. 5).

Dr. W. Burns (Ex. 54) reported on a study of British factory workers that he and Dr. D. W. Robinson conducted between 1963 and 1968. The complete study was submitted to the record by OSHA as Exhibit 12. The study's population consisted of 759 subjects exposed to average noise levels between 75 dB and 120 dB and 97 non-noise exposed control subjects. The range of exposure durations was one month to 50 years. Exposure levels were taken in octave bands from 63 to 8000 Hz, and A-weighted measurements also were taken. Approximately 4000 audiograms were performed. Subjects were screened thoroughly to exclude exposure histories that were not readily quantifiable (to some extent unknown), exposure to gunfire, ear disease or abnormality, and language difficulties (Ex. 12, p. 12). The investigators found that hearing levels of people exposed to certain noise levels for certain durations were much the same as those of others exposed to higher levels for shorter times (Ex. 12, p. 17). They found that this relationship held for relatively short durations as well as for many years of exposure (Ex. 12, pp. 17–18). Consequently, they developed a mathematical formula to predict hearing levels in the frequencies 500 through 6000 Hz in various percentages of the exposed population due to specific levels and durations of noise (Ex. 12, pp. 100–151). Data from the Burns and Robinson study are shown combined with those of Dr. Passchier-Vermeer in Table 2 above.

The Burns and Robinson study has been criticized on the gounds that eliminating all workers with any form of nonoccupational hearing loss by extensive screening (which appeared to be more rigorous than in the other studies) would cause the resulting hearing levels to be an underestimate of the total "real-life" hearing loss picture (Ex. 40, p. 7; Ex. 50, p. 17). This problem has been eliminated in the analyses performed by Col. Johnson (Ex. 17 and 310) and by OSHA in the Benefits section, by using only the NIPTS data from Burns and Robinson and adding values for presbycusis from a normal, unscreened population (such as the U.S. Public Health Survey data).

The Burns and Robinson study was also criticized by Terrence Dear of the DuPont Company for including subjects exposed to impulse noise (Tr: 864–866), although the authors maintained that they tried to minimize such exposures, and that impulse noise exposures only would have occurred in a relatively small number of cases where subjects were exposed to high levels of continuous noise (Tr: 864–866; Ex. 12, p. 97).

On the whole, OSHA believes that the study by Burns and Robinson represents a very thorough, well-controlled study, with results that are extremely useful in predicting the effect of noise exposure on hearing.

NIOSH submitted to the record a report entitled "Occupational Noise and Hearing", 1968–1972 (Ex. 26–2). The dose-response relationships described in this report had been used by NIOSH in making the recommendations in its criteria document (Ex. 1). The report (Ex. 26–2, p. vi) presented background information about the study, and statistical analyses that were meant to complement the analyses that had already been published in the criteria document. NIOSH studied a population of 792 industrial workers exposed to average noise levels of 85 dB, 90 dB, and 95 dB, and a control population of 380 subjects who were exposed to average

levels below 80 dB. (Since the control population was exposed to levels as high as 80 dB, a few members of the group may have incurred some amount of occupational hearing loss, and therefore the study would be subject to the same criticism as the study of Dr. Baughn.) Although the exposures were primarily to steady-state noise, exposure levels fluctuated slightly within each category. The total population was screened to exclude subjects who had been exposed to noise from gunfire, and who showed some sign of ear disease or audiometric irregularity (Ex. 26–2, pp. 6–7). Subjects ranged in age from 17 to 65 years. Data were presented for hearing levels of the 10th, 25th, 50th, 75th, and 90th centiles for various age groups and exposure durations, resulting from average exposures to 85 dB, 90 dB, and 95 dB. The authors concluded that the data substantiated the results of other similar investigations, but that they pertained only to simple or "ordinary" noise environments, as opposed to complex environments such as lengthened exposures, seasonal exposures, impact or impulsive noise, and high frequency noise (Ex. 26–2, p. 15).

Data from the NIOSH study have not been used in the prediction of benefits from the hearing conservation amendment. Col. Johnson stated in his report (Ex. 17, p. 10) that he did not use the NIOSH data in the analysis performed for EPA because the data had not yet been "smoothed," which would make it difficult to make predictions. Also, the NIOSH data were limited to exposures of 85, 90 and 95 dB, thus preventing hearing loss estimates for exposures to 80 dB and 100 dB. Nevertheless, the data are generally consistent with the results of the other studies discussed above.

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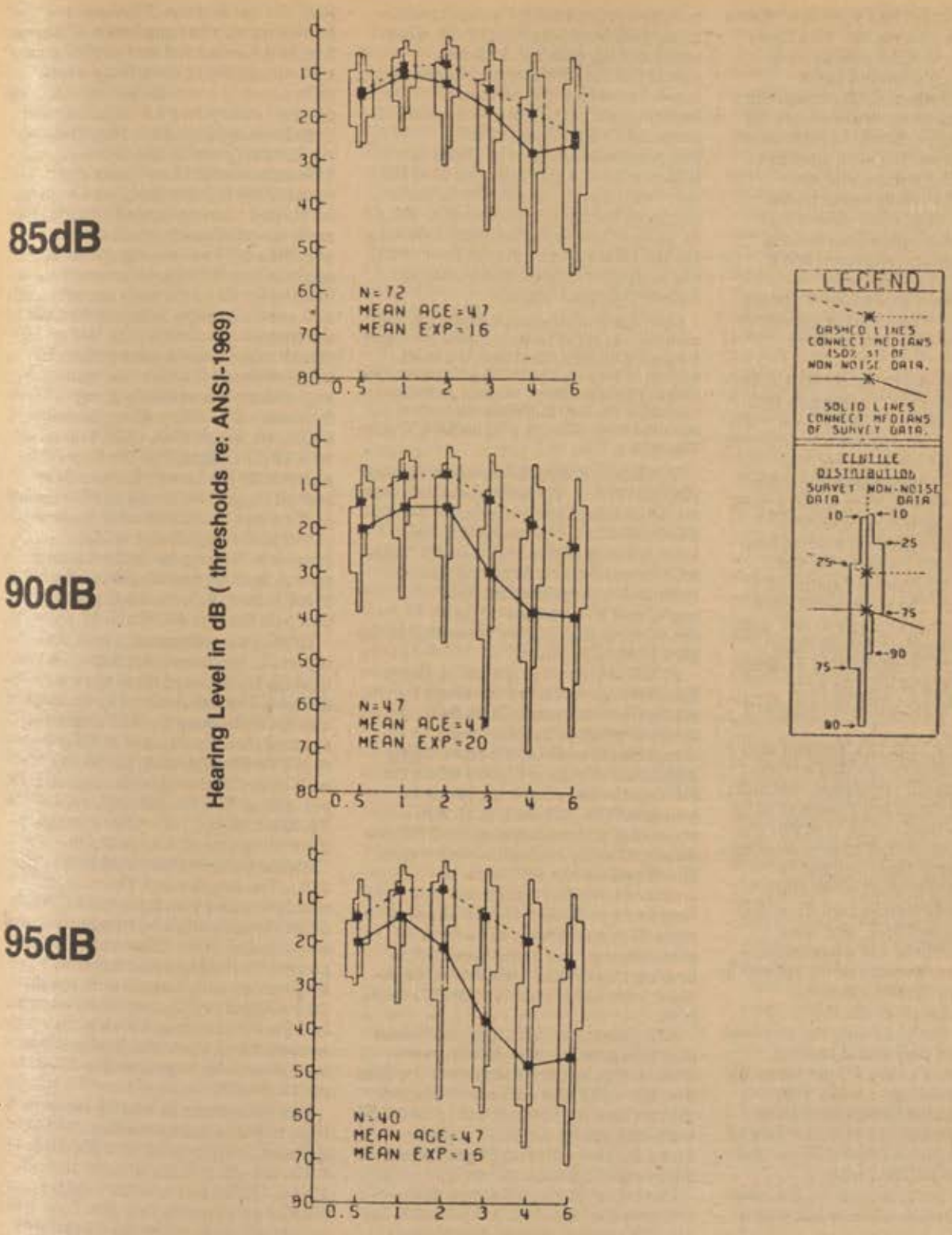

Figure 4. Hearing level distribution for workers aged 43 to 51 years exposed to daily average noise levels of 85dB, 90dB, and 95dB, and for non-noise-exposed workers.

Results of the NIOSH study are shown in Figure 4 (Ex. 26–2, p. 41). This figure shows hearing level by audiometric frequency as a function of noise exposure to levels of 85, 90, and 95 dB. Population distributions are shown for the least sensitive (labeled in this case the 10th centile) to the most sensitive (the 90th centile) groups, and are compared to the non-noise-exposed control group. This study shows that differences between median hearing levels increase with exposure level, duration, and age. Also, more importantly, the distribution of hearing levels becomes considerably greater as exposure level, duration, and age increase.

In another study, Dr. R. H. Martin, Dr. E. S. Gibson, and J. N. Lockington (Ex. 36) related the degree of employee hearing loss to average noise levels of 85 and 90 dB in industrial plants. The population consisted of 228 Canadian industrial workers ranging from 18 to 65 years of age who were screened to exclude non-occupational hearing loss. The control group consisted of 143 subjects with minimal occupational noise exposure. The study concluded that the risk of hearing loss at 500, 1000, and 2000 Hz increases significantly between 85 and 90 dB, leaving a portion of the population at risk [up to 22 percent] by a noise exposure standard of 90 dB.

Elliott Berger, with Drs. Royster and Thomas (Ex. 266A) examined a North Carolina industrial population that had been exposed for 10 to 12 years to daily average noise levels of 88 to 89 dB. The population consisted of 42 men working in one location of the plant and 58 women working in another location. Control subjects were drawn from the same geographical area, and were screened to exclude any occupational noise exposure. Because of the relatively short exposure duration and the moderate exposure levels, the investigators analyzed only the losses at 4000 Hz, where they found hearing levels somewhat worse for men than for women (Ex. 266A, pp. 82–83). They concluded that the observed hearing losses were compatible with the data of Baughn, Passchier-Vermeer, Burns and Robinson, and NIOSH, with compatibility being greater for the male than for the female subjects (Ex. 266A, pp. 81–85).

In the Inter-Industry Noise Study (IINS) (Ex. 304) the authors measured noise exposure and hearing levels of 348 industrial subjects. Daily average noise exposure levels were between 82 and 92 dB for durations ranging from 3 years to greater than 30 years. There were 228 matched control subjects whose noise exposures were less than 75 dB. After analyzing the data the authors concluded that differences in hearing levels between the control and experimental populations were not statistically significant at the frequencies 500, 1000, and 2000 Hz. Differences at 3000, 4000, and 6000 Hz were statistically significant for male subjects, but not for females (Ex. 304, p. 8). In an editorial immediately following the IINS Research Report in the Journal of Occupational Medicine (JOM), Dr. Robert O'Connor stated:

> From this study it appears that 90 dB is as protective as 85, as far as women's hearing is concerned. In the case of men, if a small amount of hearing loss in frequencies that are well beyond the speech range is considered unacceptable, then this study supports a standard of 85. (Ex. 304, p. 8) (in JOM, 17: 760–770, 1975, p. 770).

The Environmental Protection Agency (Ex. 321–16A, p. 2) stated that there were major technical problems in the design, administration, and analysis of the Inter-Industry Noise Study which "raise serious questions concerning the technical appropriateness and usefulness of a number of the conclusions which were presented in the 1978 JOM publication."

A NIOSH report prepared by Barry Lempert also criticized the study by stating that the results included only mean or average hearing level comparisons while much more highly significant effects are found when the full distribution of hearing levels is presented (Ex. 321–36A, p. 1). After reviewing and reanalyzing the IINS raw data, and using evaluation techniques developed for the 1972 criteria document, NIOSH reaffirmed that "exposure to 85 dBA should allow no more than an increase of 10 to 15 percentage points in the incidence of hearing impairment" relative to a non-noise exposed population (Ex. 321–36A, p. 4).

Col. Johnson and Dr. Thomas Schori also analyzed the raw data from the IINS, and submitted a review of the data (Ex. 321–21A). The authors concluded that the hearing levels found in the IINS were essentially the same as those found in other noise and hearing loss studies (Ex. 321–22A, p. 16).

Having reviewed the study, the critiques (Ex. 321–16A; Ex. 321–36A; Ex. 321–21A), and a critique of a critique (Motor Vehicle Manufacturers Assoc., Ex. 321–8A), OSHA has determined that the findings of the IINS do not contradict those of the studies described earlier. The Agency disagrees with the conclusions of Dr. O'Connor that 90 dB is as protective as 85 dB. Although the IINS did not find the differences between mean hearing levels of the female experimental and control groups statistically significant, there *were* differences at every frequency, showing greater hearing loss for noise-exposed than for control subjects (Ex. 804, p. 4). As Lempert pointed out, these differences would have been much larger if the full distribution of hearing levels had been presented, showing the more susceptible elements of the population. The same argument would apply to the differences between mean hearing levels of the male experimental and control groups, where systematic differences are shown. The fact that the standard deviations were greater for noise-exposed than for non-noise-exposed groups at nearly every frequency (Ex. 304, p. 4) supports this argument. In addition, OSHA disagrees with Dr. O'Connor that the frequencies above 2000 Hz "are well beyond the speech range," on the basis of the many studies and comments cited earlier, showing the importance of high-frequency hearing for understanding speech in everyday conditions (Ex. 46, p. 363; Ex. 26–1; p. 3; Ex. 26–6, p. 830; Ex. 228, p. 8; Ex. 5, p. 43803; Ex. 51, pp. 6–7).

Dr. Royster submitted a series of reports to the record (Ex. 321–22 A through H). Some of these reports discussed recent findings by Dr. Royster and his colleagues that differences in sex and race are evident in the growth of NIPTS (Ex. 321–22A, pp. 18–19), as well as in the growth of presbycusis (Ex. 321–22B, p. 510; Ex. 321–22C, pp. 116–118; Ex. 321–22D, pp. 1–2). After examining the audiograms of a large North Carolina industrial population (Ex. 321–22A), Drs. Royster and Thomas concluded that hearing threshold levels differ significantly according to race and sex and that these differences are greater for the higher audiometric frequencies and increase with age. In their subject population, black women had the best hearing, followed by white women, black men, and finally, white men after noise exposure (Ex. 321–22A, pp. 15, 18–19).

Sex differences in hearing levels have been noted in numerous studies of non-noise-exposed populations (Ex. 31, p. 4–4, Ex. 321–22, p. 7, Ex. 279, pp. 11–8, pp. 41–44). OSHA has incorporated the NIOSH presbycusis data (Ex. 1, pp. I–16 to I–17) for men and women separately in Appendix F of the amendment. Also, the Agency has calculated the benefits anticipated from hearing conservation programs using separate presbycusis data for men and for women. Actual NIPTS values have not been differentiated according to sex because

data for men and women shown separately were not available for the major studies mentioned above (Burns and Robinson, Passchier-Vermeer, Baughn, and NIOSH).

Drs. Burns and Robinson (Ex. 12, pp. 145–147) found small but persistent sex differences in noise-induced hearing loss, suggesting that NIPTS developed slightly more rapidly in men than in women. However, they did not present separate data for men and women. The IINS also showed slightly larger NIPTS values for men than for women both in the control and in the experimental populations (Ex. 304, pp. 4–8). Col. Johnson (Ex. 17 and Ex. 310) did not display NIPTS values separately for men and women, but he did show different data for certain non-noise-exposed populations, and therefore for certain estimates of the percentage at risk (Ex. 310). The studies by Baughn (Ex. 11), NIOSH (Ex. 26–2), Passchier-Vermeer (as reported by Johnson in Ex. 17), and Martin et al. (Ex. 36) did not present different NIPTS data for male and female subjects. OSHA believes that there is relatively little evidence available at this time to show that the hearing of men and women is differently affected by noise exposure, but that there is considerable evidence that differences exist in non-noise-exposed populations. Therefore, for estimating the benefits of hearing conservation programs, the Agency has used Col. Johnson's analysis of the Burns and Robinson and Passchier-Vermeer data, which shows sex differences for presbycusis but not for NIPTS. For any additional breakdown by sex or race the Agency will await further experimental evidence.

OSHA believes that the above studies are meritorious and are sufficient to make good estimates of the benefits to be derived from hearing conservation programs, despite any criticisms raised. Dr. von Gierke stated that "in spite of some uncertainties and everybody's desire for the 'perfect' study, there is adequate information available to predict with reasonable confidence the hearing impairment produced in the general population by a lifetime's exposure to continuous noise" (Tr. 705–706).

Discussion

Having established a definition of material impairment of hearing and discussed the various studies, some attention must be given to the various interpretations of the noise exposure and hearing loss data. Not all of the commenters interpreted the data in a similar manner.

Generally the argument for protecting workers above 85 dB is made on two grounds: analysis of NIPTS and of the percentage at risk showed that not only is the amount of hearing loss significantly greater at an average daily exposure level of 90 dB than at 85 dB, but also considerably more people are at risk of incurring material impairment (Ex. 40, p. 3; Ex. 47, p. 19; Ex. 57, p. 8; Ex. 82, pp. 1–4; Ex. 6, p. 12337; Ex. 26–1, p. 2).

Using the data of Baughn, Passchier-Vermeer, and Burns and Robinson, the Environmental Protection Agency found that half as many people are at risk of impairment at a daily average noise level of 85 dB as at 90 dB (Ex. 138A, pp. 1–4; Ex. 5, p. 43805; Ex. 189–5, p. 6). In addition, the amount of NIPTS doubles between 85 dB and 90 dB, especially for the frequencies 1000, 2000, and 3000 Hz (Ex. 5, p. 43804). In order to prevent *any* measurable hearing loss over a 40-year period the EPA identified a maximum 8-hour average daily noise exposure level of 75 dB (Ex. 5, p. 43803; Ex. 30, p. 4).

NIOSH also found that the population at risk due to lifetime exposures to average daily levels of 90 dB would be twice the size of the population at risk from 85 dB. The estimates were 29 percent and 15 percent, respectively (Ex. 1, Tables XV and XVII). Dr. Moller also noted that the number of impaired people doubles when average levels are increased from 85 to 90 dB (Ex. 88, p. 33).

There were numerous comments in the record concerning the amount of protection afforded by an average daily exposure level of 90 dB. Estimates of the percentage of unprotected workers ranged from 1 percent to 30 percent. Many commenters supported the 90-dB level based on OSHA's estimate that 98 percent of the population would be protected (Ex. 14–11, p. 1; Ex. 14–45, p. 1; Ex. 14–81, p. 1; Ex. 14–157, p. 2; Ex. 14–189, p. 1).

In OSHA's draft Environmental Impact Statement (Ex. 3, App. D, p. 12337) the Agency incorrectly stated that an exposure level of 90 dB would protect 98 percent of the exposed population. This estimate was based on the data and method of Burns and Robinson, using a 25-dB fence for the frequencies 500, 1000, and 2000 Hz, and a 30-year exposure duration. Later, an EPA representative (Ex. 40) pointed out that OSHA had neglected to perform one of the steps in the Burns and Robinson method, (step 7 on p. 132 of Ex. 12). Using the same data and method, the risk would actually be much greater than 2 percent (Ex. 40, pp. 5–6). Dr. Burns clarified the matter by explaining the distinction between hearing *level*, which includes presbycusis, and hearing *loss*, which does not (Ex. 54–2, pp. 1, 2).

Dr. Ward (Ex. 222C, p. 7) based his recommendation exclusively on Passchier-Vermeer's data, which, he claimed, showed that no workers would exceed a 25-dB hearing loss at the frequencies 500, 1000, or 2000 Hz due to exposure between 85 and 90 dB. For this reason Dr. Ward concluded that 90 dB protects workers from a "noticeable" hearing loss (Ex. 64, p. 3). This interpretation of Passchier-Vermeer's data is at variance with the interpretation of EPA and Col. Johnson. EPA submitted a graph of Passchier-Vermeer's data showing hearing loss as a function of noise exposure (Ex. 5, p. 43803). Although the median NIPTS from a 40-year exposure to 90 dB is essentially zero at 500 and 1000 Hz, it is nearly 10 dB at 2000 Hz. While the resulting average hearing levels would be quite small when added to the hearing loss from aging, they would be sufficient to ensure that some members of the exposed population would cross a 25-dB fence. Considering that nearly 3 million workers are exposed to daily averge noise levels of 90 dB and above, 50 percent of the population, or 1.5 million workers, would be expected to have at least this much NIPTS. Also, the NIPTS values would be expected to be larger for more sensitive individuals. Median NIPTS data say very little about actual hearing levels in the more susceptible members of the exposed population. As described above, when Johnson and EPA combined the data of Passchier-Vermeer with those of Baughn, and Burns and Robinson, the risk of crossing a 25-dB fence at 500, 1000, and 2000 Hz was 12 percent from exposure to 85 dB, and 22 percent from exposure to 90 dB (Ex. 5, p. 43805). Finally, as mentioned earlier, both the NIPTS and the risk are greater when 3000 Hz is included in the averaging and 500 Hz is eliminated.

OSHA has considered the definition of material impairment as it relates to hearing loss in light of a large body of data on the effects of noise on hearing. The Agency has determined that many workers will be at risk of material impairment of hearing, and possibly incur other kinds of physiological damage, when they are exposed to daily average sound levels above 90 dB over a working lifetime. Some workers will be expected to develop a material impairment of hearing if they are exposed to daily average sound levels between 85 and 90 dB, and a few will even develop a material impairment from average levels between 80 and 85 dB. Since it is possible to incur noise-induced hearing loss as a result of exposure to daily average levels less

than 90 dB, OSHA has determined that it is necessary to initiate audiometric testing and other aspects of the hearing conservation program at a time-weighted average sound level of 85 dB. The practice of requring an "action level," a point well below the permissible exposure level at which protective action is taken, is consistent with OSHA's policy of protecting workers before they are overexposed. Moreover, the final standard will identify those in the exposed population that might be more sensitive to noise, and protect them before they suffer further adverse effects. In keeping with this policy, employers may wish to provide audiometric testing for employees whose TWAs are between 80 and 85 dB, so that the few most susceptible workers might be identified and protected.

B. *Effects of Impulse Noise on Hearing*

The fact that impulse noise can be extremely damaging to hearing is widely supported in studies submitted to the record (Ex. 29, pp. 211–216, pp. 219–228, pp. 229–234; Ex. 30, App. G; Ex. 37 or Ex. 26–12(B); Ex. 279, 11–3 and 11–5). Although these studies suggest that there is no uniformly accepted definition of impulse noise, everyone agrees on certain of its characteristics. Impulse noise is characterized by a rapid rise time, high peak value of short duration, and a rapid decay. These sounds may be divided into two general categories: "A-duration" impulses are of very short duration (usually measured in microseconds) and are non-reverberant, in that they usually occur outside or in a sound-deadening environment. An example would be gunfire outdoors or in a sound-treated firing range. "B-duration" impulses are of longer duration (usually measured in milliseconds), and are reverberant mainly because they occur inside where the sound is augmented by reflective surfaces. B-duration impulses are more typical of industrial conditions where the sounds of metal impacting on metal, or short, high-level bursts of compressed air, are quite common. B-duration impulses are considerably more damaging to hearing than A-duration impulses of the same level because of the increased duration (Ex. 30, App. G, p. G–4).

There were a number of comments and exhibits in the record concerning impulse noise. Some were reports of studies, others were reviews of research on impulse noise, and others were discussions and recommendations for the standard.

In contrast to the studies of continuous noise mentioned above, dose-response relationships for impulse noise are not so easily defined. This may be due in part to the fact that the different studies of impulse noise varied considerably in such parameters as the subject (human or animal), the effect (TTS or NIPTS) and the stimulus (level, rise time, A-duration, B-duration, etc.). Also, there appears to be more individual variability associated with response to impulse noise than there is with response to continuous noise (Ex. 29, p. 227).

Many of the investigators and witnesses concluded that the best way to describe the effects of impulse noise was an approach called the "equal energy" method or rule (Ex. 54, pp. 16, 17; Ex. 279, 11–3, pp. 444, 449; Ex. 29, pp. 213–214; Ex. 321–21E, pp. 1–9; Ex. 80, App. B, p. 3, Ex. 81A, p. 3). According to this approach, equal amounts of sound energy produce equal effects on hearing, even though they are distributed differently in time. As explained in the introduction, sound energy is represented logarithmically by the decibel scale, an increase or decrease of 3 dB representing a doubling or halving of sound energy, and an increase or decrease of 10 dB representing a tenfold change in sound energy. Therefore, this approach is also called the 3-dB rule or the 3-dB exchange rate. It is somewhat more conservative than the 5-dB exchange rate presently used in OSHA's noise standard, 29 CFR 1910.95, and in this amendment.

Studies

In an article that OSHA had used to support the impulse requirements in the proposal, Dr. D. H. McRobert and Dr. Ward (Ex. 13) discussed their laboratory study of TTS due to short-duration impulses. The purpose of the study was to determine the appropriate trading relationship between sound level and number of impulses. Drs. McRobert and Ward used impulses with peak sound pressure levels of about 146 to 155 dB and about 2 milliseconds in duration. After establishing an individual's "critical level" (the level that produced a 20-dB TTS), the investigators lowered the level and increased the numbers of impulses. They found that subjects could tolerate greater numbers of lower-level impulses than would have been predicted by the equal energy rule (Ex. 13, p. 1299). On the basis of their experiment, Drs. McRobert and Ward recommended a 5-dB decrase in peak level for every tenfold increase permitted in number of impulses. However, they cautioned that this relationship would only be correct for non-reverberant impulses, not for reverberant impulses. In fact, they stated that it is probably erroneous to have a single dose-response curve for both reverberant and non-reverberant impulses (Ex. 13, p. 1300).

In a document submitted by EPA (Ex. 29, pp. 219–228), Drs. T. Ceypek, J. Kuzniarz, and A. Lipowczan reported on their field study of 213 drop-forge workers. The noise environment consisted of impulses with peak sound pressure levels of 127 to 134 dB and durations of 100 to 200 milliseconds repeated 3,000 to 10,000 times per day, superimposed on a background noise of about 110 dB. Subjects had been exposed to these conditions for one to 30 years. The results showed large hearing losses even after fairly short durations, such as two years (Ex. 29, pp. 221, 227). The authors concluded that impulses combined with continuous noise produced a more rapid development of permanent hearing loss than would continuous noise alone and that the loss observed after five years was the same as that which would be expected after 10 years of exposure to continuous noise (Ex. 29, pp. 221, 227). They also concluded that the criteria developed for gunfire (non-reverberant impulses) were inappropriate for such industrial conditions as dropforging (Ex. 29, pp. 221, 227).

In another chapter of the document submitted by EPA (Ex. 29, pp. 229–234), Dr. H. G. Dieroff described a laboratory study that he had conducted of the effects of impulse noise on guinea pigs. In an attempt to discover a mechanism causing the hearing loss that is different from the one involved in continuous noise-induced hearing loss, he studied the effects of impulse noise on the cochlear microphonic potential (MP), and on the secretion of succinodehydrogenase (SDH) activity in the cochlear. In so doing he compared a mechanical and a histochemical response to sound stimuli. He found that when guinea pigs were exposed to peak sound pressure levels of 162 dB for durations of 200 to 400 milliseconds the MP was very rapidly adversely affected, whereas any adverse SDH changes were not detected until much longer after they would have been predicted to appear with exposure to equivalent levels of continuous noise (Ex. 29, pp. 232–233). These seemingly conflicting results were not easily explained.

NIOSH submitted to the hearing record three studies on the effects of impulse noise (Ex. 26–12 (A) (B) and (C)), which had been performed at the Upstate Medical Center of the State University of New York by Drs. Roger Hamernik and Donald Henderson and their colleagues. In the experiments

chinchillas were used, a practice that is not unusual for laboratory studies of permanent hearing loss. In the first of these studies (Ex. 26–12(A), pp. 1–20), Dr. C. R. Perkins, with Drs. Hamernik and Henderson, explored the effects of the time interval between impulses on the magnitude of hearing loss. They exposed five chinchillas to 50 A-duration impulses with a peak sound pressure level of 155 dB and an interval between sound stimuli of one minute. Five more chinchillas were exposed to impulses of the same number and level, but with an interval between stimuli of only 10 seconds. The results showed that the group with the shorter interval between stimuli (and hence less recovery time) had much more temporary and permanent hearing loss than the group with the longer recovery interval (Ex. 26–12(A), pp. 6–7).

In the second study, Drs. Hamernik, Henderson, J. Crossley, and R. Salvi (Ex. 26–12(B), and Ex. 37) reported on a laboratory experiment on the interaction of continuous and impulsive noise. As justification for the experiment, the authors cited the high incidence of serious hearing losses among army personnel in the armored branch, where exposure to a combination of continuous and impulsive noise is common (Ex. 26–12(B), p. 117). Groups of chinchillas were exposed to 50 impulses having a 40-millisecond A-duration with peak sound pressure levels of 158 dB and 175 dB, a 2000 to 4000 Hz band of continuous noise of 95 dB, and two combination exposures of impulsive noise at 158 dB with continuous noise at 95 dB. Results showed that the combination of impulsive and continuous noise produced sizeable permanent hearing losses, whereas the TTS from the exposures to continuous noise alone and impulsive noise alone recovered fully with time (Ex. 26–12(B), pp. 118–119). The exposure to impulsive noise of 175 dB proved to be less damaging than the combined exposure (of 90 dB plus 175 dB), even though the impulse was 17 dB higher in level (Ex. 26–12(B), p. 119). When the combined exposure was interrupted with quiet periods of approximately 2 seconds, the damage was less severe even though the total sound energy was the same (Ex. 26–12(B), p. 120). Dr. Hamernik and his co-workers concluded that since the addition of the background noise to the impulses added very little to the total sound energy, the large increase in damage must be due to something else, such as "metabolic insufficiency" in the cochlea (Ex. 26–12(B), p. 120). The authors suggested that the interactive effect of impulsive and continuous noise might be similar to the drug-noise interaction, where damage due to the interaction can be two to four times greater than the damage expected from each stimulus alone (Ex. 26–12(B), p. 120).

In the third study (Ex. 26–12(C)) Drs. Hamernik and Henderson and Charles M. Woodford attempted to determine a safe level of B-duration impulses and to explore the trading relation between impulse intensity and duration. They exposed a total of 23 chinchillas to 50 impulses with the same duration (200 milliseconds) and interval between stimuli (one per minute), but with differing peak sound pressure levels. The investigators found that 50 impulses at the 140-dB level produced no permanent hearing loss or cochlear destruction, and was presumed safe for chinchillas, whereas the 155-dB level produced profound changes in hearing and cochlear structure, and was presumed hazardous (Ex. 26–12(C), pp. 2–3). In the group exposed to 150 dB some animals were severely affected, and others appeared to be nearly normal. The authors concluded that 150 dB may be close to a critical level at least for the number and temporal pattern of impulses that were used in the experiment (Ex. 26–12(C), p. 4).

Reviews

In a publication submitted by the Environmental Protection Agency, Drs. R. Coles, C. Rice, and A. Martin reviewed research on the effects of impulse noise performed before 1973 (Ex. 29, pp. 211–217). According to the authors (Ex. 29, p. 212), the first comprehensive set of recommendations for impulse noise was published in 1968 by Coles, Garinther, Hodge, and Rice. These recommendations were based on gunfire-induced TTS (Ex. 29, p. 212), and assumed that a similar amount of permanent hearing loss would occur after years of habitual exposure (Ex. 29, p. 214). They were applicable to military situations where about 10 to 20 exposures per year would occur (Ex. 29, p. 214). These criteria allowed A-duration impulses with peak levels up to about 175 dB, so long as the duration was extremely short (only a few microseconds). Peak levels must be reduced as duration increases. The authors also described (Ex. 29, p. 213) the attempt in 1970 of Coles and Rice to extend the criteria (previously based on gunfire-type impulses) to longer duration impulses, which would be typical of industrial conditions. Coles and Rice added data points to the criteria, indicating that the peak level should be considerably lower for B-duration than for A-duration impulses in order to produce the same amount of hearing loss. According to Coles et al. (Ex. 29, p. 213), this extension was based on TTS studies by Cohen, Kylin, and LaBenz in 1966, and Walker in 1969.

Another document (Ex. 279, 11–3), a report by Dr. Alan Martin entitled "The Equal Energy Concept Applied to Impulse Noise," presented an extensive review of research conducted before 1976 on the effects of impulse noise. In addition to some of the studies mentioned above, he discussed his own field study (Ex. 279, 11–3, p. 432) of 77 dropforge workers exposed to peak sound pressure levels of 65 to 448 Pascals (130 to 147 dB) with a repetition rate of 0.2 to 0.7 per second. Dr. Martin combined noise levels and duration according to the method advocated by Robinson (Ex. 12, App. 10, and Ex. 17, p. 14). His experiment supported the use of the equal energy (or 3 dB) rule for predicting the amount of permanent hearing loss resulting from all kinds and combinations of noise (Ex. 279, 11–3, pp. 437, 449). Instead of starting with critical peak levels and progressing to lower levels with increases of duration (like Coles et al. in Ex. 29, p. 212), Dr. Martin advocated building on the existing criteria for continuous noise, decreasing the duration as the level became higher (Ex. 279, 11–3, pp. 444–449).

Using the data from other impulse noise investigations, Dr. Martin combined level and duration of exposure according to the equal energy rule, and compared the results to studies of continuous noise. A study of 70 dropforgers by Guberan, Fernandez, Cardinet, and Terrier was supported by Dr. Burns (Ex. 54, pp. 9,11) as well as by Dr. Martin (Ex. 279, 11–3, p. 439) as supporting the equal energy rule for predicting hearing levels resulting from impulse noise. Dr. Martin also used Ceypek's data (Ex. 279, 11–3, p. 440) on dropforgers and achieved the same results. In addition he cited a study by Atherly (Ex. 279, 11–3, p. 443) of 50 trimmers who used pneumatic chisels on manganese bronze castings. Once again the observed hearing levels agreed very closely with predicted levels according to the equal energy rule, even in the extremes of the population distribution (at the first and 99th percentiles) (Ex. 279, 11–3, pp. 443–444). Dr. Martin concluded that these studies provided ample proof that the equal energy concept may be extended to include exposures to industrial impulse noises (Ex. 279, 11–3, p. 444).

Dr. Martin believed that the preponderance of the evidence indicated that the equal energy concept should be extended from steady-state noise

exposure to include industrial impulse noise. He concluded by stating:

> It is somewhat surprising that, in the past and in the context of injury to hearing, impulse noise has been treated as a special type of noise having different properties than steady-state noise. It is now apparent from research, as perhaps has been from a logical viewpoint for some time, that it merely forms part of a "temporal" continuum of noise, and therefore should be treated in a similar manner to the rest of that continuum. (Ex. 279, 11–3, p. 449).

Criteria and Standards

The current noise standard, 29 CFR 1910.95, limits impulse noise to a peak sound pressure level of 140 dB.

OSHA's proposal maintained the maximum allowable level for impulses at a peak sound pressure level of 140 dB but specified a maximum of 100 impulses at that level with a 10-dB decrease in level for each tenfold increase in number (39 FR 37775, October 24, 1974), (an equal energy approach). According to the proposal's preamble, this requirement was based on the study by Drs. McRobert and Ward (Ex. 13), discussed above. In addition the proposal defined "impulse or impact noise" as "a sound with a rise time of not more than 35 milliseconds to peak intensity and a duration of not more than 500 milliseconds to the time when the level is 20 dB below the peak." If impulses occurred more often than once every half second they were to be considered as continuous noise.

Certain other standards and criteria for impulse noise were submitted to the record. In a report entitled "Proposed Damage-Risk Criterion for Impulse Noise (Gunfire)" (Ex. 16), the Committee on Hearing, Bioacoustics, and Biomechanics (CHABA) modified the criteria of Coles et al. (Ex. 29, pp. 212–214; Ex. 279, 11–3, p. 421), making it about 10 dB more stringent (Ex. 16, p. 5) in order to protect a higher percentage (95 percent) of the exposed population (Ex. 16, p. 2). Even so, the criteria were designed to permit NIPTS of 10 dB at 1000 Hz, 15 dB at 2000 Hz, and 20 dB at 3000 Hz and above in a small percentage of the population (Ex. 16, p. 1). The criteria specified a maximum peak sound pressure level of 164 dB for the short pulses (25 microsecond or less), with a 2-dB decrease for each doubling of duration, dropping to a plateau of 152 dB for A-duration impulses or 138 dB for B-duration impulses (200 to 1000 milliseconds) (Ex. 16, pp. 2, 4–5).

The authors of the CHABA report cautioned that it was only a first attempt at reasonable damage risk criteria for impulses, and it rested heavily on the assumption of a constant relation between TTS and NIPTS, and that this assumption might be incorrect (Ex. 16, p. 6). However, they believed that the report designated "reasonable limits for the type of impulse noise to which most service personnel will be exposed: rifle and pistol reports from his own and his fellows' weapons, and single rounds fired by higher caliber armament in both reverberant and non-reverberant conditions." (Ex. 16, p. 6).

The NIOSH criteria document (Ex. 1) made very little mention of impulse noise, except to say that the provisions in the recommended standard were "intended to apply for all noise even though additional controls may be necessary for certain specific types of noise, such as some impact and impulsive noise." (Ex. 1, p. I–1). However, no specific recommendations were given for the measurement of impulse noise, or for calculating its contribution to the daily dose. In the supporting text NIOSH stated that industrial noise and hearing surveys dealing with this kind of exposure were just beginning at that time (1972) (Ex. 1, p. IV–9).

EPA submitted to the record a document entitled "Information on Levels of Environmental Noise Requisite To Protect the Public Health and Welfare With an Adequate Margin of Safety" (Ex. 30). This document contained a section on impulse noise (Appendix G), which modified the CHABA criteria so that the allowable levels would prevent 90 percent of the exposed population from incurring more than a 5-dB hearing loss at 4000 Hz (Ex. 30, App. G, pp. G–4, p. G–10). The allowable levels became accordingly more stringent. A peak sound pressure level of 152 dB was the maximum allowable level for impulses of 25 microseconds or less, with plateaus of 140 dB for A-duration impulses and 126 dB for B-duration impulses (Ex. 30, Appendix G, p. G–6). Unlike the CHABA criteria EPA recommended changes in peak level of 10 dB for every tenfold change in number of impulses based on a limit of 100 impulses (Ex. 30, App. G, p. G–4). The EPA "Levels" document indicated growing support for the extension of the equal energy rule to include impulsive as well as continuous noise exposure (Ex. 30, App. G, p. G–9). However, the authors recommended evaluating impulsive and continuous noise separately, "each according to its own criterion," until combining them according to the equal energy rule had been further justified by more research (Ex. 30, Appendix G, pp. G–8, G–9).

Recently Col. Johnson submitted to the hearing record a preliminary draft ANSI standard entitled "The Evaluation of the Effect on Human Hearing of Sounds with a Peak A-Weighted Sound Pressure Level Above 120 Decibels and a Peak C-Weighted Sound Pressure Level Below 140 Decibels" (Ex. 321–21E). Although the draft ANSI standard is intended to cover impulse noise, the committee decided against unequivocally defining impulse noise, impact noise, or types of non-impulsive noise (Ex. 321–21E, p. 1), and instead refers to "intense" sound (Ex. 321–21E, p. 3). The basic measurement used to assess the effect of intense sound on hearing is the A-weighted equivalent continuous level (calculated by the equal energy rule), and all sound between the levels specified in the title is to be included in the assessment (Ex. 321–21E, p. 1). The measuring system must be able to integrate properly the energy of very short impulses, and the sound environment must be sampled at least every 25 microseconds (Ex. 321–21E, p. 6).

Although the ANSI standard still is in the preliminary draft stages, the intent of integrating impulsive with continuous noise according to the equal energy rule appears to be quite clear.

Discussion

The topic of the maximum permissible peak sound pressure level of 140 dB will not be addressed in this discussion since the requirement is present in the existing standard, 29 CFR 1910.95, and remains unchanged at this time. However, the method with which impulses are to be included in employee dose is germane to the calculation of dose or TWA for purposes of the hearing conservation amendment.

Walter Nowikas, late president of Donley, Miller and Nowikas, Inc. (Ex. 161, 9 B; Tr. 3222), pointed out that OSHA's criteria were derived from studies of short duration impulses, and therefore were not appropriate for longer duration industrial impulses. He believed that the proposed limit of 100 impulses at 140 dB was excessive since it could exceed the allowable exposure for continuous noise when the sound energy was summed. To prevent this discrepancy, he suggested reducing the number of impulses by a factor of 10 (Ex. 14–42, p. 6). Mr. Nowikas recommended changing the criteria "to conform at least with the RMS equivalent" (the equivalent for continuous noise) (Ex. 161, p. 31).

Some comments favored integrating impulses in the manner suggested above by Dr. Martin (Ex. 279, 11–3) and later by Col. Johnson (Ex. 321–21E). Dr. Loren Kerr, Medical Director of the United Mine Workers (Ex. 80, App. B, p. 3),

suggested that the standard should read, "Impulse noise, when integrated by the equal energy rule, shall not produce equivalent levels in excess of Table G—16(a)." Dr. Burns (Ex. 54, p. 16) testified that he was "satisfied that impulse noise, suitably handled, is also amenable to a simple energy method of exposure."

In order to be sufficiently protective, Drs. Richard Bolt and Edgar Shaw, speaking for the Acoustical Society of America, recommended the equal energy rule until such time as more definitive criteria could be developed. They stated:

> It is regrettable that no simple but valid damage risk criterion covering all kinds of impulse and impact noise exposure has yet been found or appears within sight. In these circumstances, it may be wise to consider limits based strictly on the A-weighted daily total acoustic energy, i.e. the eight hour energy equivalent level Leq. Such a measure might prove overprotective by as much as 10 decibels in some circumstances, but would have the merit of simplicity with respect to interpretation and instrumentation. (Ex. 14–303, p. 2).

Other commenters pointed out that OSHA had proposed a standard that seemed to allow two separate doses—one for continuous noise, and one for impulse noise (Ex. 79, p. 7; Ex. 80, App. B, p. 3). On this subject Wookcock stated (Ex. 79, p. 7):

> * * * I would like to point out that OSHA has proposed a noise standard which, in effect, sets two separate levels—one for continuous noise and one for impulse and impact noise. Conceivably, the standard allows for a double exposure. This should be corrected so that both hazards are not permitted to exist at the same time.

Dr. Ward must have recognized this problem when he recommended using a combination of the 5-dB and 3-dB trading relations. He suggested using the 5-dB trading relation when calculating noise dose for exposures from 85 dB to 105 dB and the 3-dB trading relation for high level exposures above 105 dB (Tr. 1042–1043). He felt that this combination would bridge the gap between steady and impulsive noise (Ex. 64, Statement by W. Dixon Ward on behalf of AISI—July 1, 1975, pp. 10–11).

Conclusions

It is clear from examining the studies, reviews, standards and comments discussed above that the early criteria for impulse noise were developed using assumptions that are not generally applicable to industrial conditions. The studies on which they were based used A-duration (gunfire) impulses, even though they have been extrapolated to cover B-duration impulses (Ex. 29, pp. 212–213; Ex. 16, p. 6; Ex. 30, App. G, p. G–6). In addition, the early studies of gunfire noise did not include moderate or high levels of continuous noise in the background, which is typical of the industrial situation (Ex. 294, p. 1; Ex. 26–12(B), p. 117). Since the early criteria were meant to apply to the military situation they assumed only 10 to 20 exposures per year (Ex. 29, p. 214), whereas workers in industry often are exposed to impulsive noise on a daily basis.

When impulsive noise was combined with continuous noise, the studies and reports submitted to the hearing record showed fairly clearly that the hazard increased (Ex. 26–12 (B), p. 119; Ex. 29, pp. 221, 227). The study by Hamernik et al. (Ex. 26–12(B), p. 119) showed an effect that was not just additive but synergistic. Field studies where impulses were superimposed on background noise indicated that hearing loss was exacerbated. Ceypek et al. (Ex. 29, p. 221) found considerably more damage than would be expected from continuous noise. Dr. Martin (Ex. 279, pp. 449, 432–444), through the results of his own investigation and by evaluating the data from studies by Guberan et al., Ceypek et al., and Atherly, found that the best way to predict hearing loss was to extend the equal energy rule from continuous through impulsive noise. The draft ANSI standard submitted by Col. Johnson (Ex. 321–21 E, p. 1) supports this method for use in the U.S.

Therefore, OSHA has determined that, for purposes of the hearing conservation program, impulse noise should be combined with continuous noise for purposes of calculating employee noise exposure. Since industrial impulses are almost always superimposed on a background of moderate-to-high levels of continuous noise (Ex. 6, p. 12338; Ex. 26–12(B), p. 117; Ex. 29, p. 229; Ex. 29, p. 227; Ex. 30, p. G–8), and since both may be harmful, it is only reasonable to consider their effect together, rather than to treat each separately. There is ample justification for this approach in the studies and comments submitted to the hearing record (Ex. 26–12(B), pp. 117, 121; Ex. 279, 11–3, p. 449; Ex. 29, p. 213; Ex. 80, App. B, p. 3; Ex. 81A, p. 3; Ex. 54, p. 16). However, since there are still some uncertainties as to the ameliorative effects of certain temporal patterns (Ex. 26–12(A), pp. 6–7, 10; Tr. 1051; Ex. 26–12(B), p. 120), and since there usually are some quiet periods (or less noisy periods) during the work day (Ex. 64–5, p. 2; Ex. 64–6, p. 6; Ex. 6, p. 12338, Ex. 114, p. 7), the Agency cannot determine the precise effects of industrial impulses at this time, and therefore OSHA has chosen to retain the 5-dB exchange rate for purposes of the hearing conservation amendment. Until such time as another method, such as the equal energy rule (the 3-dB exchange rate), or a combination of the 3-dB and 5-dB exchange rate (as suggested by Dr. Ward, Tr. 1042–1043), is borne out by laboratory and field research, OSHA will continue to require the integration of all sound, including impulse noise, according to the 5-dB exchange rate in the computation of dose or TWA.

While the hearing conservation amendment does nothing to change the PEL or methods of compliance required by 29 CFR 1910.95(a) and (b)(1), it does require that all noise exposures above 80 dB, whether impulsive or steady state, be considered in determining whether an employee is included in the hearing conservation program. The decision to measure all noise exposures for purposes of the hearing conservation program is a pragmatic approach to the whole problem of impulse noise. For, while there is some dispute as to the precise definition and effect of impulse noise, there is general agreement that impulse noise is damaging. The hearing conservation program is designed to identify and protect those who show an increased susceptibility to the effects of noise. Accordingly, in computing an employee's noise dose or TWA for purposes of inclusion in the hearing conservation program, the impulsive component of the noise exposure is included. Moreover, there have been many technological advances in the capabilities of measuring instruments, and equipment now exists that can integrate impulse noise into the dose. Therefore, OSHA has determined that it is appropriate to include impulse noise in the dose computation for hearing conservation in order to provide employees exposed to significant amounts of this type of noise the protection of the amendment.

C. *Extra-Auditory Effects of Noise*

The most obvious physiological effect of noise is damage to the auditory system. However, depending upon the level, type, and duration of the noise, a variety of extra-auditory effects have been observed, which will be discussed in the following paragraphs. In addition, it should be noted that people who are exposed to noise at work may also be exposed to noise during their non-working hours. For example, many workers live in areas where there is highway and aircraft noise as well as noise from industrial plants. Industrial workers who live in the urban settings are sometimes stressed by noise 24

hours a day without respite, and without adequate opportunity to recover, either physiologically or psychologically. Thus, effects that might otherwise have been temporary would tend to become chronic.

Although there is a substantial body of data suggesting a wide variety of noise-induced physiological responses, specific responses to specific noise doses have not yet been identified. The evidence of noise-induced health effects is not conclusive for 8-hour exposures of 85 dB, or 90 dB, or even higher levels experienced over a working lifetime. However, to ignore this large body of data is to undervalue the significance of the adverse effects (Ex. 5, p. 43806; Ex. 138A, p. 2–31). Both testimony and written exhibits, including subjective and experimental evidence, indicate that noise can be harmful to human health (Ex. 2C–106, p. 2; Ex. 2C–111, p. 1; Ex. 2C–4, p. 1; Ex. 96, pp. 277–281; Ex. 189–8, p. 2; Ex. 28A, pp. 18–24, 27–28, 41–44, 46–49; Ex. 32, App. B, pp. 6–11; Ex. 79, p. 2; Ex. 173, pp. 1–2, 7–8; Ex. 84, Attach. 2, pp. 1–2).

During the 1975 and 1976 public hearings most of the evidence that was submitted was anecdotal, although some studies were submitted by individuals (Ex. 28A), unions (Ex. 88, Ex. 95, Ex. 96, Ex. 97, Ex. 98), and government agencies (Ex. 26–9; Ex. 26–10; Ex. 26–3; Ex. 26–11; Ex. 32; Ex. 40). Leonard Woodcock, then president of the United Auto Workers, stated:

> I am sure that there are many limitations to these studies, as there always seems to be in this sort of work. But we think there is truth to these studies since it matches our subjective experience. We expect that future research into this important area will offer more definitive data. (Ex. 79, p. 5)

According to Ruth Knowles, then president of Local 1716 of the Textile Workers Union (Tr. 2024), "Some workers have been forced to retire long before retirement age because of hypertension." She goes on to state that in her opinion the high noise exposure in the weave department could have been a factor in those instances.

The major concern over extra-auditory health effects from noise arises from the fact that noise has the ability to act as a general, non-specific, biological stressor (Ex. 138A, p. 2–31). Evidence suggests that the stress reaction produced by noise is not unlike that produced by other stressors; that is, a generalized reaction governed by sympathetic activation of the autonomic nervous system.

The concept of biological stress, first introduced by Dr. Hans Selye, has been described as "the nonspecific response of the body to any demand made upon it; a stereotyped, phylogenetically old adaptation pattern primarily preparing the organism for physical activity, e.g., fight or flight." (Ex. 138A, p. 2–32).

This stress reaction produces a widespread change in bodily activity. There is a rise in blood pressure, a rise in pressure inside the head and an increase in sweating. The heart rate increases, there are changes in breathing and there may be a sharp constriction of the muscles over the whole body (Ex. 26–9, p. 10–8). These change are likely to be mediated by increased adrenal secretion of the catecholamine hormones, epinephrine and norepinephrine (Ex. 138A, p. 2–32).

In the hearing record two theories were proposed to explain mechanisms by which these stress-related physiological changes can have an impact on human health. Two conceivable damage pathways were developed:

1. Abnormalities in blood pressure regulation that lead to hypertension.
2. Increased blood platelet adhesiveness that accelerates the development of atherosclerotic plaques in the walls of the arteries.

Each of these stress-related damage pathways is discussed in turn.

1. The theory that noise stress can result in hypertension is supported by Dr. Bruce Welch (Ex. 321–16E, pp. 1–11) and Dr. Ernest Peterson (Ex. 321–16D, pp. 1, 4, 10) as well as by numerous other researchers, referred to in these and other exhibits (Ex. 88, p. 6; Ex. 96, p. 279). Intense industrial sound impairs the regulation of blood pressure, the most distinct manifestation of which is an increased prevalence of hypertension (Ex. 321–16E, p. 2).

According to Dr. Welch, hypotension, or reduced blood pressure levels, also can result from noise stress (Ex. 321–16E, pp. 3–4). Both hyper- and Hypotension fundamentally are disorders of circulatory regulation. They are characterized by exaggerated and inappropriate cardiac and vasomotor response to changes in body position or physical and psychological stimuli (Ex. 321–16E, p. 8). This increase in vascular lability (or changeability) under noise stress affects the circulatory adjustments that must normally be made during the course of a working day (Ex. 321–16E, p. 9). For those who already have impaired circulation, excessive vascular lability can lead to congestive heart failure, cardiac ischemia, or cardiovascular stroke. In fact it has been established that hypertension, even at moderate elevations, is associated with increased risk of coronary and *cerebrovascular* disease (Ex. 321–16E, p. 3).

2. In a report submitted by EPA (Ex. 138A, p. 2–40) Hattis et al. proposed another pathway theory, which involves an increase in the adhesiveness of blood platelets. Increased platelet adhesiveness has clear potential for negative side effects, due to an increased tendency for the formation of thrombi, small aggregates of platelets and other blood components involved in the clotting process. These thrombi contribute to the buildup of atherosclerotic plaques, which gradually narrow the arteries and reduce the oxygen supply to vital tissues. A heart attack can occur when there is complete blockage of an artery to the heart muscle, or when the demand for blood oxygen is greater than that which can be supplied through a narrowed coronary artery. These effects can be cumulative, for the same thrombi that contributed to a gradual narrowing of the arteries can complete the sequence by forming the final occlusion leading to tissue death in the heart.

Two epidemiological studies that were submitted to the record are of particular importance. In a classic study of German iron and steel workers (Ex. 98, p. 219), Dr. Gerd Jansen found that 62 percent of the workers chronically exposed to noise levels above 90 dB had "peripheral circulatory symptoms", compared to 48 percent of those exposed to lower levels. Physiological and psychological examinations were performed to determine the extent to which the difference could be caused by non-occupational factors. Dr. Jansen concluded that noise interferes with involuntary bodily functions, and as such could be a serious health risk.

A NIOSH-sponsored study (Ex. 29, pp. 441–452) performed by the Raytheon Service Company lends further support to these findings. The medical records of factory workers routinely exposed to high noise levels (at or above 95 dB) were compared to those of a population exposed to lower noise levels (at or below 80 dB). Statistically significant differences in the number of cardiovascular and circulatory disorders as well as other health problems and complaints were found between the two groups. In a follow-up study the Raytheon Service Company compared medical records of workers exposed to high noise levels (prior to the implementation of a hearing conservation program) with records of the same workers after a hearing conservation program has been put into effect. The overall results indicated fewer accidents, diagnosed medical disorders, and absences during the period when workers were involved in a

hearing protection program. The Raytheon report summarizes: "In general, the results were interpreted as adding strong support to the hypothesis that prolonged exposure to high intensity noise increases the incidence of various medical, accident and attendance problems." (Ex. 26–11, pp. 5–1 and 5–2).

In an experimental study (Ex. 28A, pp. 42, 46–50) on the effects of prolonged exposure to tonal pulses, Dr. Robert Cantrell found statistically significant increases in plasma cortisal and blood cholesterol levels when compared with the pre-exposure levels of his experimental subjects. Significant increases were noted at noise levels of 80 and 85 dB, and were pronounced at 90 dB.

However, there was skepticism during the hearings about the importance of extra-auditory effects. The Edison Electric Institute maintained that:

> since there is no clear evidence on non-auditory noise impact, an occupational noise standard should not consider this area. We recommend that the federal government undertake additional long-term research as provided for in the OSH Act before promulgating standards for non-auditory noise effects (Ex. 73, p. 2).

According to Dr. Bruce Karrh of DuPont:

> I know of no significant report of extra-auditory physiological effects for persons with noise exposure levels below 115 dBA. We have not conducted a controlled scientific study on non-auditory effects of noise at our plants because of our experience with our hearing conservation program has not indicated a need for such a study (Ex. 114, p. 14).

In May of 1973 three Swedish researchers (Carlestam, Karlsson, and Levi in Ex. 29, p. 485) pointed out that "the evidence in favor of noise as a major pathogenetic environmental agent is rather shaky."

Between the 1975 hearings and the recent reopening of the record (April 1980), considerable research activity has occurred, and new and more persuasive evidence has been submitted to the record.

The EPA submitted an analysis by Dr. Welch (Ex. 321–16E) of over forty studies from European and Soviet bloc nations of the effects of noise exposure on the cardiovascular system. Dr. Welch found evidence of noise-induced structural changes in the heart, increased cardiac morbidity, cerebrovascular and peripheral vascular disorders, and hypertension (Ex. 321–16E, pp. 2–21). Dr. Welch admits that many of these studies suffered from methodological problems, although approximately half of them presented data in a statistically verifiable manner. Viewed as a whole, these studies represent a consistent body of data containing significant evidence that noise levels greater than 90 to 95 dB may increase the risk of cardiovascular disease in exposed workers. He concludes:

> In a practical sense, the available evidence now demands that prolonged exposure to high intensity sound be viewed in a much broader sense than heretofore as a serious threat to general human health. The evidence for associating long-term sound exposure with cardiovascular disease, in particular, is comparable to that for associating it with loss of hearing (Ex. 321–16E, p. 37).

In another report submitted by EPA (Ex. 321–16D, pp. 1–2), Dr. Peterson also discusses recent developments in research on the extra-auditory effects of noise. He finds that by far the largest body of evidence centers about the relationship between prolonged exposure to intense noise and cardiovascular performance. The most common occurrence is one of impaired regulation of blood pressure, which may be manifested either as hypotension or hypertension. Other signs and symptoms that occur more frequently in noise-exposed workers are abnormalities in cardiac pacing, reducing stroke volume, various ECG abnormalities, and narrowing of retinal arteries. Dr. Peterson also reported on his own work (Ex. 321–16D, pp. 6–10), a laboratory study of the effects of protracted noise exposure on rhesus monkeys. Monkeys were chosen as an animal model so as to closely approximate human response. As a result of life-like exposure scenarios (averaging 85 dB) for 9 months, the monkeys showed significant alterations in blood pressure that were sustained even after cessation of the stimulus.

A third submission by EPA (Ex. 321–16F) is a study of German brewery workers by Dr. H. Ising et al., who attempted to quantify the risk to the cardiovascular system associated with exposure to noise levels averaging 95 dB. Dr. Ising used each individual as his own control by comparing various cardiovascular indicators with and without the use of hearing protectors. In so doing he overcame some of the methodological problems discussed by Dr. Peterson (Ex. 321–16D, pp. 2–4) and Dr. Welch (Ex. 321–16E, pp. 35–37). Dr. Ising found that on days when people worked without hearing protection, there was a significant elevation in systolic blood pressure, changes in arterial wall elasticity, and increased levels of catecholamine hormones excreted in the urine. (The catecholamines are characteristically secreted in response to stress, and have been associated with increased blood platelet adhesiveness and with increases in blood pressure (Ex. 138A, pp. 2–32 and 2–33)).

Despite the quantity of evidence in the studies discussed above, clear dose-response relationships do not yet exist for the cardiovascular effects of noise. However, if, as the evidence suggests, there is a cause-effect relationship between noise and hypertension, the health implications would be widespread and serious (Ex. 79, p. 5; Ex. 266B, pp. 2, 13, 14–15; Ex. 138A, p. 2–31; Ex. 321–16E, p. 37; Ex. 29, p. 485). Therefore the Agency urges caution on the part of employers. OSHA has included the above evidence as a qualitative, if not a quantitative, argument for requiring hearing conservation programs.

Other extra-auditory effects are also discussed in the record. The report of the initial Raytheon study, mentioned above, described other possible effects of noise (Ex. 29, pp. 449, 451). In addition to cardiovascular effects, the investigators found evidence of digestive, respiratory, allergenic, and musculo-skeletal disorders. Over a period of 5 years the number of diagnosed disorders in every category was significantly higher for workers exposed to high noise levels that it was for those exposed to lower noise levels.

In his report (Ex. 321–16E, p. 31), Dr. Welch discusses neurological changes associated with long-term exposure to occupational noise. After reviewing the scientific literature, he finds that the sense of balance can be altered, that reaction time is impaired, and that there is decreased tactile sensitivity in the hands and feet. Dr. Cohen and Dr. Joseph Anticaglia (Ex. 96, pp. 277) suggest that noise-induced neurological changes may occur as a result of overstimulation of the brain's reticular formation, leading to a state of reflex hyperactivity and abnormal EEG response. The authors noticed that laboratory subjects complained about feelings of disorientation after exposure to high levels of noise (Ex. 96, p. 278). Studies cited by Dr. Edith Gulian (Ex. 97, pp. 38–39) support this observation with factory workers as well. It has also been suggested that high levels of noise reduce the eye's ability to focus clearly, and narrow the visual field (Ex. 97, p. 35; Ex. 96, p. 278). These effects can be significant from the standpoint of potential accidents and injuries (Ex. 96, p. 279).

There was information on the effects of noise on worker performance submitted to the hearing record. According to EPA's Public Health and

Welfare Criteria for Noise (Ex. 31, p. 8–2), a variety of effects have been observed in the literature. EPA cites research by Dr. D. O. Hebb to explain these effects. To paraphrase: Changes in stimulation (such as intense noise) produce arousal activity which originates in the reticular formation. An individual's level of arousal affects the performance of a task. Too little arousal produces inadequate performance whereas too much arousal interferes with performance. The optimum is somewhere at the top of an inverted U-shaped curve. Thus, noise can enhance, interfere with, or fail to affect the performance of certain tasks. The EPA concludes that:

> Continuous noise levels above 90 dBA appear to have potentially detrimental effects on human performance, especially on what have been described as noise-sensitive tasks such as vigilance tasks, information gathering and analytical processes. Effects of noise on more routine tasks appear to be much less important, although cumulative degrading effects have been demonstrated by researchers. Noise levels of less than 90 dBA can be disruptive, especially if they have predominantly high frequency components, are intermittent, unexpected, or uncontrollable. The amount of disruption is highly dependent on the type of task, the state of the human organism, and the state of morale and motivation (Ex. 31, pp. 8–6 and 8–7).

Noise can degrade job safety in some of the same ways that it degrades performance. It is logical to conclude that the same parameters that disrupt job performance (high noise levels, or noise that is high in frequency, intermittent, unexpected, or uncontrollable) can jeopardize job safety. In addition, there are other reasons why noise can be a safety hazard. Noise can effectively mask alarm signals and warning shouts. This includes signals from malfunctioning machines and the sound of approaching vehicles.

I.W. Abel, former president of the Steelworkers Union, reported the following:

> A recent study of the causes of 25 fatalities in railroad accidents by the Federal Railroad Administration showed the common factor was the workers' unawareness of the approach of the railroad cars or equiment that struck them. Many of these workers, the study pointed out, were working under exposure to a high level of noise (Ex. 78, p. 20).

Howard Pemberton, safety committeeman from Local 588 of the UAW, describes the workers' condition:

"They cannot escape the noise. They also tell us—and we know from our own experience—that they cannot hear instructions from the foremen, and that they must scream to carry on necessary communication" (Ex. 2C–74, p. 2).

Another way in which noise can lead to accidents (although the cause and effect relationship is less direct), is through workers' aversion to the noise. Dr. John Finklea, then Director of NIOSH, related the following incident:

> Several weeks ago, a worker fatality was reported in a power plant in the Cincinnati area. An investigation revealed that the accident victim and his fellow workers, irritated by the screeching sounds from a pulley drive in a conveyor system, had resorted to repeated "soaping" of the pulley unit to quiet the sound. Gaining access to the pulley for this purpose involved certain risks that were contrary to company work policy. Despite this, a worker in the course of soaping the pulley evidently became caught, was pulled into the moving conveyor and was killed. It is doubtful that even an 85 dBA noise limit would have prevented this accidental death. Yet the case deserves mention if only to show that non-auditory problems of noise cannot be ignored. Indeed, it should motivate more conservative approaches in specifying noise limits meeting both health *and* safety needs (Ex. 26–1, p. 7).

Finally, the general effect of worker absenteeism should be mentioned. Whether from psychological aversion to noise or the physiological consequences of noise stress, absenteeism appears to be higher among workers in noisy industries. According to anecdotal evidence from union witnesses, both fatigue and absenteeism are higher (Ex. 2C–74, p. 2; Ex. 79, p. 2). Studies in the record supported this contention. The Raytheon study mentioned earlier (Ex. 26–11, p. 3–172), found significant differences in absenteeism between groups of workers exposed to average noise levels above 95 dB and below 80 dB. Absenteeism in the high noise group was significantly decreased after the institution of a hearing conservation program.

A study by Schmidt, Royster, and Pearson (Ex. 321–22F, p. 28) found significant differences in absenteeism as well in accident records. The report by Dr. Gulian cites a study by Odescalchi of 50 noisy Italian companies (such as textile, steel and metal fabrication), where the annual number of absences is about 15 percent higher than in quieter ones (Ex. 97, p. 60). Other studies cited by Dr. Gulian are inconclusive on this issue, but enough data exist to be strongly indicative of increased absenteeism, which can be very costly to industry.

III. History of the Regulation

The occupational noise exposure standard, which is found at 29 CFR 1910.95, was originally promulgated as a standard under the Walsh-Healey Public Contracts Act, 41 U.S.C. 35 *et seq.* (See 34 FR 7946, May 20, 1965; 35 FR 1015, January 24, 1970). The Walsh-Healey occupational noise standard (41 CFR 50–204.10) was adopted under § 6(a) of the Occupational Safety and Health Act, 84 Stat. 1590, 29 U.S.C. 651 *et seq.* which, within two years of the effective date of the Act, allowed the Secretary to promulgate without regard to rulemaking any established Federal standard. (See also § 4(b)(2) of the Act).

The present noise standard limits an employee's noise exposure to 90 dB as an 8-hour time-weighted average (TWA). Employee exposure to noise above the permissible exposure level (PEL) must be reduced to within permissible limits by feasible engineering controls or administrative controls. Where such controls cannot reduce employee exposure to within permissible limits, they are to be supplemented with personal protective equipment. The OSHA noise standard also requires that the employer must administer a continuing effective hearing conservation program if exposures exceed the PEL. OSHA has interpreted this to require employers to provide audiometric testing for those employees exposed above the PEL without regard to the use of personal protective equipment. (See Industrial Hygiene Field Operations Manual, Chapter IV, pp. 9–16, OSHA Instruction CPL 2–2.20, April 2, 1979).

On August 14, 1972, the National Institute for Occupational Safety and Health (NIOSH) transmitted to the Department of Labor a criteria document, "Occupational Exposure to Noise" (HSM 73–11001) (Ex. 1), in accordance with section 20(a) and 22(d) of the Occupational Safety and Health Act, (29 U.S.C. 669(a), 671(d)), which authorizes the Secretary of Health, Education and Welfare to conduct research to develop criteria for dealing with harmful physical agents and to make recommendations to the Secretary of Labor concerning new or improved occupational safety and health standards. The criteria document recommended that employee noise exposures be limited to an 8-hour TWA of 85 dB in new installations and that the Secretary should study the feasibility of reducing the PEL in all facilities to an 8-hour TWA of 85 dB. In addition, the criteria document recommended audiometric testing not only for employees whose exposures exceeded the PEL but also for those employees whose exposures were reduced to within the PEL by the use of personal protective equipment.

On January 26, 1973 the Assistant Secretary of Labor for Occupational Safety and Health appointed an Advisory Committee on Noise pursuant to section 7(b) of the Act (29 U.S.C. 656). The Committee consisted of 15 members, representing a broad cross-section of individuals knowledgeable about noise hazards in the industrial environment. The Committee included representatives of employers and employees, as well as representatives of the public and the occupational safety and health professions. The purpose of this committee was to obtain and evaluate additional recommendations from labor, management, government, and independent experts. In its deliberations the Committee considered approximately 135 comments submitted to it by various interested parties (see Ex. 2(c)), as well as numerous oral presentations (see Ex. 2(a)). The Committee held meetings periodically during an eight-month period and on December 20, 1973 it transmitted its recommendations for a revised occupational noise exposure standard (see Ex. 2(b)) to the Occupational Safety and Health Administration (39 FR 6647, February 21, 1974).

Briefly, the Advisory Committee recommended that the permissible exposure level for occupational noise be an 8-hour time-weighted average of 90 dB, with exposures down to 85 dB integrated into the computation. Exposures to steady-state noise were not to exceed 115 dB at any time. In addition, the Advisory Committee recommended audiometric testing be done annually for all employees whose exposures equalled or exceeded 85 dB or would equal or exceed 85 dB but for the use of personal protective equipment.

OSHA considered the information and recommendations contained in the NIOSH Criteria document (Ex. 1), the Advisory Committee's recommendations (Ex. 2(b)), and other available information. On October 24, 1974, OSHA proposed a revision to its occupational noise exposure standard and solicited comments and objections to it from interested persons (39 FR 37773–37778). OSHA proposed to retain an 8-hour TWA of 90 dB as the PEL, with exposures down to 85 integrated into the time-weighted average. In addition, the suggested ceiling of 140 dB for impact noise exposure contained in the old standard (see 29 CFR 1910.95, Table G–16, note) was proposed to be modified to a mandatory ceiling of no more than 100 impulses of 140 dB per day, with a tenfold increase in the permissible number of impulses to which employees could be exposed for each 10 dB decrease in the peak pressure of the impulse. The proposal also required the employer to determine if any employees were exposed to an 8-hour time-weighted average of 85 dB or above and to measure the exposure of any employees so identified. Additional exposure monitoring was required within 30 days of any change of equipment or process which would affect the noise level. Employee exposures to impact or impulse noise were also required to be monitored.

Under the proposal, audiometric testing was to be required for all employees who had noise exposures equal to or exceeding 85 dB as an 8-hour TWA and for all employees who were using personal protective equipment to reduce their exposures to an 8-hour TWA of 90 dB. If the employee's audiogram showed a significant threshold shift (STS) when compared to the employee's first or baseline audiogram, the employee had to be retested within one month. If the diminution of hearing was confirmed on retest, then the employee had to be informed of the change in the hearing level, and had to be provided and fitted with, and instructed in, the use of hearing protectors. Employees whose audiograms showed that they had a significant threshold shift were required to wear hearing protectors under the proposal even if they were not exposed over the PEL.

The preference for engineering controls over personal protective equipment as a method of compliance was retained and clarified and a limited exception was proposed that would have allowed personal protective equipment to be used even where engineering or administrative controls were feasible if the employee overexposure occurred on no more than one day a week. Various other provisions in the proposal required the employer to keep records of employee exposure monitoring, audiometric tests, calibration of audiometers, and notifications of employee overexposures.

On December 18, 1974, the Administrator of the U.S. Environmental Protection Agency (EPA), acting under the authority of section 4(c)(2) of the Noise Control Act of 1972 (86 Stat. 1236, 42 U.S.C. 4903), published a notice in the **Federal Register** requesting that the Secretary of Labor review the proposed occupational noise exposure regulation and report to the Administrator within 90 days on the advisability of revising the proposed regulation (39 FR 43802). Briefly, EPA contended that the proposal "does not protect the public health and welfare to the extent required and feasible." EPA objected to the proposal's permissible exposure limit, including the use of a 5 dB time-intensity trade-off (doubling rate) in computing the PEL, and to the definition of significant threshold shift which was used in the proposal. On March 18, 1975, OSHA published in the **Federal Register** the Review and Report Requested by EPA (40 FR 12336). In its response, OSHA reviewed and explained the reasoning underlying its proposed regulation. OSHA noted that the document to which EPA objected was merely a proposal upon which the public had been invited to comment. The Assistant Secretary concluded that "no changes should be made in the proposal at this stage," since the proposal by its very nature did not represent a final agency position and EPA's objections would be aired along with objections raised by concerned persons at an informal public hearing. In addition, OSHA promised to consider EPA's request and the evidence contained therein along with the rest of the evidence in developing its final standard. To the extent that the final hearing conservation rule promulgated today deals with issues raised in the Request for Review and Report, they are discussed below under the appropriate topic headings.

In the notice of proposed rulemaking, interested persons were given approximately 45 days to submit written data, views and arguments on the proposal and to file objections and request a hearing thereon. The comment period was subsequently extended two more times (until March 21, 1975) because of the complexity of the issues raised in the proposal and in response to a number of requests for additional time in which to prepare responses. (See 39 FR 42929, 12/9/74; 40 FR 2822, 1/16/75). Thus, the public was given almost five months in which to file comments and objections on the proposal. OSHA received approximately 1000 written comments on the proposal (Ex. 14).

Section 6(b)(3) of the Act provides for informal public hearings on objections to a proposal. Many persons requested that hearings be held on the proposed occupational noise exposure standard and an informal public hearing was scheduled (40 FR 16336, 4/11/75). The rulemaking hearing was convened by Administrative Law Judge Milton Kramer on June 23, 1975. The hearing lasted through July 30, 1975. Over 90 parties, many of them represented by multi-witness panels, participated in the hearing. In addition, during the course of the hearing approximately 188 exhibits, many containing numerous documents,

were submitted to the record. Testimony at the hearing addressed every issue raised by the proposal, as well as environmental issues and economic issues. At the close of the hearing, a 45-day period for the receipt of post-hearing comments was authorized by Judge Kramer. The hearing record also remained open for receipt of an economic impact analysis.

On June 18, 1976, OSHA published a notice of availability of an economic impact analysis which had been prepared for the agency by Bolt, Beranek and Newman, Inc. (BBN) of Cambridge, Massachusetts (41 FR 24718). The economic impact analysis considered the possible inflationary impact and economic feasibility not only of the proposed noise exposure regulation, but of several alternatives such as a standard with a PEL of 85, and various compliance periods. Benefits to be derived from the alternatives were also considered. Basically the economic impact analysis was modeled after the guidelines for implementing Executive Order 11821 (see 39 FR 41501) although the proposal predated the Executive Order (see Ex. 192, p. iii). According to the BBN study noise exposure monitoring was estimated to cost approximately $12 per production worker, while audiometric testing for all workers exposed to an 8-hour TWA of 85 dB or above was estimated to cost about $20 per worker (Ex. 192, p. iv). The cost of keeping the PEL at 90 dB and instituting a hearing conservation program including audiometric testing was estimated to be approximately $241 million per year (Ex. 192, p. iv). BBN also estimated the relative probability of workers experiencing material impairment after 20 and 40 years of exposure at 85 dB as opposed to 90 dB (Ex. 192, pp. 2-26—2-36) and estimated the benefits of including hearing conservation requirements at or below the PEL (Ex. 192, pp. 2-34—2-36).

Interested persons were given an opportunity to comment on the BBN study and a second informal public hearing was scheduled to begin on August 24, 1976 (41 FR 24718). The notice also invited the submission of any new information that might be available on the issue of economic feasibility of the proposed standard and on any of the other issues discussed in the economic impact analysis itself. OSHA subsequently extended the period in which to file comments and rescheduled the public hearing in response to a number of requests for extensions of time (41 FR 32912, 8/6/76). OSHA received approximately 108 comments on the economic impact analysis (Ex. 193).

The economic impact hearing was convened on September 21, 1976 with Administrative Law Judge Jean F. Greene presiding. Approximately 70 parties were scheduled to appear at the hearing (Ex. 196), and approximately 69 exhibits were submitted to the record during the hearing. The hearing lasted through October 8, 1976. Those participating at the hearing were given 60 days from the close of the hearing in which to submit post-hearing comments.

During the hearing OSHA received many requests for information that was not contained in the economic impact analysis itself, but which was related to its preparation. OSHA, through arrangements with BBN, made available that portion of the requested information which had not been obtained under a pledge of confidentiality. BBN prepared a document (Ex. 278) which included some of the data requested at the hearing. In addition, BBN discussed and clarified many of the issues raised at the hearing. On January 28, 1977, OSHA published in the **Federal Register** a notice of the availability of the BBN post-hearing comment and additional information on the economic impact analysis (42 FR 5374). Those who participated at the hearing were given additional time in which to comment on the BBN submission. OSHA received approximately 18 comments on the BBN submission (Ex. 279).

Although the proposal was published before any of the Executive Orders requiring the preparation of Inflationary or Economic Impact Statements or Regulatory Analyses (Executive Orders 11821, 11949 and 12044), OSHA has prepared a Final Regulatory Analysis for this hearing conservation amendment which is generally consistent with the requirements of the most recent Executive Order on the subject. This analysis was based on information and methodologies contained in the noise record and uses standard techniques of economic and scientific analysis. In addition publicly available population and employment data, such as that published by the Bureau of Labor Statistics *(Employment and Earnings)* was used. Similarly, the estimates of the costs of compliance as well as benefits of the amendment were made using information from the record and publicly available data. The expected economic impact was developed using costs estimated by OSHA, on the basis of record information, publicly available data and standard techniques of economic analysis. OSHA has used the latest available data. Interested persons may request copies of the Final Regulatory Analysis through the Docket Office.

On April 18, 1980, OSHA again opened the record to introduce additional comments, letters and reports that had been sent to the agency since the last time the record had been open (45 FR 26366). Some corrected transcripts from the second hearing were submitted to the record as an exhibit and some updated cost data on hearing conservation programs were also submitted. Interested persons were given over 45 days in which to submit comments. The Agency subsequently extended the comment period until July 3, 1980 in response to requests for additional time (45 FR 40166, 6/13/80). Thus the public was given 11 weeks in which to submit comments on this information.

OSHA received a number of objections to its April 18, 1980, **Federal Register** notice. Some of these objections, as noted, requested additional time in which to comment, and some raised certain procedural objections (see Ex. 321-15A, 321-11, 321-14). Several comments expressed the belief that OSHA had selectively introduced exhibits into the record (Ex. 321-15A, p. 2, 321-11, p. 2). However, OSHA made no attempt to "select" correspondence to be submitted to the record or correspondence to be withheld. Rather, all the substantive comments on noise which the Agency had on file were submitted to the record. Any comments which may have been inadvertently omitted could have been resubmitted in response to the **Federal Register** notice.

The **Federal Register** notice invited comments "on the above materials only," and went on to explain that because of the length and repetition of the existing record the public was asked to refrain from resubmitting material already submitted. The record in this proceeding could be characterized as voluminous, verbose, redundant, and since it contains approximately 36,000 pages, unwieldy. The Agency has tried in every manner consistent with the statutory mandate to accommodate the reasonable demands and concerns of interested persons. However, some few persons apparently interpreted the **Federal Register** notice to mean that relevant new data would not be allowed into the record. (See Ex. 321-15A, 321-11, p. 2). The vast majority of commenters, however, construed the sentence correctly and did not resubmit evidence but instead confined their comments to the general subject matter of the additional submissions. A number

of the comments received in response to the Federal Register notice (see, for example, Ex. 323) did in fact constitute new evidence or studies on the subject matter of the new submissions. (See, for example, Ex. 321–44, 321–53D, 321–17, 321–19, 321–20A, 321–21, 321–22, 321–14D, 321–35, 321–13, 321–16).

In misconstruing the notice, several persons mentioned that they should be given a change to submit new evidence showing the effectiveness of hearing conservation programs and new updated cost estimates on engineering controls (Ex. 321–15A, 321–12A, p. 4; 321–11, p. 2–4; 321–53A, p. 2). As discussed above, the final rule here merely articulates hearing conservation requirements. Several issues, including the appropriate permissible exposure level and priorities among compliance strategies, have not been decided at this time. Both issues have been deferred for further study.

The Agency contemplates further economic studies and another hearing on these and other remaining issues. The record will be reopened to receive any new evidence on the relevant issues, including overall effectiveness of personal protective equipment as opposed to engineering controls in preventing material impairment, the permissible exposure level and the correct doubling rate, economic costs and consequences of various alternative strategies, benefits of the various strategies, and technological advances in engineering controls. Anyone wishing to do so may submit new evidence when the record is reopened.

Certain other participants requested that OSHA repropose the standard in view of advances in technology (Ex. 321–12A, p. 2; 321–11, p. 2). At the present time it is not contemplated that re-proposal will be necessary. The original proposal as well as the EPA Request for Review and Report and the OSHA response, all of which were printed in the Federal Register and actively debated at the hearing, gives the public ample notice of the wide range of regulatory alternatives that are being considered within the general parameters of the permissible exposure level and the method-of-compliance issues. Such alternatives include industry-by-industry standards, different compliance schedules, and a performance standard allowing the employer to choose the best method of compliance.

Another commenter (see Ex. 321–12A, p. 3) objected to a meeting with several audiologists which was held in August 1979. The meeting which was the subject of this objection had been held primarily to discuss various problems with the instructions contained in the Industrial Hygiene Field Operations Manual on audiometric testing as part of an effective hearing conservation program. Since some of the issues discussed at the meeting could have possible relevance to the hearing conservation amendment, OSHA included a detailed summary of the meeting in a group of noise-related materials submitted to the record of April 18, 1980 (see Ex. 317). Interested persons were given an ample amount of time in which to comment upon this material. Clearly, then, the business community as well as other interested persons were permitted "a further opportunity for input" (see Ex. 321–12A, p. 4) on the subject of the meeting.

A few other commenters objected that a new hearing was not being scheduled to discuss the new record submissions. (See Ex. 321–15, 321–15A, p. 2). Section 6(b)(3) of the Act does not indicate a "right" to a hearing every time something new is submitted to the record. Such an interpretation of section 6(b)(3) might even, for example, require a hearing in response to post-hearing comments, a procedure which could easily result in needlessly drawnout rulemakings.

As stated above, the Agency has tried at every point in the proceeding to accommodate all reasonable demands and concerns of the public. This has been done by according more time to respond at numerous junctures in the proceeding, clarifying ambiguities and considering numerous alternative approaches suggested by the public as well as by other government agencies. The public dialogue on the various issues raised during the course of this proceeding has been extensive and helpful. The record has been carefully reviewed and all opinions, comments and evidence therein have been considered in reaching the final decisions reflected in the hearing conservation amendment. The Agency believes this provides workers with adequate protection without undue burden on employers.

IV. Benefits

Summary and Conclusions

The primary purpose of this hearing conservation amendment is to prevent occupationally related cases of hearing impairment. Hearing impairment is a serious obstacle to a person's effectiveness as an employee and in the other aspects of life as discussed elsewhere in this preamble. Occupationally related hearing loss cannot be cured by hearing aids.

The noise record includes extensive evidence indicating that hearing conservation programs can reduce the number of cases of hearing impairment. Based on that record OSHA has made estimates of the number of hearing impairments prevented by the hearing conservation program prescribed herein. Evidence in the record amply demonstrates that many workplaces are not safe from hazards posed by noise. Present noise exposures pose a significant risk of harm to workers and can be lessened or reduced by instituting hearing conservation programs for workers exposed at or above a TWA of 85 dB.

OSHA estimates that hearing conservation programs for all employees exposed above 85 dB will eliminate 212,000 cases of material impairment of hearing after 10 years, 696,000 after 30 years and 898,000 cases at equilibrium. Even assuming full compliance with the present standard which requires hearing conservation programs for all employees exposed over 90 dB, this amendment would prevent 38,000 additional impairments within 10 years, 143,000 within 30 years, and 189,000 at equilibrium. Therefore the standard will significantly reduce the risk of hearing impairment present in many workplaces. Unfortunately this standard will not completely succeed in eliminating occupationally related hearing impairment. Approximately 162,000 cases of impairment will remain at equilibrium after the implementation of this standard.

OSHA anticipates that employers and employees will carefully and conscientiously carry out the provisions of this standard. However, even if only 50% of employees receive protection, there will be a reduction of 381,000 cases of impairment at equilibrium. This is still a very substantial benefit.

The OSHA estimates are based on the methodology of CPA, the exposure estimates of BBN and the scientific data contained in the record. OSHA has utilized its judgment based on the record to choose what it believes are the better methodologies, assumptions and data and has updated the estimates to take into account more recent, publicly available population data. Therefore, as discussed below, OSHA believes that its estimates improve upon the earlier estimates.

The Supreme Court in *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute*, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (July 2, 1980) indicated that in promulgating a standard dealing with toxic materials or harmful physical agents, the Act "requires the Secretary to find, as a

threshold matter, that the toxic substance or harmful physical agent in question poses a significant health risk in the workplace and that a new lower standard is therefore reasonably necessary or appropriate to provide safe or healthful employment." (slip op., p. 5.).

The record in this proceeding clearly demonstrates and OSHA therefore concludes that all these tests have been met. OSHA finds that employee exposure to noise at existing workplace levels poses a significant health risk in the workplace. Even assuming full compliance with the current occupational noise exposure standard, some employees face a significant risk of material impairment of hearing. Accordingly a new and more protective standard is reasonably necessary and appropriate to provide healthful employment. Indeed OSHA would reach this same conclusion even if the risk of hearing impairment had been substantially less than is the case.

These conclusions have been reached without reliance on the further benefits of reduced absenteeism, improved workplace safety, and reduced extra-auditory health effects also resulting from the standard. But, of course, those benefits provide additional justification for the standard.

Finally, workplace noise, and the resulting occupationally related hearing loss, is perhaps the most widespread hazard faced by workers. As Leonard Woodcock, then President of the United Auto Workers stated, "noise is probably the most pervasive of the many job hazards which our members face today. We have had no health and safety problem about which our members complain more" (Tr. p. 1388).

The hearing conservation standard will go a substantial way towards alleviating the worst aspect of the hazard, hearing loss, though it will not achieve the ideal solution, eliminating the hazard at its source. The Agency finds that eliminating noise exposure utilizing engineering controls would create substantial additional benefits of reduced discomfort and more effective hearing conservation.

The existing level of risk in absolute numbers and the amount of risk reduced by this standard is great. Clearly, even if the level of risk were lower and the reduction of risk were not as great, OSHA would still be able to make a valid threshold finding of significant risk. While in this instance detailed data were available to estimate the hearing impairment benefits of this noise regulation, it should be recognized that in many circumstances much less evidence will be available, especially for relatively new substances which may create life threatening risks. As the Supreme Court noted, OSHA may make a finding of significant risk even when much less evidence is available upon which to base such judgments. "OSHA is not required to support its findings that significant risk exists with anything approaching scientific certainty . . . this provision requires a reviewing court to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge . . ." (slip op., p. 45).

The rest of this section sets forth, in depth, the basis for OSHA's estimates of hearing impairment and analyzes the relevant portions of the record. To make its estimates as current and exact as possible, OSHA made use of some publicly available census and labor statistics data, such as employment by SIC code, which is not physically in the noise record. The limited amount of data in this category that has been utilized is not controversial and is publicly available.

It is relatively complicated to present data on the number of noise-related cases of hearing impairment because it occurs at varying ages and lasts a varying number of years before death. The approach selected here is the "snapshot" approach. This estimates in a given year, the absolute number of cases of impairments existing if there were no regulation, the number eliminated by the standard or an alternative, and the number of impairments remaining. It is not appropriate to add the number of impairments in the 10th year to those in the 20th year, for example, since that would double-count the persons who were impaired in both years. On the other hand, the actual number of impaired individuals over periods of time greater than a year are greater than the number present in a given year. Over time persons die and then are subtracted from the totals while others enter into the totals for the first time.

For example, OSHA estimated that hearing conservation programs for all employees exposed above 85 dB would prevent 696,000 material hearing impairments in the 30th year and 799,000 in the 40th year. The total number of individuals saved from impairment by these programs during the decade is less than the sum of 696,000 + 799,000, because some individuals lived through that period and would have been counted as saved from impairment at each of those timepoints. On the other hand, the number of individuals saved from impairment prior to the 40th year is much greater than 799,000 since many who will be saved from impairment by these programs will die before the 40th year and were therefore not counted in the 40th year totals. OSHA has also presented data on the number of person-years of hearing impairment prevented. This data does not present the same problems, but does not indicate how many individuals will suffer impairment.

Much of the data presented is for the equilibrium year. Hearing impairment develops gradually over time from the accumulation of noise the employee is subject to in each year of employment. In addition, hearing impairment once developed lasts beyond age 65 and through the entire time of retirement until death. Clearly hearing impairment is a substantial loss to retired persons as well. Many people live well into their 80's. (For example, the average life expectancy of males at age 65 is 14 years and females 19 years. Of course a substantial portion of the population lives longer than these averages.) Therefore, the full effects of hearing conservation programs will not be achieved until the entire population has been replaced by a population who have spent their entire working lives covered by these programs. This does not occur for at least 70 years, the time from age 18 until when most retirees have died by age 88. However, benefits are also presented at the 10th, 20th, 30th and 40th years after the implementation of hearing conservation programs. It can be seen that by the 30th year, about ¾ of the number of employees who will ultimately be protected will receive the full benefits of hearing conservation programs.

Introduction

Workers will derive substantial benefits from the hearing conservation amendment. The primary benefit of the amendment will be a sizable reduction in the incidence of occupational hearing impairment for U.S. workers. This reduction will substantially improve the health and quality of life of these workers. In addition, there will be possible declines in the number of workplace accidents and in the incidence of cardiovascular disease following the implementation of the amendment. The hearing conservation amendment will also create financial benefits stemming from reductions in worker absenteeism and medical costs, which will partially offset the costs of the amendment. Employers will profit by the decline in workers' absences, while workers will benefit from the reduction in medical costs. Consumers and taxpayers as a whole will gain from a reduction in the societal subsidy to medical costs. These financial benefits

furnish additional support for the amendment.

Occupational hearing loss damages the social relationships of impaired workers by hindering their ability to communicate with other workers, their families, and their friends. OSHA's hearing conservation amendment, by substantially reducing the incidence of occupational hearing loss, will improve the quality of life for these individuals since they will no longer need to endure the difficulties and hardships experienced by those who associate with impaired workers. These improvements are also benefits of this amendment.

In addition, other indirect benefits will occur. For example, audiometric testing will indicate that there are workers with non-occupationally caused hearing difficulties, thereby enabling their referral to otologists for treatment. (For an example, see Ex. 321–1, p. 2.) Monitoring will provide information on workplace noise levels that may be used by workers and their union representatives in collective bargaining negotiations concerning work conditions. However, these informational benefits are not easily quantified, and the following discussion will focus on the benefits resulting from the increased use of personal hearing protectors as required by the amendment.

The hearing conservation amendment will also lead to a more equitable distribution of the costs and benefits of industrial production. Currently, one undesirable side effect of industrial production is the loss of hearing ability among a substantial number of workers. Although workers bear this cost of industrial production, the benefits of this production are shared by firms, stockholders, and consumers, as well as by workers. One traditional principle of distributional equity is that those who benefit from an activity should share in its costs. In order to prevent occupational hearing loss, implementation of the hearing conservation amendment will impose compliance costs on firms. Depending on the particular economic circumstances of these firms, these costs may be passed on to consumers or borne by stockholders. In both cases, most workers will no longer bear the cost of occupational hearing loss, while those who share the benefits of industrial production will share the costs of preventing that loss.

Moreover, the benefits of the reduced incidence of occupational hearing loss will be experienced to a greater extent by poorer and lesser educated workers who often have little choice except to work in the noisiest and least healthful jobs. Evidence derived from a U.S. Public Health Service Survey shows that for every age group, those of lower educational attainment have a higher risk of hearing impairment than those with higher levels of education (Center for Policy Alternatives, "Some Considerations," Ex. 138A, 3–2 to 3–3). Thus, the reduced incidence of occupational hearing impairment will more than proportionately benefit those with fewer material resources.

In this section, the various benefits of the hearing conservation amendment are discussed. The primary benefit of the amendment—the prevention of occupational hearing impairment—is treated extensively by including first, an examination of the major studies in the record, second, a description of OSHA's methodology for updating the estimates of the benefits and third, a presentation of the results of OSHA's calculations. Several other effects of the amendment, including improved workplace safety, and possible reductions in cardiovascular illness, absenteeism, medical costs, and workers' compensation payments, are also discussed. Finally, although the current record lacks the information needed for a final evaluation, two possible benefits are analyzed: reduced annoyance and improved productivity.

Material Impairment of Hearing Prevented

Previous Estimates

Four major studies present in the record estimate the number of hearing impairments that would be prevented by an OSHA standard regulating occupational noise exposure. Although each has certain inadequacies, taken together they reveal that occupational noise >85 dB impairs a substantial number of workers. Based on these studies and OSHA's own calculations and analysis, presented below, the Agency has concluded that regulatory action is necessary.

Bolt, Beranek, and Newman, Inc. (BBN), a consulting firm under contract to OSHA, prepared a report entitled "Impact of Noise Control at the Workplace" (Ex. 7), which was dated January 1, 1974. They estimated, based on "informal discussions with industry spokesmen", their extensive experience conducting noise surveys, and 1973 employment data, that 8,524,000 workers (59.3 percent of the 14,382,000 production workers in 19 two-digit industries) were exposed to noise levels > 85 dB, while 3,755,000 workers (26.1 percent) were exposed to levels > 90 dB (BBN, Ex. 7, p. C–2). For demonstration purposes they assumed that 30 percent of production workers were exposed to levels > 90 dB and an additional 40 percent were exposed between 85 and 90 dB. (Ex. 7, p. D–3). Then using the risk data of Baughn, they calculated that maximum compliance with a 90 dB Permissible Exposure Limit (PEL), which they referred to as "the present standard," would reduce the number handicapped at retirement by 700,000 (25 dB fence at 500, 1000, and 2000 Hz); and that compliance with an 85 dB PEL would reduce this number by an additional 770,000.

This study formed the basis for BBN's testimony at the 1975 hearings. After those hearings, OSHA contracted with BBN for a more extensive study of workplace noise and the impact of 85 and 90 dB PEL's. The resulting study, entitled "Economic Impact Analysis of Proposed Noise Control Regulation" (Ex. 192), was released by OSHA in 1976. In it, BBN estimated that 4,468,400 workers (34.5 percent of the 12,939,300 production workers in the 19 industries studied) were exposed to noise levels > 85 dB, while 2,393,200 workers (19.3 percent) were exposed to levels > 90 dB (BBN, Ex. 192, p. 2–7).

Using dose-response relationships for noise exposure and hearing impairment developed by Baughn and the team of Burns and Robinson, BBN estimated the number of hearing impairments that would occur under a number of alternative regulations, definitions of material impairment, and assumptions concerning job mobility. They estimated that after implementation of a 90 dB PEL, between 86,400 and 875,100 workers would still be impaired (25 dB fence at 500, 1000, and 2000 Hz) while an 85 dB PEL would reduce this to between 44,400 and 631,200. Therefore, the additional impairments prevented by an 85 dB PEL would be between 42,000 and 243,900 (BBN, Ex. 192, p. 2–35). (The range of estimates was due to the use of two measures of the risk of impairment: the Burns and Robinson data for the lower bound and the Baughn data for the upper bound.)

In addition, BBN made estimates of the benefits of requiring hearing protector use in combination with the 90 and 85 dB PEL's. They did this using three different assumptions concerning hearing protector use. First, that all workers required would wear hearing protectors and three-fourths of them would wear them correctly. Second, that three-fourths of the workers required to do so would wear hearing protectors and three-fourths of them would wear their hearing protectors correctly. Third, that one-half of the workers required to

do so would wear hearing protectors and one-half of them would wear them correctly. In all cases, correct use of hearing protectors was assumed to yield a 30 dB attenuation.

Using these assumptions, BBN calculated that a 90 dB PEL for engineering controls, with hearing protector use for those exposed above 85 dB, would leave between 10,800 and 324,200 impairments after 20 years of exposure if everyone who required hearing protectors wore them. The number of impairments remaining in the workforce was larger under the second and third assumptions. For these two assumptions, the estimates of impairments remaining in the population were between 30,000 and 488,400 impairments (second assumption), and 32,900 and 634,900 impairments (third assumption) (BBN, Ex. 192, p. 2–35). Compared to the effects of a 90 dB PEL, the use of hearing protectors by those exposed above 85 dB was therefore estimated to prevent at least an additional 53,500 to 75,600 impairments (lower bound estimate based on the Burns and Robinson data) or an additional 240,200 to 550,900 impairments (upper bound estimate based on the Baughn data).

The estimates provided by BBN require updating for several reasons. First, the production work force of 12,939,300 for the 19 industries studied by BBN was based on employment data for 1975. Second, BBN calculated the benefits of noise control assuming a workforce composed entirely of 20-year-olds who would be exposed to noise for 20 years. This inaccurately depicts the effects of noise on a real work force that also contains older workers and retirees who have been exposed for more than 20 years. Third, in most cases, the number of hearing impairments was calculated for hearing thresholds greater than or equal to a 25 dB average of 500, 1000, and 2000 Hz. For reasons discussed in the Health Effects section, OSHA believes that this combination of frequencies is not the most appropriate measure of material hearing impairment and that a 25 dB average of hearing threshold levels at the frequencies of 1000, 2000, and 3000 Hz is preferable.

A third benefits estimate was performed by the Center for Policy Alternatives (CPA) under contract to the Environmental Protection Agency (EPA). Entitled "Some Considerations in Choosing an Occupational Noise Exposure Regulation," it was presented at the first hearings. Using the risk data of Baughn throughout their report, CPA estimated that present noise exposures (based on the estimates in BBN's first report and assuming no job mobility) would lead to 1,649,000 impairments (25 dB at 500, 1000, and 2000 Hz) after 40 years of exposure. They calculated that if noise exposures for all workers above 90 dB were brought down to 90 dB, the number of impairments could be reduced to 1,106,000, while if all exposures above 85 dB were brought down to 85 dB, the number of impairments could be reduced to 710,000 (CPA, Ex. 138A, p. 2–28). Thus a 90 dB PEL could prevent 543,000 hearing impairments while an 85 dB PEL could prevent an additional 396,000 impairments.

A fourth estimate of the impairments prevented by the proposed noise regulation that was submitted to the record and subjected to examination at the 1976 hearings was also performed by CPA under contract to EPA. ("Economic/Social Impact of Occupational Noise Exposure Regulations," Ex. 232). This report continued the earlier research CPA had performed for EPA (Ex. 138A). The noise exposure profile used in the second CPA report was based on the same raw exposure data that BBN had collected for their second report (Ex. 192), although the data were modified by CPA. CPA estimated that after the establishment of equilibrium, compliance with a 90 dB PEL would prevent 770,000 workers from impairment (25 dB fence at 500, 1000, and 2000 Hz) while an 85 dB PEL would prevent 1,350,000 impairments (CPA, Ex. 232, p. 5p7). Thus the additional impairments prevented by the 85 dB PEL would total 580,000.

For various reasons the CPA estimates also require updating. First, the estimates were based on 1974 employment levels rather than on the latest available data. Second, although CPA used an age distribution of the exposed population, they excluded retirees and did not distinguish between men and women. OSHA has determined that these calculations should include future retirees because they will also benefit from hearing conservation programs. In addition the calculations must distinguish between men and women because of the presbycusis differences between the sexes. Third, CPA used the frequencies 500, 1000, and 2000 Hz instead of the more appropriate 1000, 2000, and 3000 Hz. Fourth, the CPA study discussed the benefits of engineering control strategies to reduce noise levels to 90 and 85 dB, but not the benefits of hearing conservation programs that require the issuance and use of hearing protectors.

OSHA's Methodology

In order to improve upon the estimates of BBN and CPA, OSHA has decided to revise and update the calculation of the benefits of the hearing conservation amendment. The principal benefit of the hearing conservation amendment will be to prevent occupational hearing impairments through the inter-related aspects of effective hearing conservation programs. For example, monitoring provides information on the need for hearing protection and the type of protectors required. The use of these hearing protectors will reduce worker exposures. Training sessions will instruct workers in properly fitting, maintaining, and using hearing protectors. Audiometric testing detects temporary and permanent shifts in hearing ability, thereby detecting workers who are susceptible to hearing loss, identifying workers who may be wearing their hearing protectors improperly, and motivating those who would not otherwise wear them.

OSHA's estimates of the benefits of hearing conservation programs were calculated by comparing the number of hearing impairments that would occur if no hearing conservation programs exist with the number that will occur after they are established. The methodology used to estimate the benefits is derived from the studies summarized above as well as from other evidence contained in the record. Specifically, OSHA has determined that the methodology of the CPA report is more appropriate than the simpler methodology followed by BBN. BBN's methodology was based on a hypothetical work force composed of 20-year-olds, while CPA's methodology used the actual age distribution of the noise-exposed population. OSHA's calculations do, however, use the noise exposure distribution developed by BBN since it is the best available evidence on occupational noise exposures.

The benefits of preventing hearing impairment are described here by presenting (1) the number of persons prevented by hearing conservation programs from incurring material impairment of hearing after the full effects of these programs are realized, (2) the number of persons prevented from incurring material impairment of hearing at years selected from the interim time period before the full effects are realized, and (3) the accumulated person-years of impairment prevented over that time period.

People in the *current* workforce will only gain a limited benefit from the hearing conservation programs

established by this hearing conservation amendment since many of these workers have already suffered noise-induced hearing loss. The full benefits of the amendment will be realized only by workers who spend their entire working lives covered by its provisions. It will take a number of years for the current worker population to be completely replaced by people who have been covered by hearing conservation programs for all of their working lives. Over time, the number of people prevented from incurring a material impairment will rise until an equilibrium is reached after the entire pre-hearing conservation work force has been replaced. With the continued provision of hearing protectors and hearing conservation programs, this equilibrium level of impairments prevented should continue for the years following the establishment of equilibrium.

Although the benefits of preventing occupational hearing impairment are not fully realized until equilibrium is reached, benefits will accrue during the period prior to equilibrium. As the years advance, the number of workers prevented, at any one time, from having a material impairment of hearing will increase. In order to describe this progression, the number of material impairments prevented during the 10th, 20th, 30th, and 40th years following implementation were calculated and are referred to as the interim benefits of the hearing conservation programs.

These first two descriptions, the number of impairments prevented at equilibrium and the number prevented at 4 interim years, provide only views of the benefits at particular time points. These "snapshot" views fail to capture the differences in the number of impairment-free years each person has enjoyed. For example, the number of impairments prevented at the 40th interim year will include some people who have been free from impairment for 40 years, as well as some people free from impairment for as short as 1 year. In fact, as time passes after implementation, the average number of impairment-free years per impairment prevented increases.

In order to describe this pattern, OSHA has calculated the accumulated number of person-years of impairment prevented over the interim time period. The number of person-years of impairment prevented is derived by multiplying the number of impairments prevented by the number of years each individual was kept free from impairment. For example, 2 people prevented from incurring a material impairment of hearing for 10 years apiece equals 20 person-years of impairment prevented. This would also be equal to 1 person for 20 years or 4 people for 5 years.

The accumulated person-years of impairment prevented were estimated from the interim benefits using the procedures suggested and used by CPA (Ex. 232, p. B–21), and described in Appendix A of OSHA's Final Regulatory Analysis. Estimates of the accumulated number of person-years of impairment prevented were calculated for 10, 20, 30, 40, and 70 years after the implementation of hearing conservation programs. Seventy years was chosen to approximate the length of time required for equilibrium to be reached. Since these calculations were based on a population that included retirees, and since many retirees live well into their 80's, it will take at least 70 years for people in the existing workforce, who have spent some of their working lives without the benefits of hearing conservation programs, to be replaced by people who have had those benefits.

Noise Exposure Distribution. These updated hearing impairment calculations are based on the same set of 19 industries and the same noise exposure data used by BBN for their second study of the proposed regulation. (CPA used the same set of industries, but modified the exposure data.) BBN, in their economic impact analysis, presented a noise exposure distribution based on surveys of 68 different establishments in 19 two-digit standard industrial classification (SIC) industries. The industries selected by BBN were the ones believed to contain most of the noisy workplaces in the U.S. (BBN, Ex. 192, p. 2–1). These industries and the number of production workers in them during 1979 are listed in Table 3.

Note.—That the total number of workers in these industries today is about 2 million greater than BBN's 1976 estimate.

The selection of industries and establishments was based on BBN's extensive experience with industrial noise and its control. During the survey, BBN estimated the number of workers exposed to various noise levels within 5 dB ranges. Because of uncertainty in the classification of workers by exposure level, BBN adjusted the raw data by distributing one-fourth of the workers in each 5 dB range to the next highest 5 dB range and one-fourth to the next lowest 5 dB range. Although CPA judged this adjustment to be inappropriate (See Ex. 232, p. B–4), OSHA has retained it because BBN was more familiar with the raw data and its peculiarities.

Table 3.—*Industries Studied*

SIC code [1]	Industry title [1]	Production workers [2] (thousands)
20	Food	1,176.2
21	Tobacco	52.5
22	Textiles	777.0
23	Apparel	1,122.2
24	Lumber and wood	646.3
25	Furniture and fixtures	398.0
26	Paper	541.5
27	Printing and publishing	702.2
28	Chemicals	636.9
29	Petroleum and coal	139.7
30	Rubber and plastics	801.1
31	Leather	207.4
32	Stone, clay, and glass	560.5
33	Primary metals	978.3
34	Fabricated metals	1,305.9
35	Machinery, except electrical	1,816.2
36	Electrical machinery	1,378.6
37	Transportation equipment	1,404.2
49	Utilities	659.3
Total		14,904.0

[1] Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, 1972.
[2] Average number of production workers in 1979.

Source: U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, 27, (March 1980): 58–66, Table B-2.

These exposure estimates, which were published in the 1976 BBN report (BBN, Ex. 192, pp. 2–4 and 2–7) and discussed at the hearings, have been recalculated to correct minor errors in the original profile. Thus, the noise exposure profile used here differs slightly from the profile published by BBN as Table 2.1 of their report. These differences are small—no more than one-half of one percentage point for any 5 dB exposure range. This recalculation has also corrected the inconsistency of Tables 2.1 and 2.2 of the 1976 BBN report (BBN, Ex. 192, pp. 2–4 and 2–7). Except for the total percentage exposed above 85 dB, the exposure profile used here is consistent with BBN's Table 2.2. The total percentage above 85 dB differs by only one-tenth of one percentage point. (See also Table 11 in the Cost of Compliance section below.) Table 4 presents the corrected noise exposure distribution for the 19 industries.

Table 4.—*Noise Exposure Distribution*

Exposure Level (db)	Percent
Less than 80	46.88
80–85	18.74
85–90	15.06
90–95	10.98
95–100	5.47
100+	2.87
Total	100.00

Source: Bolt, Beranek, and Newman. This is a corrected version of Table 2.1 from "Economic Impact of Proposed Noise Control Regulation," Ex. 192, p. 2-4.

OSHA has chosen to use the BBN exposure estimates because they remain the most comprehensive and detailed estimates of occupational noise exposures in U.S. industry. Although these estimates were briefly criticized at the hearings (see Hearing Transcript,

Sept. 21, 1976, pp. 139–43; Sept. 22, 1976, pp. 237–42, 360–1) as well as in the post-hearing comments (Ex. 279–8, pp. 37–8, 69–72), no one came forward with another set of exposure estimates that includes both the full range of industries and the detailed exposure levels of the BBN estimates. The American Road Builders Association (Ex. 186B) and the Motor Vehicle Manufacturing Association (Ex. 242D) presented estimates limited to the specific industries in which their member companies operate. Evidence, based on samples drawn from a wider range of industries, is included in surveys by Hearing Conservation Noise Control (Ex. 240B) and NIOSH (Ex. 321–14B and Ex. 321–14D). These surveys present the number of workers exposed above either 90 or 85 dB but do not provide a detailed classification of employees by 5 dB exposure level ranges as do the BBN estimates. This classification is necessary for the matching of the exposure distribution with the risk matrices to estimate the number of hearing impairments prevented by hearing conservation programs.

OSHA has concluded that three simplifying assumptions were necessary in order to use the BBN noise exposure distribution to estimate the number of hearing impairments prevented. First, that BBN's noise exposure distribution adequately describes the occupational noise environment in the 19 industries studied, and that the 19 industries encompass all substantial occupational noise exposure. Second, that the noise exposure distribution and the size of the work force in the 19 industries will remain unchanged for the 70-year period used to calculate benefits. If there are changes in the noise distribution and the size of the work force which increase the number of persons exposed to harmful noise levels, this assumption will lead to an understatement of the number of hearing impairments prevented. On the other hand, if these changes decrease the number of persons exposed, then there will be an overstatement of the number of impairments prevented. Third, in industries with fluctuating noise levels, it was assumed that a 5 dB exchange rate adequately represents time-weighted exposure levels. The BBN data are based on a 5 dB exchange rate. The CPA report argued that these data should be adjusted to take into account a 3 dB exchange rate (CPA, Ex. 232, p. B–5).

The exchange rate or the "doubling rate" is a way of either averaging or comparing exposure levels and durations. Under a 5 dB exchange rate, for a 5 dB increase in the exposure level the exposure duration must be halved to obtain an equivalent time-weighted exposure. Thus, 8 hours of exposure to a level of 90 dB is equal to 4 hours at 95 dB. Similarly, under a 3 dB rate, an increase of 3 dB necessitates halving the duration—e.g., 8 hours at 90 dB equals 4 hours at 93 dB. Since OSHA is currently retaining the 5dB exchange rate used in 29 CFR 1910.95, and since the procedure used by CPA to adjust the BBN data does not appear to be based on actual exposure data, the Agency did not adjust the noise exposure distribution to account for a 3 dB exchange rate. This adjustment would have increased the effective exposure level of the work force and would have increased the estimated number of hearing impairments. By not performing this adjustment, OSHA may be understating the number of hearing impairments prevented by the final amendment.

Fences. The methodology used to estimate the number of people suffering impairments of hearing continues the standard practice of drawing fences to demarcate "normal" from "materially impaired" and then calculating the number of persons with hearing abilities worse than the level of that fence. An important issue is the choice of appropriate fences, both in terms of the levels used as well as the frequencies to be examined or averaged. BBN did most of their calculations using a 25 dB average of hearing threshold levels at the frequencies of 500, 1000, and 2000 Hz. However, BBN also examined the effects of choosing other levels, 15 and 35 dB, as well as an average of the frequencies of 1000, 2000, and 3000 Hz (BBN, Ex. 192, pp. 2–27, 2–28). CPA correctly pointed out that the effect of noise on a population of workers is to cause a change from one population distribution to another. They state:

> Essentially the entire population of workers has worse hearing because of the influence of noise. Those which, without noise, might have had excellent hearing are shifted so that they have less than excellent hearing. Those which without noise, would have had only fair or poor hearing have their hearing handicaps increased. (CPA, Ex. 232, p. 5–2)

Thus, the usual practice of drawing a single fence does not adequately describe the shift of the entire distribution of workers. Therefore, CPA suggested that a series of fences be employed (CPA, Ex. 232, p. 5–3). There were many other comments submitted to the record concerning the choice of appropriate fences, both for the determination of the number of workers suffering material impairment as well as for workers' compensation purposes. (For a discussion of these comments, see the Health Effects Section.) After a thorough review of these comments, OSHA has concluded that the number of hearing impairments prevented by the final amendment should be measured using the fences of 15, 25, and 40 dB. These fences are defined as the average of a person's hearing threshold levels for the frequencies 1000, 2000, and 3000 Hz. As described in the discussion on health effects, these frequencies were chosen as those most appropriate to describe the ability of persons to understand human speech under everyday conditions. The levels were chosen to describe the number of persons with various degrees of hearing loss: mild hearing loss, material impairment, and moderate to severe impairment.

Dose-Response Relationship. A person's hearing ability can be estimated by analyzing two components: the loss in hearing ability due to noise and the loss in hearing ability due to the effects of aging (presbycusis). The following discussion will focus on these two components, presenting OSHA's arguments concerning the best available and most appropriate evidence for each.

The change in hearing ability due to noise exposure is measured in terms of the permanent decibel shift in hearing thresholds caused by noise. This change, the amount of lost hearing ability, is more commonly called the Noise-Induced Permanent Threshold Shift or NIPTS. An examination of the hearing loss studies cited in the Health Effects section reveals a fair degree of consistency in their basic findings concerning the amount of NIPTS caused by various combinations of exposure levels and durations. One way to incorporate all of the information in these studies is to average the results. Col. Daniel Johnson has recommended such an approach (Ex. 17, p. 2) and EPA has applied it to the data of Baughn, Burns and Robinson, and Passchier-Vermeer both for establishing criteria for noise regulation (Ex. 26–3) and for identifying safe levels of noise exposure (Ex. 30, p. C–5). Recently Col. Johnson published a variety of calculations, based on averaging the data of Burns and Robinson (referred to only as "Robinson" by Johnson) and Passchier-Vermeer (Ex. 310).

OSHA has chosen to use the studies of Burns and Robinson and Passchier-Vermeer because of the completeness of their data for describing the NIPTS at frequencies from 500 to 6000 Hz for various population percentiles, noise levels, and exposure durations. Baughn's data (Ex. 11) were not available for individual frequencies, thus preventing

the averaging of hearing threshold levels at 1000, 2000, and 3000 Hz. The NIOSH data (Ex. 26–2) were limited to exposures of 85, 90, and 95 dB, thus preventing the estimation of hearing loss for exposures to 80 and 100 dB.

OSHA has determined that the results of the Burns and Robinson and Passchier-Vermeer studies can be strengthened by averaging the NIPTS values from each. Because Johnson's recent publication, *Derivation of Presbycusis and Noise Induced Permanent Threshold Shift* (Ex. 310), provides a convenient presentation of this data, OSHA has used it as the basis for the calculation of the number of occupational hearing impairments. Table A.7 in Appendix A of OSHA's Final Regulatory Analysis presents the NIPTS values, derived from the Johnson publication, which were used by OSHA.

The second component that determines a person's hearing ability is calculated by observing the hearing ability of a "normal" population, and making adjustments to account for the effects of aging (presbycusis) on hearing ability. For this study, OSHA has used a presbycusis base developed by Johnson from the data of the U.S. Public Health Survey conducted in 1960–62. In this survey, 6,672 persons aged 18–79, drawn from the civilian, non-institutional population of the U.S., were given audiometric examinations. Thus, the survey gives a detailed picture of the actual hearing ability of the U.S. population. Other researchers, most notably Burns and Robinson, have screened their populations quite severely in order to eliminate all individuals who have been exposed to gunfire, or had ear disease, or other ear abnormalities. These screening techniques were designed to create a population that is otologically "normal."

But the actual work force is not otologically "normal." Some workers have been exposed to gunfire, both from sport shooting and from service in the armed forces. Other workers have or have had ear disease or other ear abnormalities. OSHA has therefore decided that the presbycusis base to use in calculating the number of hearing impairments in the work force should reflect, as closely as possible, the real world hearing ability of the U.S. population. The Public Health Survey represents the best available description of this hearing ability. An examination of the aging curves in Baughn (Ex. 12, p. 26) and Berger, Royster, and Thomas (Ex. 266A, pp. 42, 43, and 57) reveals that the data of the Public Health Survey are consistent with other major presbycusis bases.

The two components, the NIPTS and the presbycusis, may then be added together to find the total hearing loss for populations of given ages and sexes exposed to specified levels and durations (See Johnson's discussion, Ex. 310, p. 16). Johnson has provided a convenient computer program (Ex. 310, pp. 43–47) which was used to generate dose-response relationships. A simple linear interpolation was used to match the exposure distribution with these dose-response relationships to create the risk matrices (Tables A.9, A.10, A.11 in Appendix A of OSHA's Final Regulatory Analysis) used in the calculation of the number of hearing impairments.

Hearing Protector Use and Attenuation. Under the current noise standard, hearing protector use is mandatory for workers exposed above the PEL (90 dB TWA) where there are no feasible engineering or administrative controls. Under the amendment hearing protectors must also be provided to all workers exposed to noise levels between 85 and 90 dB, but of these workers only those who have experienced a significant threshold shift are required to wear hearing protectors. It is impossible to project accurately the number of workers exposed to noise between 85 and 90 dB who would voluntarily choose or be required to wear hearing protectors, but it is probable that the annual audiometric test will identify, by showing significant threshold shifts, the employees most vulnerable to occupational hearing loss. These employees will then be required to use hearing protectors, which should prevent most of them from incurring a material impairment of hearing. Thus, the following calculations are based on the assumption that following the implementation of this amendment, all workers who are vulnerable to occupational hearing loss will wear hearing protectors when exposed to noise >85 dB.

The CPA report did not present any assumptions concerning hearing protector use or attenuation. BBN assumed for correct usage, an attenuation value of 30 dB (BBN, Ex. 192, p. 2–34). As the following studies indicate, this is an attenuation that is generally achieved only in laboratory settings.

In a NIOSH-sponsored study (*A Field Investigation of Noise Reduction Afforded by Insert-Type Hearing Protectors*, Ex. 308), a team of researchers investigated the attenuation received by workers using various types of hearing protectors in actual industrial settings. The three earplugs tested had median attenuation values of 7.5, 10.0, and 12.8 dB (Ex. 308, p. 26). Padilla's study revealed an overall mean attenuation of 12 dB at 500 Hz for the earplugs he tested. He estimated that this was equal to approximately 7 dB over the frequencies 125–8000 Hz. ("Ear Plug Performance in Industrial Field Conditions," Ex. 301, p. 34). Regan found mean attenuation values of 25.11 and 19.74 dB for two types of earplugs and 33.04 dB for one type of earmuff (*Real Ear Attenuation of Ear Protective Devices Worn in Industry*, Ex. 300A, pp. 67–71). In addition, Berger presents information from the National Acoustic Laboratories (Australia) for four different earplugs. For these earplugs, the Noise Reduction Rating with a correction of two standard deviations ranged from 0–14 dB, while with a correction of one standard deviation the range was 9–19 dB ("Laboratory Estimates of the Real World Performance of Hearing Protectors," Ex. 321–35E).

The results of these studies reveal, for the earplugs tested, a mean attenuation of approximately 10–15 dB in industrial settings. It is reasonable to assume that the training and audiometric testing provisions of the hearing conservation amendment will improve industrial hearing conservation programs to at least maintain the upper bound of this average attenuation range. Moreover, those exposed to very loud workplace noise can use earmuffs or a combination of earmuffs and earplugs. These two options appear to have a higher attenuation rating than the earplugs tested in the studies mentioned. Accordingly, for the purposes of these calculations, OSHA has concluded that a reasonable assumption is that workers using personal hearing protection will receive an attenuation of 15 dB.

Mobility. The OSHA calculations were based on the assumption that workers do not move between jobs with harmful noise exposures and jobs without such exposures. Both BBN and CPA generally assumed such mobility to calculate the number of material hearing impairments. However, they used different procedures and assumptions concerning the effect of mobility on the number of material impairments in the population and the number that would benefit from reduced occupational noise exposure. BBN's calculations suggest that assuming mobility reduces the number of additional workers protected by controlling noise levels to 85 dB. (BBN, Ex. 192, Table 2.11, p. 2–30). CPA, on the other hand, argued that an assumption of mobility dramatically increases both the estimated number of

material impairments in the pre-regulation population and the number of impairments that would be prevented by regulatory action (Ex. 232, p. 5–8. See also discussion at the hearings by CPA: Hearing Transcript, Oct. 8, 1976, pp. 2286–92, 2343–9, 2354–8 and BBN's reply in their Post-Hearing Comments, Ex. 278, pp. 60–65).

Occupational mobility has two separate, contradictory effects. First, mobility from jobs with harmful noise exposures to jobs without such exposures means that each individual worker will be exposed to harmful levels of noise for a shorter length of time because he or she will not have spent an entire lifetime exposed to harmful levels of occupational noise. This shortened duration of exposure lowers a worker's chance of suffering an occupational hearing impairment as well as the amount of lost hearing ability, and thus would tend to reduce the number of impairments in the entire population. The second effect of mobility, however, is to increase the population exposed to harmful noise levels, even though for shorter periods of time. This increase in the population at risk will tend to increase the number of occupational hearing impairments.

CPA has calculated that, on the average, workers hold three different jobs during their lifetimes. If one assumes that during one of these jobs they will be exposed to harmful occupational noise levels and that the other two jobs have no such noise exposure, then the total population at risk will be increased threefold. (The noise exposure distribution indicates that approximately one-third of the jobs in the 19 industries have noise exposures >85 dB; while two-thirds have exposures less than this. See Table 4.) In order for there to be no difference in the estimated number of hearing impairments when comparing the assumptions of mobility and no mobility, this threefold increase in the number of workers must be matched by a two-thirds decrease for each worker in the percentage risk of crossing a fence. If the decrease is less than two-thirds, then mobility will increase the number of impairments. If it is more than two-thirds, then mobility will decrease the number of impairments.

CPA calculated, using the equal energy rule (the 3 dB exchange rate), equivalent lifetime exposure levels for workers holding one job with harmful noise exposures and two jobs without such exposures during a working lifetime. This calculation reveals that the maximum reduction in a worker's lifetime exposure level with an assumption of three jobs per worker is about 5 dB for exposures >90 dB, 4 dB for exposures of 85–90 dB, and 3 dB for exposures of 80–85 dB (CPA, Ex. 232, Table B–6, p. B–14). An examination of the risk matrices (Tables A.9, A.10, A.11 in Appendix A of OSHA's Final Regulatory Analysis) shows that these reductions in lifetime exposure levels lead to a decrease of less than two-thirds in the percentage risk. Therefore, the decrease in the percentage risk is more than matched by the increase in the population at risk due to mobility. Thus, even though an individual's risk of impairment declines from the shortened exposure duration, the increase in the number of persons at risk leads to an increase in the total number of impairments in the population.

Accordingly, the Agency concurs with the judgment of CPA that an assumption of mobility will increase the estimated number of material impairments in the noise-exposed population and therefore will increase the estimated number of impairments prevented by the regulation. As CPA also argued, this effect occurs whenever workers move between jobs with and jobs without harmful noise levels and is intensified by increasing the assumed number of jobs per worker (CPA, Ex. 232, p. 5–8). This effect follows from the shape of the dose-response curve for noise, which is such that the first exposure to noise is more damaging than successive increments of exposure (Hearing Transcript, Oct. 8, 1976, p. 2357).

However, the current record does not contain sufficient information on the current pattern of occupational mobility for the industries under study to enable OSHA to update the hearing impairment calculations using a specific mobility rate. Therefore, OSHA has assumed that no mobility occurs. Since such mobility does take place, this assumption will lead to an understatement of the estimated number of material impairments in the population as well as to an understatement of the number of hearing impairments prevented by the final hearing conservation amendment.

Results of OSHA's Calculations

Occupational hearing impairment is a function of age, sex, exposure level, and exposure duration. OSHA's methodology for calculating the number of material impairments incorporates these functional relationships.

The six basic steps used to calculate the number of material impairments prevented by the hearing conservation amendment were:

1. Develop an age distribution,
2. Develop an age by exposure level distribution,
3. Adjust exposure levels for the use of hearing protectors,
4. Develop a sex distribution and combine with the age by exposure level distribution,
5. Calculate the number of hearing impairments from all causes,
6. Determine the number of occupational hearing impairments.

These six steps, as well as the procedure used to estimate the interim benefits of the regulation, are described in detail in Appendix A of OSHA's Final Regulatory Analysis. It should be noted that OSHA's procedure uses an age distribution that includes retired workers, as well as incorporating a distribution of the work force by sex, thus improving upon two deficiencies of previous studies.

The benefits of the hearing conservation amendment will accrue primarily to future populations of workers, slowly reducing the number of material impairments in these populations until an equilibrium is reached. The results of these calculations show that 1,060,000 individuals currently have crossed a 25 dB fence (1000, 2000, and 3000 Hz) due to occupational noise. Hearing conservation programs are expected to reduce this number to 848,000 persons 10 years after implementation; 583,000 in 20 years; 364,000 in 30 years; 261,000 in 40 years; and 162,000 at equilibrium (See Appendix A of OSHA's Final Regulatory Analysis, Table A.15). In each of these years, the number of hearing impairments which would have existed in the absence of hearing conservation programs remains constant at 1,060,000.[2] Consequently, the number of hearing impairments prevented by hearing conservation programs can be calculated by subtracting the number that will exist in any of the years from the 1,060,000 impairments that would have existed. Hearing conservation programs, therefore, are expected to reduce the number of hearing impairments (25 dB fence) by at least 212,000 in the 10th year after implementation; 477,000 in the 20th year; 696,000 in the 30th year; 799,000 for the 40th year; and 898,000 at equilibrium (See Table 5). The reduction of 898,000 impairments at any one time after the establishment of equilibrium represents 84.7 percent of the occupational impairments that would have occurred without hearing conservation programs.

In addition, OSHA has calculated the number of individuals with hearing impairments at any one time after the

[2] This is based on the assumption of a constant size for the work force exposed to noise, as discussed above.

establishment of equilibrium for two other fences—15 dB and 40 dB at 1000, 2000, and 3000 Hz. These calculations reveal that without hearing conservation programs, 1,624,000 people will be across a 15 dB fence, and 473,000 will be across the 40 dB fence due to occupational noise exposure. Hearing conservation programs for those exposed to levels >85 dB are expected to reduce this to 321,000 across the 15 dB fence, and 59,000 across the 40 dB fence (Table A.13 of OSHA's Final Regulatory Analysis). Thus after the establishment of equilibrium, these programs can be expected to reduce the number of persons across the fences by 1,303,000 for the 15 dB fence, and 412,000 for the 40 dB fence (See Table 5), reductions of 80.2 percent, and 87.1 percent, respectively.

Table 5.—*Hearing Impairments Prevented by the Hearing Conservation Amendment*

	Years after implementation				Equilibrium
	10	20	30	40	
Number of impairments prevented:					
15 dB Fence					1,303,000
25 dB Fence	212,000	477,000	696,000	799,000	898,000
40 dB Fence					412,000
Accumulated person-years of impairment prevented:					
25 dB Fence	1,060,000	4,505,000	10,370,000	17,848,000	43,300,000

Source: OSHA, Office of Regulatory Analysis

Finally, the number of person-years of impairment prevented can be calculated. (The procedure used follows that of CPA, Ex. 232, and is described in Appendix A of OSHA's Final Regulatory Analysis.) In the 70 years following implementation of the amendment, the total accumulated person-years of prevented impairment is 43.3 million. The pattern of this accumulation is presented in Table 5.

Two conclusions follow from these data: First, without hearing conservation programs, a large number of workers will suffer hearing impairment and reduced hearing ability. Therefore, OSHA has determined that workers who are exposed to occupational noise >85 dB (TWA) face a significant risk of material impairment. Second, hearing conservation programs for all workers exposed to >85 dB (TWA) will substantially reduce that risk.

Full Compliance Assumptions

In keeping with past practice concerning the preparation of economic analyses of OSHA regulations, full compliance with the hearing conservation amendment, including 100 percent usage of hearing protectors, has been assumed. For a variety of reasons, this may not occur. Many workers cannot or will not wear hearing protectors. Workers with irregularly shaped or infected ear canals cannot wear ear inserts. Similarly, persons needing to wear either prescription or safety glasses often cannot wear ear muffs because the frames of the glasses will break the seal the muff makes around the ear. More often, hearing protectors will not be worn because they are uncomfortable. Workers have complained about headaches, claustrophobia, and general discomfort from the use of ear protectors. In addition, the use of earplugs may lead to ear infections, especially in dirty workplaces.

Full compliance with this amendment will have substantial benefits. Partial compliance will also provide benefits, although not to the same extent. Moreover, the estimated attenuation of 15 dB after regulation may also be an overestimate of the benefit achieved from the use of hearing protectors. In order to provide this attenuation, hearing protectors must be fitted carefully, worn properly, maintained conscientiously, and replaced in a timely fashion. As illustrated in Table 6, if all workers who are required to do so wear hearing protectors, if they receive a 15 dB attenuation, and if they wear their hearing protection every day that they are exposed to noise, then the total pool of material hearing impairment from occupational causes (at equilibrium) will be reduced by 898,000 persons. If only 10 dB of attenuation is achieved, the number of material impairments prevented falls to 759,000. However, if only 50 percent of workers exposed above 85 dB receive 10 dB attenuation and the remaining 50 percent do not wear ear protection, then the reduction in the number of impairments declines to 381,000. The effectiveness of hearing conservation programs is therefore very dependent on the attenuation that hearing protectors provide and their daily use by all workers.

Table 6.—*Sensitivity Analysis for Assumptions on Hearing Protector Use and Attenuation*

Assumption	Number of occupational impairments prevented[1]
100% of workers required[2] wear hearing protectors and receive 15 dB attenuation	898,000
100% of workers required[2] wear hearing protectors and receive 10 dB attenuation	759,000
50% of workers required[2] wear hearing protectors and receive 10 dB attenuation	381,000
No hearing protector use	0

[1] Hearing threshold levels >25 dB average of 1000, 2000, and 3000 Hz. Data are for equilibrium.
[2] All workers exposed to levels >90 dB after feasible engineering and administrative controls have been implemented and all workers exposed >85 dB who have shown a permanent significant threshold shift.

Source: OSHA, Office of Regulatory Analysis.

These calculations of the number of impairments prevented are also based on the assumption that workers exposed above 85 dB do not currently use hearing protectors. However, the current OSHA standard for noise does require the use of hearing protectors by workers exposed to levels above the PEL of 90 dB (TWA) and the establishment by each employer of a "continuing, effective hearing conservation program" for these employees (29 CFR 1910.95(b)(3)). Moreover, there is evidence in the record to suggest that some employees currently do wear hearing protection and that some companies have established hearing conservation programs. (The BBN exposure estimates were based solely on the use of non-use of engineering controls. The use or personal hearing protectors was not factored into their estimates.)

But the effectiveness of these programs and the length of time they have been in operation is less clear. Submissions by Newport News Shipbuilding (Ex. 131), Dupont (Ex. 273A), and Burlington Industries (Ex. 175) describe hearing conservation programs for three large companies that appear to be effective. But one cannot reasonably conclude that all companies with workers exposed to levels greater than 90 dB are maintaining such programs. A NIOSH study revealed that only 29 percent of the manufacturing respondents had such programs, while another 20.1 percent were planning such programs. Most of those without

programs or plans claimed no noise problems (Ex. 321–14B, p. B–3). This study also included the testing of equipment used by 65 companies with hearing conservation programs. These tests revealed that 80 percent of these companies were not in compliance with at least one of the then existing ANSI specifications for audiometers and audiometric test booths (Ex. 321–14B, p. 55).

Based on data from NIOSH's National Occupational Hazard Survey (Ex. 321–14D), it is reasonable to conclude that up to 20 percent of those exposed to greater than 90 dB currently wear hearing protectors. The lack of adequate audiometric testing, monitoring, and training activities, however, make it less likely that a 15 dB attenuation would be achieved. A more reasonable estimate of the current attenuation would be 10 dB, which is the lower bound of the average attenuation range revealed in several studies on the real world attenuation of hearing protectors. (See discussion above.) OSHA has calculated, using the procedures and assumptions detailed in this section and in Appendix A of OSHA's Final Regulatory Analysis, that the effect of this current hearing protector use would ultimately be a reduction of 120,000 material impairments (25 dB fence) from the 1,060,000 that would continue to exist at any one time in the absence of hearing protector use.

OSHA anticipates that fully effective hearing conservation programs for all workers exposed to levels greater than 85 dB would prevent 898,000 impairments after the entire population has worked with hearing conservation programs in effect. Thus, the incremental or additional benefits due to the hearing conservation amendment will be the difference between these benefits and the 120,000 impairments expected to be prevented by existing programs. The final hearing conservation amendment, therefore, is estimated to prevent 778,000 material impairments over and above the number expected to be prevented by current hearing conservation programs. (These 778,000 impairments prevented consist both of workers exposed to levels >90 dB who are not currently receiving hearing protection as well as those exposed between 85 and 90 dB who will benefit from hearing conservation programs for the first time.)

This discussion on the benefits of preventing hearing impairment has shown that there are substantial benefits to be gained from reducing workplace noise exposure by 15 dB for those exposed above 85 dB. It was assumed in this discussion that the reduction of noise exposures would be achieved through the use of personal hearing protectors. However, that reduction could also be achieved by engineering controls, including the redesign of machinery and the construction of baffles to impede the transmission of sound energy. Engineering controls provide more consistent and dependable protection to worker hearing than personal hearing protectors and are still preferred by OSHA.

Improved Workplace Safety

A second benefit of the hearing conservation amendment is improved workplace safety. The presence of untreated workplace noise can increase the number of accidents because (1) noise can mask warning signals or shouts, and (2) noise exposure might lead to inattentiveness and fatigue, both of which may precipitate accidents. Edith Gulian's summary of studies in the European literature revealed no clear consensus on the relationship between noise and accidents. One study found no relationship, while two others concluded that noise may have contributed to accidents (Gulian, Ex. 97, p. 60). Two other studies in the record, by examining the job safety records of workers before and after the institution of hearing conservation programs, showed a statistically significant reduction in the number of accidents and injuries occurring after the initiation of hearing conservation programs.

Schmidt, Royster, and Pearson (Ex. 321–22F) studied a cotton yarn plant where a hearing conservation program requiring the use of hearing protectors was instituted in 1972. Using a statistical technique by which each worker serves as his or her own control, the researchers compared the mean number of injuries in the 4-year period prior to the hearing conservation program to the 4-year period following institution of the hearing conservation program for two groups of employees exposed to noise levels of 92–96 dB. The results showed a statistically significant reduction in reported injuries.[3] For one group, the reduction in the mean injury rate was from 0.4 to 0.2 injuries per year, or by about 50 percent; for the other group, the reduction was from 0.5 to 0.3 injuries per year, or by about 40 percent (Schmidt, et al., Ex. 321–22F, p. 22).

A second study was performed by the Raytheon Service Company under contract to NIOSH (Ex. 26–11). The researchers studied the records of a boiler fabrication plant for the 2-year period before the initiation of a hearing conservation program and the 2-year period after program initiation. The results of this study showed a statistically significant [4] reduction in the number of accidents among workers exposed to noise levels >95 dB after the initiation of the hearing conservation program. The median frequency of accidents was reduced from 3.8 to 2.3 accidents per worker per year, or by 39.5 percent (Raytheon, Ex. 26–11, pp. 3–5 to 3–6).

Information from the Bureau of Labor Statistics shows that annually there are about 2,474,000 reported occupational injuries in the 19 industries in this noise study, of which about 1,052,900 are lost workday cases (Bureau of Labor Statistics, *Occupational Injuries and Illnesses in 1978: Summary*, March 1980, Report 586, Table 3, pp. 12–13). If these accidents are distributed evenly among all workers in these industries without regard to noise exposure, then approximately 851,000 total cases and 362,000 lost workday cases could occur each year for those exposed above 85 dB (TWA) [2,474,000 injuries × 34.4 percent (workers exposed>85 dB)=851,056; 1,052,900 lost workday cases × 34.4 percent=362,198]. Similarly, there are 477,000 total cases and 203,000 lost workday cases among those exposed above 90 dB (TWA) [2,474,000 injuries × 19.3 percent=477,482; 1,052,900 lost workday cases x 19.3 percent=203,210]. The Schmidt, Royster, and Pearson study, and the Raytheon study together reveal that the initiation of hearing conservation programs may reduce this yearly toll of accidents.

The reduction in the number of accidents, beside improving the quality of worker lives, may also provide financial benefits to employers by reducing the costs of accidents. These costs include administrative and legal fees, safety administration, damage to equipment, loss of productivity, supplements to workers' compensation payments, and lost income due to inefficiency of replacement personnel. Robert Sharkey, Safety Administrator for Alcoa, estimates that these costs total $14,000 per lost-workday case. (See Peter J. Sheridan, "What Are Accidents Really Costing You?" *Occupational Hazards*, March 1979, pp. 41–43.)

Extra-Auditory Health Benefits

As described in the Health Effects section, there is a wealth of evidence suggesting a link between noise

[3] Statistical significance refers to the probability or confidence, based on laws of probability and statistics, that the decline in the number of accidents was not due solely to chance. In this case, the confidence level was 99.9 percent.

[4] 99 percent confidence level.

exposure and ill effects, including cardiovascular, respiratory, allergenic, musculo-skeletal, and glandular disorders. However, because precise dose-response relationships have not yet been developed OSHA has not attempted to quantify these benefits. One example does reveal the magnitude of the occurrence of cardiac disease in the U.S. today. The current rate for deaths due to heart disease for those between 45 and 64 years old is 536.7 per 100,000 (Bureau of the Census, *Statistical Abstract of the United States*, 1979, p. 77, Table 111). If this rate applies to the 4,984,000 workers aged 45–64 in the 19 industries, then approximately 27,000 will die of heart disease annually. By reducing noise exposure, the hearing conservation amendment may help to prevent some of these premature deaths.

Reduced Absenteeism

The reduction in noise exposures due to hearing protector use should reduce the number of noise-induced illnesses and could also lead to better worker attitudes towards their jobs, thus improving both attendance records and job performance. In both cases, employers, firms, and consumers would benefit from increased output and reduced costs. The Raytheon study (Raytheon, Ex. 26–11) found that the median number of absences for the group exposed to >95 dB fell by 12.4 days per year after initiation of a hearing conservation program. This was a reduction of about 83 percent from the preconservation program level of absences (Raytheon, Ex. 26–11, p. 3–177).

Several studies of the economic impact of the proposed regulation placed a monetary value on the expected reduction in absenteeism. CPA, in their first study, assumed a reduction in absenteeism of 1 day per year per worker exposed over 85 dB. This was calculated to provide an estimated benefit of $2 billion per year (CPA, "Some Considerations," Ex. 138A, p. 2–55). In their second study, CPA used a more complex methodology based on information from the Raytheon report concerning the reduction in the average number of days absent. CPA calculated the value of lost production based on lower and upper bounds—i.e., average production worker wages and value added per production worker. Based on 1975 dollars, CPA estimated that the value of improved worker attendance for an 85 dB PEL would be between $341.04 million and $1.2484 billion per year (CPA, "Economic/Social Impact," Ex. 232, p. 5–28). A third estimate of the value of absenteeism savings was performed by the Council on Wage and Price Stability (COWPS). Although not based on any empirical studies, COWPS assumed that an 85 dB PEL would reduce absenteeism by 1 day for those previously exposed to 85–90 dB and by 2 days for those exposed above 90 dB. COWPS calculated the savings by multiplying the number of person-days saved by the average daily wages of manufacturing workers, including an estimate of the costs for turnover and new worker training. Finally, COWPS concluded that controlling noise exposures to 85 dB would produce a benefit of $271.7 million per year (COWPS, Ex. 206, p. 19).

After a review of these estimates, OSHA has concluded that the best estimates are provided by the methodology used by CPA in their September 1976 report, which was based on information from the Raytheon study. OSHA has chosen to reestimate the absenteeism benefits by updating the CPA calculations for the increase in the size in the labor force and changes in wage rates since 1976. For this update, OSHA has used only the wage rate to estimate the value of production lost from absenteeism. These calculations, which assume that hearing conservation programs will reduce exposures to below 85 dB for those exposed at 90 dB and above, follow the CPA methodology. First the total number of worker-days of absenteeism prevented were calculated by using the number of workers exposed to noise >90 dB and the number of days of absenteeism saved according to the CPA presentation of the Raytheon data (See CPA, Ex. 232, p. 5–25). The equation used was: 1.243 million workers exposed >95 dB × 3.9 days saved per worker + 1.636 million workers exposed to 90–95 dB × 1.55 days saved per worker = 7.384 million worker-days saved. The value of the production gain from reduced absenteeism was then estimated using the 1979 average wage rate in the 19 industries (See *Employment and Earnings*, 27, 3, March 1980, Table C–2.). Thus, 7.384 million worker-days saved × 8 hours per day × $6.76 per hour = $399.3 million. This gain of about $400 million per year from reduced absenteeism will benefit employers by partially offsetting the costs of hearing conservation programs and feasible engineering and administrative controls.

Reduced Medical Costs

Workers, and also society, indirectly through third party medical payments, will benefit financially through reduced medical costs. Although in most cases noise-induced hearing loss is untreatable and irreversible, there still is a drain on medical resources—principally professional time—used to reach those diagnoses. In addition, there is the purchase of prescribed hearing aids in the minority of cases for which hearing aids can help, as well as the hearing aids purchased by workers vainly hoping for a cure. In all three cases, social resources are consumed. The prevention of occupational hearing impairments will free those resources for other uses.

Ideally, the magnitude of this loss could be quantified. However, the current noise record does not include either estimates of this loss or information from which estimates could be calculated. Because of this lack of information, OSHA has not attempted to quantify these savings, although preventing 898,000 hearing impairments should lead to a substantial reduction in medical costs.

Reduced Workers' Compensation Payments

Two estimates of the anticipated reduction in workers' compensation payments for occupational hearing loss are contained in the record. BBN estimated that the *additional* workers' compensation liability saved by reducing noise exposures to 85 dB would be $16.097 million (BBN, Ex. 192, p. 2–38). This is the additional savings, comparing a 90 dB with an 85 dB PEL, not the total reduction expected from the implementation of hearing conservation programs. CPA made an estimate of the *total* potential workers' compensation payments that a noise regulation might save. They calculated that the present value of the stream of potential savings for an 85 dB PEL over the next 40 years would be $530 million (CPA, Ex. 232, p. 5–34).

But any of these estimates is speculative since hearing impairment is often not compensated. Over 70 percent of manufacturing workers in the U.S. live in states that pay few or no hearing impairment claims (EPA, *Occupational Hearing Loss: Workers' Compensation under State and Federal Programs*, Ex. 321–16C, p. viii). EPA estimates that in 1977, 6,095 claims totalling approximately $13 million were paid for occupational hearing loss. This figure could change considerably in the future because the number of claims filed has been increasing dramatically (EPA, Ex. 321–16C, pp. 14–15).

It has been pointed out that an estimate of reduced workers' compensation payments cannot be directly added to the other benefits described in this section. As COWPS testified:

Although a reduction in workmen's compensation payments is a benefit to employers who no longer have to pay workmen's compensation premiums, it represents an almost equal and offsetting cost to workers who no longer receive such payments. (COWPS, Ex. 208, pp. 7–8)

In other words, workers' compensation payments are transfer payments from employers to impaired workers. The true social cost is the incidence of occupational hearing impairment and the various other ill effects of noise; the true social benefit is the reduction in the number of hearing impairments and ill effects.

Annoyance

Several of the studies in the record quantified the benefit of reduced annoyance from noise exposures. (See CPA, "Some Considerations," Ex. 138A, pp. 2–55 to 2–59; Smith *The Occupational Safety and Health Act*, Ex. 261A, pp. 46–52; COWPS, Ex. 208, pp. 17–18.) Although these calculations provide interesting information, they primarily apply to the benefits of using engineering controls to reduce noise exposures. The use of hearing protectors to achieve noise reductions will not create the full value of these benefits, because hearing protectors also create disutilities, especially worker discomfort, for those who must wear them. Thus, the benefits of less annoyance due to lowered noise levels are likely to be considerably reduced by this disutility although there are no data in the record enabling OSHA to make a more precise determination.

Worker Productivity

The hearing conservation amendment may also improve the productivity of workers exposed to high levels of noise. There are two possible mechanisms for this: (1) through improvements in conscious worker attitudes towards their jobs, and (2) through subconscious reductions in psychological and physiological stress. The hearing conservation amendment will improve the quality of worker lives by preventing occupational hearing loss and by reducing the incidence of other noise-induced illnesses. These improvements in the quality of life may improve worker attitudes towards their jobs, thus leading to increases in the quantity and the quality of goods and services they produce. The reduction of noise exposures through the issuance and use of hearing protectors may also improve worker performance even if it does not improve conscious worker morale. In particular, workers may still hold the same attitudes towards their jobs, but may be more productive because of a reduction in the subconscious psychological and physiological stress experienced by workers exposed to workplace noise.

In both cases, employers, workers, and consumers would benefit financially. The increased production and improved product quality would benefit employers by offsetting, at least partially, the cost of the amendment. To the extent that the increases in output and improvements in quality increase the productivity of labor inputs, workers could be able to gain improvements in wages and fringe benefits. Finally, consumers would benefit from the increase in the quantity and quality of output. This increase would enable them to purchase an increased quantity at existing prices or continue to purchase the existing quantity but at reduced prices.

Thus, one can reasonably believe that reductions in noise exposure with the use of hearing protectors could, through improved worker morale and reduced subconscious stress, improve worker productivity and lead to financial benefits for employers, workers, and consumers. However, the empirical literature summarized in submissions to the noise record does not provide enough data to confirm or reject this.

In their criteria document on occupational exposure to noise, NIOSH reviewed some of the literature on the effect of noise on job performance (NIOSH, *Criteria for a Recommended Standard*, Ex. 1). NIOSH discovered that the effect of noise appears to be quite variable depending on the type of noise, the nature of the job, and the attitudes of the person affected. It also appeared that impulsive noise (recurring bursts of noise of high intensity) and intermittent noise (on and off exposures) create greater performance losses than continuous noise. The nature of the job is also important—jobs which require "unremitting attention" or "which place extreme mental demands on the employee" appear to be the most vulnerable to decrements in employee performance under noise exposures. For simple, repetitive tasks, performance may be enhanced by the presence of low to moderate levels of noise. Finally, it appears that certain attitudes and personality factors influence the effect noise has on task performance. Tense, anxious individuals, as well as those already dissatisfied with their jobs may be less able to perform productively under noisy conditions than other persons (NIOSH, *Criteria for a Recommended Standard*, Ex. 1, pp. IV–13 to IV–16).

EPA and Edith Gulian drew similar conclusions from their reviews of the literature. EPA concluded that continuous noise levels above 90 dB can impair job performance for "noise sensitive tasks," such as vigilance, information gathering, and analytical tasks. Noise levels of less than 90 dB can be disruptive, especially if the noise is composed of high frequencies, or if it is "intermittent, unexpected, or uncontrollable." The amount of this disruption is a function of the nature of the task, and the psychological and physiological state of the individual. The studies surveyed showed that noise does not usually affect the total quantity which a person produces, but may increase the variability of the work rate and reduce the accuracy of the work (EPA, *Public Health and Welfare Criteria for Noise*, Ex. 31, pp. 8–1 to 8–7). Gulian's survey of the European literature found several studies which indicated increased production with reduced noise exposures, but concluded that the literature was inconclusive on the effects when noise levels were lower than 100 dB, although under certain conditions lower levels have shown adverse effects on productivity (Gulian, Ex. 97, pp. 18–20).

Many of these studies involved testing the ability of persons to perform certain experimental tasks under laboratory conditions and not actual jobs under industrial working conditions. Moreover, the studies mentioned above investigated primarily the effects of noise on performance. They did not examine what effect the issuance and use of hearing protectors might have on job performance.

One study that did examine the effect of hearing protectors indicates that the issuance and use of hearing protectors may have an adverse effect on productivity. This study, by L. R. Hartley (cited by CPA, "Some Considerations," Ex. 138A, pp. 2–45 to 2–46), examined the ability of test subjects to perform a laboratory task under four conditions: quiet, quiet while wearing hearing protectors, noisy, and noisy while wearing hearing protectors. Under quiet conditions, subjects were exposed to broad-band noise at a C-weighted sound level of 70 dB; for noisy conditions exposures were at a C-weighted sound level of 95 dB. The researcher used two measures of subject performance—the number of gaps (pauses of 1½ seconds) and errors. The results revealed that without hearing protectors, exposure to noisy conditions increased both the number of gaps and the number of errors compared to the quiet conditions. When the subjects were exposed to conditions of quiet, the use of hearing protectors increased the number of gaps and

errors. Finally, under noise conditions, the use of hearing protectors decreased the number of gaps, but increased the number of errors. CPA concluded their discussion of this study by suggesting that these results:

> . . . tend to give added support to the preference of OSHA, NIOSH, and EPA for engineering solutions to noise, rather than personal ear protection. The widely-observed resistance of workers to the discomfort and annoyance of at least some ear protectors increases the probability that their imposition may sometimes have negative effects on the quality, if not the quantity of industrially-produced goods (CPA, "Some Considerations," p. 2-46).

A final determination of the effect of noise and hearing protector use on productivity awaits the completion of further research. Therefore, OSHA has not based its justification of the hearing conservation amendment on possible gains in worker productivity.

Conclusion

In this section, the benefits of the hearing conservation amendment were delineated and discussed. The primary benefit will, of course, be a substantial reduction in the incidence of occupational hearing impairment in the population exposed to workplace noise. The additional benefits to be gained include improved workplace safety, reduced absenteeism, reduced medical costs, and a possible reduction in cardiovascular and certain other illness. The range of health, safety, and financial benefits, and the magnitude of their favorable impact on the quality of life for U.S. workers serve to justify this amendment.

V. Cost and Feasibility Considerations

Summary and Conclusions

The following three sections analyze in depth the costs of the final standard, its economic feasibility and its technical feasibility. This subsection briefly summarizes that analysis.

The cost of the hearing conservation amendment will average $53 per year for each of the 5.1 million employees estimated to be covered by the amendment. This comes to $270 million in total annual costs for the 19 sectors of the economy (2-digit SIC codes) which have significant noise exposures. Approximately $15.7 million is already being spent on hearing conservation programs, so the additional costs generated by the standard are $254.3 million. As explained in the cost section, OSHA believes these costs are somewhat overestimated because of the methodology used.

The industry with the largest compliance costs is lumber and wood with annual costs of $30.9 million. Other industries with annual costs between $20 and $25 million are printing and publishing, primary metals, fabricated metals, machinery except electric, and utilities. The food and textile industries have costs of $17 million. No other industry has costs over $13 million per year.

The only other comprehensive cost estimates were submitted by BBN. They estimated a cost of $65 per employee included in hearing conservation programs. Certain changes in the standard, as well as the use of more timely cost data, account for the differences between the BBN and OSHA estimates.

The section on economic impact discusses in detail the impacts of the costs of the standard. These impacts are small. If the total costs of the regulation are passed on to consumers, prices would increase 0.0148%. Even in the segment most impacted, lumber and wood, prices would increase only 0.0776%.

Even in the unlikely event that firms would be forced to absorb the costs of the amendment, these costs represent only 0.1932% of the profits of the 19 industries. It should be noted that even in the industry most affected, lumber and wood, costs represent slightly under 1% of profits. It is inappropriate to present the increased price and decreased profit data as cumulative when analyzing impacts. The two maximum effects will not occur simultaneously. The greater the increase in prices, the smaller the reduction in profits. Similarly, the greater the reduction in profits, the smaller the increase in prices. The price and profit impacts are both likely to be less than the maximums presented here.

Section 6(b)(5) of the Occupational Safety and Health Act requires standards to be feasible and this includes economic as well as technical considerations. The D.C. Circuit explored this requirement in *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467 (1975). It states,

> There can be no question that OSHA represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs. This is not, however, the same thing as saying that Congress intended to require immediate implementation of all protective measures technologically achievable without regard for their economic impact. To the contrary, it would comport with common usage to say that a standard that is prohibitively expensive is not "feasible." . . . practical considerations can temper protective requirements. Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.
>
> This qualification is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. As the effect becomes more widespread within an industry, the problem of economic feasibility becomes more pressing. (pp. 447-8).

As shown in the economic impact section, the cost impacts of the final hearing conservation amendment will not lead to economic dislocation. The costs are tiny relative to sales (averaging 0.0148%) and small relative to profits.

The worst case is 1% of profits while the average is 0.2%. In reality the costs as a percentage of profits will be less because some costs will be passed forward to consumers. These costs are easily affordable and no economic disruption or anything approaching it will be caused in any industry. Even employers who have a high percentage of employees affected by the amendment should be able to afford the $53 per employee cost. Therefore OSHA finds that the standard is without doubt economically feasible.

Technological feasibility is analyzed in the resource availability section. No difficult engineering problems, or indeed any engineering problems, are created by the standard. The hearing protection devices are already available on the market. The measuring and testing equipment needed (dosimeters, audiometers, etc.) is also available for purchase. In those areas where short-term production may not be adequate to meet immediate demand, a 2-year delayed starting date is provided by the standard. There also are adequate numbers of trained personnel, audiologists, physicians, etc., to meet the needs of employers resulting from the standard.

OSHA therefore finds the hearing conservation amendment is clearly technologically feasible.

VI. Costs of Compliance

Introduction

Many industry groups strongly recommended to OSHA that hearing conservation programs are a cost-effective and affordable means of reducing noise induced hearing impairment among workers. Bolt Beranek and Newman, (BBN), in their 1976 report for OSHA, ("Economic Impact Analysis of Proposed Noise Control Regulation," Ex. 192) estimated that the hearing conservation provisions of the proposed standard would cost the manufacturing and utilities sectors of the U.S. economy a total of $289.3 million per year in 1975 prices. This amounted to an annual cost of $65 per worker included in the program. The monitoring, recordkeeping, and associated tasks were estimated at $155.2 million annually, (p. 3–9) and were based on the assumption that a typical plant had 50 production workers and could be surveyed by a noise engineer for $600. The annual cost for audiometric testing was calculated at $20 per production worker for $89.1 million, and hearing protectors were estimated at $10 per worker for a total of $45 million per year (Ex. 192, p. 3–33). None of these cost estimates were adjusted to reflect the existence of hearing conservation programs already established by industry.

The BBN estimates of these provisions were not widely criticized. However, certain differences between the proposed standard and the final rule, as well as the availability of more timely cost data, have convinced OSHA to update these estimates of the expected compliance costs. The current estimation procedures, which are based on a thorough review and analysis of the entire record, are presented below for each major provision of the final regulation (Appendix B of OSHA's Final Regulatory Analysis provides the detailed caculations for a sample SIC industry). Overall these new calculations show that the total annual cost of the regulation will average about $53 for each of the 5.1 million workers estimated to be covered by the hearing conservation amendment. Thus, the total cost of complying with all of the provisions of the amendment are estimated at about $270 million a year. After accounting for some of the compliance activities already taking place, OSHA estimates that the new compliance costs will not exceed about $254.3 million a year and most likely will fall well below this amount (see Table 7).

Table 7.—*Estimated New Annual Compliance Costs of the Hearing Conservation Amendment*

Monitoring	$73,731,000
Audiometric Testing	87,199,000
Hearing Protectors	46,534,000
Training	40,029,000
Warning Signs	1,795,000
Recordkeeping	6,033,000
Total	254,321,000

Source: OSHA, Office of Regulatory Analysis.

Monitoring

The proposed standard directed employers to monitor worker exposure to noise on an annual basis. The final amendment will be less costly because in most cases, it requires monitoring to be performed only every other year. Although the final hearing conservation amendment requires that a new representative exposure be obtained whenever there is a charge in noise levels that would render the employee's hearing protection inadequate, in practice, the general availability of hearing protectors rated to reduce high noise levels should make these occurrences infrequent.

A number of consultants have submitted documents to the record listing their fees for noise measurement services. For example, Exhibit 319 B–8 lists $440 plus expenses as the daily change for a noise engineer and $360 plus expenses as the daily fee for a technician. Exhibit 319 B–11 indicates fees from $250 to $350 for an engineer and from $180 to $240 for a technician, while Exhibit 319 B–16 reported between $229 and $465 plus expenses for an engineer and between $175 and $255 plus expenses for a noise technician. The average of these daily fees is about $362 for an engineer and $262 for a technician. Travel expenses will vary according to each firm's location relative to the consultant. However, as the demand for these services grows, economies of scale will operate to reduce costs below current market charges. For example, the expanded market for consultant services within a region will stimulate the supply of monitoring consultants in the area, thereby minimizing travel expenses. Also, noise engineers should find it increasingly profitable to combine resources with audiometric testing firms to provide industrial clients with a complete range of hearing conservation services. A growing number of firms already market these comprehensive consulting programs (Ex. 305; 319 B–12), and this one-stop approach to satisfying monitoring, testing and training requirements should substantially reduce the costs of these services over time.

Based on its survey experience, OSHA has estimated the average time it would take noise experts to take measurements in plants of varying sizes. Table 8 shows OSHA's estimate of the cost of hiring a noise consultant, based on the daily fee of $362 for an engineer, $262 for a technician, and a $50 average travel expense.

Table 8.—*Cost of Monitoring by Consultant*

Number of employees measured	Days in the field		Days in office—		Cost
	Engineer	Technician	Engineer		
1 to 10	1				$412
11 to 20	1		.5		593
21 to 40	1	1	.5		855
41 to 60	1.5	2	.5		1,298
61 to 80	2	2	1		1,660
81 to 100	2.5	3	1.5		2,284
101 to 120	2	4	2		2,548
121 to 140	2	5	2		2,806

Source: OSHA, Office of Regulatory Analysis.

The monitoring provision of the amendment requires the reporting of representative exposures of all workers exposed to a time weighted average (TWA) of noise above 85 dB, rather than an actual measurement of each such employee. Thus, a measure of the exposure of one employee may be used to represent similarly exposed employees. Since the data shown in Table 8 correspond to measured workers (as opposed to others who are represented by the measured workers), an estimate of the number of employees who would be individually measured is necessary to assess the total monitoring cost. However, there is no data base available to identify statistically the determinants of the number of employees who would actually have to be measured according to the final rule. This number will vary due to the nature of the industrial process and the diversity of the work areas and tasks. For instance, in workplaces where noise levels are fairly uniform throughout the shop, fewer employees will need to be monitored than in workplaces where the noise exposure vary extensively among workers. Nevertheless, it can be assumed that, in general, the percent of the work force to be measured would vary inversely with the size of the plant. (See Ex. 309, p. 35, Table 3.1 for an example of how the percentage of workers to be sampled within a group of similarly exposed workers might decline as the group grows larger.) Table 9 gives estimates of the percentage of employees who would have to be measured individually to provide representative exposures of workplace noise for all exposed workers. These estimates were developed by OSHA.

based on its broad experience with noise surveys for numerous industrial establishments, and are consistent with the final monitoring requirement as they are predicted on a sampling strategy designed to place employees within 5 dB ranges.

Table 9.—*Percent of Employees Measured To Provide Representative Exposures*

Number of employees	Employees measured (percent)
1 to 19	100
20 to 49	60
50 to 99	50
100 to 249	40
250 and over	30

Source: OSHA, Office of Regulatory Analsysis.

To refine the estimate of the cost of using consulting services to conduct industrial noise measurements, it was necessary to construct a statistical distribution of the number of production workers in manufacturing establishments of different sizes. The U.S. Bureau of the Census provides 1977 data on the total number of employees in five establishment size categories (*County Business Patterns*, CBP–77–1). The conversion of this size distribution from total employees to one limited to production workers was accomplished by combining these data with information from the U.S. Bureau of Labor Statistics (BLS) (*Employment and Earnings*, 1909–1978) to obtain a 15-year average ratio of the number of production workers to the total number of employees. When multiplied by the 1977 Census estimates of total employment by industry and establishment size, this procedure yields estimates of 1977 production worker employment by industry and establishment size. These data are shown in Table 10.

OSHA believes that the best estimates of the total number of workers affected by this hearing conservation program are obtained from the BBN data on the percentage of workers exposed to various levels of noise in those industrial sectors which include most manufacturing and public utility firms (Ex. 192, p. 2–7). BBN's industry-wide estimates, as presented in Table 11, were developed from surveys of 68 firms representing 19 two-digit SIC categories, were based on years of extensive experience and expertise in noise control surveys, and were the most comprehensive and detailed noise exposure estimates submitted to the record. Thus, they remain the best source of data on TWA exposures in typical noisy industrial surroundings.

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Table 10

Number of Production Workers and Establishments by Industry and Establishment Size

SIC	1-19 Employees		20-49 Employees		50-99 Employees		100-249 Employees		Over 250 Employees	
	Production Workers	Establish-ments	Production Workers	Establish-ments	Production Workers	Establish-ments	Production Workers	Establish-ments	Production Workers	Establish-ments
20	75,583	13,118	122,613	4,783	158,034	2,813	292,110	2,332	527,859	1,248
21	431	102	817	30	1,402	22	5,487	37	44,363	42
22	17,182	2,647	36,791	1,238	53,829	825	143,386	1,007	525,811	985
23	73,714	12,301	150,593	4,490	180,224	2,810	314,631	2,257	403,037	1,020
24	131,794	25,577	108,400	3,550	117,628	1,697	159,585	1,103	128,894	319
25	33,894	5,762	45,134	1,527	52,706	819	91,521	647	174,745	373
26	15,173	2,204	38,254	1,360	61,079	983	149,706	1,146	277,289	538
27	126,470	35,518	101,748	5,199	89,263	2,042	117,751	1,251	266,969	641
28	33,186	6,812	48,072	2,091	54,695	1,082	94,994	841	405,953	687
29	8,380	1,379	9,271	286	9,988	137	23,797	142	88,264	123
30	33,391	5,590	62,459	2,230	82,901	1,353	134,120	989	288,230	498
31	8,275	1,410	13,415	467	20,528	332	48,213	341	116,969	325
32	74,668	11,639	80,305	2,810	65,780	998	107,929	750	231,819	422
33	20,304	3,003	41,908	1,475	54,945	893	130,046	945	731,098	795
34	117,675	19,020	169,809	6,154	170,975	2,815	274,821	2,041	572,619	1,088
35	163,075	32,304	155,393	6,406	135,719	2,502	219,331	1,783	942,683	1,468
36	38,208	7,192	59,430	2,212	80,189	1,319	179,628	1,383	1,021,145	1,394
37	27,347	5,379	34,035	1,318	44,954	801	93,414	751	1,204,450	898
49	67,188	10,593	66,942	2,179	79,232	1,156	110,509	744	335,430	421
Total	1,065,937	201,550	1,345,388	50,310	1,514,071	25,459	2,690,979	20,490	8,287,626	13,285

Source: Estimated as described in text from the U.S. Bureau of the Census, County Business Patterns, CBP-77-1; and the U.S. Bureau of Labor Statistics, Employment and Earnings, 1909-1978.

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Table 11.—Percentage of Production Workers Exposed to Noise

SIC	90 dB	85 dB	80 dB	75 dB
20	16	28	47	
21	6.6	9.7	28	
22	52	75	87	
23	0	1	20	
24	72	94	97	
25	12	30	53	
26	21	40	59	
27	19	45	66	
28	20	37	55	
29	52	76	82	
30	8.9	20	40	
31	0	1	20	
32	4.8	16	42	
33	38	63	81	
34	19	34	56	
35	13	26	46	
36	2.5	7	27	
37	13	23	42	
49	30	74	89	
Total	19.3	34.4	53.1	71.5

Source: Bolt, Beranek, and Newman. "Economic Impact Analysis of Proposed Noise Control Regulation," (Ex. 192, p. 9-7; and BBN worksheets).

Technically, representative exposures are only required for workers with a TWA exposure to noise of 85 dB or above. However, it seems probable that many employees exposed to noise below a TWA of 85 dB would be surveyed also. This is because, at least initially, employers would not know which workers were exposed to 85 dB without monitoring representatives of most of the workers stationed in fairly noisy work areas. Consequently, all workers exposed above a TWA of 80 dB were assumed to be surveyed for cost estimation purposes despite the fact that, as employers become more knowledgeable about the exposures, this adjustment will overestimate monitoring costs.

Therefore, the number of measurements for each establishment size category in each SIC industry studied can be estimated by the following equation:

[1] $M = (PM/100)(PW/E)(N)$

where:

M = the number of measurements
PM = the percent of workers actually measured (Table 9)
PW = the number of production workers (Table 10)
E = the number of establishments (Table 10)
N = the percentage of workers exposed to >80 dB (Table 11)

This formula simply multiplies: (the percent of workers that the sampling strategy would require to be actually measured) × (the average number of production workers per establishment) × (the percentage of workers exposed to >80 dB). When the number of measurements for each establishment size are matched to estimates of the corresponding consultant charge (Table 8) this provides estimates of the average cost for a firm using a noise consultant. Since monitoring will usually be required biennially, the annual consultant cost is one-half of the values listed in Table 8.

However, employers may elect to monitor with in-houe personnel. An acceptable dosimeter, readout and calibrator, such as described in Exhibit 319 A-7, costs $1,230. The standard capital recovery formula with a 10 percent interest rate and a 10-year equipment lifetime gives an annualized capital cost of about $200. Periodic calibration costs could add another $60 a year. In addition, it might take an employer about an hour per measured employee to select representative workers, make daily calibrations of the dosimeter, and place and remove the dosimeters from the individual workers. Since this task may be performed by the employer or by supervisory employees earning more than the average industry production worker wage, an average cost of $10 per hour was used to account for the time required to complete this task. Thus, the average annual cost for each establishment can be calculated as $260 + ($10 × the number of measured workers/2 years). The resulting values imply that monitoring would usually be done by in-house staff only in the largest plants where the average cost of $755 [5] is substantially below the $1,142 [6] average consultant cost. However, for the smallest establishments, the annual consultant fee of $206 is significantly less than the cost of developing an in-house program by purchasing the required equipment.

Alternatively, sound level meters and calibrators may be purchased for $810 (Ex. 319 A–7). Since these meters are expected to last at least 10 years (Ex. 319 A–7; Ex. 319 A–72), a 10 percent interest rate yields an annualized equipment cost of $99.27. Biennial calibration would add an additional $30 per year (Ex. 319 A–7). However, the time employers would need to make TWA exposure measurements with a sound level meter would often exceed the time required using a dosimeter because sound level meter measurements often require following employees through various phases of the work process. For this reason, the following calculations assume the use of dosimeters for in-house monitoring.

It was assumed that employers would select the least expensive mode of complying with the provision. Therefore, for each SIC sector, multiplying the number of establishments in each size class by the average consultant cost where consultant services would be more efficient (generally the first three or four establishment size categories), and the average in-house cost using dosimeters for the larger size categories where in-houe programs are more efficient, provides an estimate of the industry's monitoring cost. Summing these costs over all the SIC's gives total costs of $78,427,000 to initiate monitoring programs in all establishments in the studied industries.

However, many firms already have extensive monitoring programs. Although precise estimates are not available, a survey of hearing conservation programs conducted by The National Institute for Occupational Safety and Health (NIOSH) (Ex. 321-14B) evaluated responses from 1,410 manufacturing firms (p. 7). Twenty-nine percent stated that their firm had a program concerned with hearing conservation (p. B–3), and 90 percent of those firms, or 26 percent of the respondents, reported that they currently monitor workplace noise (p. B–7). Since the survey sample was heavily weighted with firms of over 100 employees, the results may apply primarily to these larger firms. Table 10 indicates that there are about 33,775 establishments with more than 100 employees in the industries studied. Based on the NIOSH study, it is reasonable to conclude that 26 percent of the firms with more than 100 employees already have monitoring programs. Thus, the new annual cost of this monitoring provision falls to about $73,731,000 for the 19 SIC sectors (See Appendix B in OSHA's Final Regulatory Analysis for a detailed example of the computational procedure).

Even more important, however, is the implausibility of the assumption that every single establishment in the industries studied would have workers exposed to a TWA of 85 dB or greater. The only large-scale survey that presents estimates of the number of plants with noise levels above 85 dB is the National Occupational Hazard Survey (NOHS) prepared by the NIOSH (Ex. 321–14D). The Center of Policy Alternatives (CPA), Massachusetts Institute of Technology, presented a preliminary summary of these data, stating that "NIOSH has collected extensive data on noise exposures in workplaces representative of American industry . . ." (Ex. 138A, p. 2–6). Since NIOSH directed its staff to note "Any continuous *noise* in worker's normal environment equal to or exceeding 85 dBA . . ., regardless of exposure

[5] $260 + (10 × M/2) = $755, where M is defined as in equation (1) and equals, on average, (.30 × 8,287,626/13,285 × .531) which is 99.

[6] Table 8 indicates that the consultants fee for measuring 99 workers was estimated at $2,284. If performed biennually, the annual cost is $1,142.

duration. . . ." (NOHS, vol. 1, p. 15), it is clear that these estimates of the number of noisy firms would exeed projections made on a TWA basis. Table 12 displays the results of this survey, which indicate that only about 49 percent of the plants in the studied industries have workers exposed to noise levels of 85 dB or greater as measured by NOHS. If this survey is accurate, the monitoring costs estimated above are substantially overstated.

Table 12.—*Number of Plants With Continuous Noise Above 85dB in the National Occupational Hazard Survey*

Industry sector	Total plants [1]	Number of plants with workers exposed to continuous noise [2]	Percent of plants with continuous noise
Manufacturing	141,397	68,949	48.8
19	113	72	63.7
20	16,173	7,711	47.7
21	196	48	24.5
22	3,225	1,560	48.4
23	15,565	4,115	26.4
24	3,091	2,214	71.6
25	4,616	3,132	67.8
26	4,659	3,673	75.6
27	13,609	5,248	38.6
28	6,743	2,423	35.9
29	993	599	60.3
30	5,640	2,967	52.6
31	1,653	798	48.3
32	7,955	4,425	55.6
33	5,040	3,716	73.7
34	19,615	12,658	64.5
35	14,190	6,949	49.0
36	5,073	1,937	38.2
37	3,457	1,849	53.5
49			[3] 45.8

[1] NIOSH, Table, pp. 42–43.
[2] NIOSH, Table 49, p. 290.
[3] Preliminary NOHS estimate reported in Exhibit 138A, p. 2–8

Source: National Institute of Occupational Safety and Health, *National Occupational Hazard Survey*, Vol. III (Ex. 321–14D).

Moreover, the current record does not adequately indicate the widespread current or future availability of rental markets for dosimeters or sound level meters. An informal telephone survey reveals that even the relatively more expensive dosimeters can generally be leased for under $100 per month. On a biennial basis this is less than $50 per year for most of the 311,094 establishments in the industries studied, for a total yearly equipment charge of only $15.6 million. Alternatively, some firms will share noise monitoring meters rather than purchase them. Thus, the true new monitoring costs attributable to this hearing conservation amendment may be substantially below OSHA's $73.7 million estimate which was based solely on data in the noise record.

BBN's economic impact analysis (Ex. 192, p. 3–9) projected annual costs of $155.2 million for the proposed monitoring provision. This estimate overstates the cost of the final provision for several reasons. First, the BBN analysis was based on the proposed requirement for annual monitoring, whereas the final rule will generally require only biennial monitoring. Second, BBN's methodology assumed that all industrial firms employed 50 production workers and would hire noise consultants to conduct the monitoring requirements. OSHA has determined that larger firms will find it substantially more economical to obtain noise measuring instruments and to perform the monitoring themselves. Third, BBN's estimate includes the cost of recordkeeping which OSHA treats as a separate cost category. Fourth, the BBN estimates do not reflect the current monitoring activities which are already taking place. OSHA believes that these factors taken together more than offset the price increases which may have occurred since BBN's 1976 report and consequently account for the divergent estimates.

Audiometric Testing

An analysis of the record indicates that the cost of audiometric testing will vary with the size of the establishment. Very small plants are likely to send production workers who require testing to a clinic or doctor. Somewhat larger plants will contract with audiometric testing firms for the actual exam and review. Still larger plants will find it cost effective to purchase the equipment for audiometric testing, to train the industrial nurse or safety director to give the test, and to use an outside firm of doctor to review the audiograms. The largest firms will perform the entire service in-house.

Commercial specialists who evaluate worker's hearing have submitted the following per employee costs for audiometric testing, review and reporting: $7.50 to $10.65 (Ex. 317); $10.00 (Ex. 319 B–6); $3.00 or less for more than 100 (Ex. 319 B–12); $7.00 to $20.00 (Ex. 319 B–5); and $12.00 (Ex. 293). These firms generally provide this service by transporting an audiometric test booth in a mobile van directly to the commercial establishment that has contracted for the testing. Employees of the smallest firms, however, will often be sent to a clinic or doctor's office to be tested. These fees will vary greatly and some are rather high (Ex. 2C–71–3, p. 50 reported $20). However, many clinic or physician fees should ultimately be comparable to those charged by mobile units because (1) negotiated fees are a traditional practice in industrial medicine, (2) employers of small firms may group together to gain scale economies, and (3) stationary medical facilities do not bear the substantial transportation costs borne by the operators of mobile vans. (For example, the Washington Speech and Hearing Society currently charges $120 plus $10 per exam for their central mobile unit but only $7.50 per test at their facility.)

Because the current market for audiometric services is small relative to the demand that would follow the promulgation of this regulation, it is not possible to make precise estimates of the cost to all firms that would purchase these services. However, in order to estimate the regulatory cost, it is reasonable to assume that the average firm sending workers to a clinic would lose about 2 hours in lost production time plus about $15 per worker for test fees and travel expenses. For firms large enough to take advantage of mobile units, the estimated lost production time per worker would be about one-half hour, and the submissions cited above imply an average test fee of about $12.00.

For large firms, in-house programs will be substantially less expensive. A comment to the Advisory Committee (Ex. 102, Sec. 9, p. 15) estimated the cost of providing audiometric testing programs for firms with 200, 300, and 500 employees at about $6.00, $5.00, and $4.00 per audiogram, respectively. Numerous submissions in the record itemize the specific components of these costs. For example, audiometric test booths sell for about $1,700 (Ex. 319 A–44; Ex. 319 A–51; Ex. 2C–71–3, p. 47), and installation could add about $300. Audiometer price quotes average about $500 (Ex. 319 A–51; Ex. 319 A–53; Ex. 319 A–60; Ex. 319 A–62; Ex. 319 A–66; Ex. 319 A–67) and are expected to operate for 10 years (Ex. 319 A–90; Ex. 319 A–60). The calibration procedures require a coupler which costs about $130 (Ex. 319 A–16; Ex. 319 A–11) and a sound level meter with an octave filter set which costs about $1,000. The operator's certification course is good for 5 years and costs $250 plus 3 days of an employee's time (Ex. 319 B–4) which amounts to $240 at $10 per hour. The cost of calibrating the audiometer could be another $100 every other year (Ex. 102, Sec. 9, p. 16). Thus, the total capital outlay is about $4,200. Assuming that the test booths last for 20 years, the other equipment lasts for 10 years, the certification course is given every 5 years, and the interest charge is 10 percent, the total annualized cost amounts to about $650.

Since one exam takes about 10 minutes of time (Ex. 306–J5C, p. 9; Ex. 319 B–6), approximately 48 workers can be tested by a technician earning a daily rate of about $80. Thus, the cost to the firm of the technician's time amounts to $1.67 per worker tested. The cost of

reviewing audiograms and reporting the findings is also dependent upon whether this service is contracted out or done in-house. Contractor fees for reviewing audiograms are reported at $2.25, $2.50, $3.00, and $4.00 per audiogram (Ex. 317; Ex. 319 B–12), whereas the in-house review by a physician or audiologist was estimated to cost only $0.25 each (Ex. 102, sec. 9, Audiometric Testing, p. 16). Thus, using $2.50 as a reasonable average cost to review the audigram, a typical cost for administering the tests as well as reviewing the audiograms would amount to $4.17 per unit ($1.67 + $2.50). Finally, a cost for one-half hour of lost production for each worker during the test procedure adds an additional one-half of the hourly wage per worker tested. In summary, the annual cost of the in-house audiometric program is estimated at about $650 per establishment for equipment and certification-related charges, and about $4.17 plus one-half of the industry hourly wage for each employee tested.

The Can Manufacturers Institute, Inc., (Ex. 2C–71–3, p. 50) stated that it would become cost-effective for a firm to develop its own audiometric testing capability when the number of audiograms it required reached about 100 per year. Dr. W. G. Thomas, (Ex. 102, sec. 9) put the break-even point between in-house and contracted audiometric testing at about 300 employees. To estimate the number of firms that would develop their own testing facilities, it is appropriate to use the Table 10 estimates of the number of production workers in the five establishment size categories for the 19 industries studied. The data in Table 10 imply that if the BBN estimate of 34.4 percent of production workers exposed to a TWA >85 dB remains constant across establishment sizes, the average number of workers per establishment in the hearing conservation program will be less than 2 employees for the smallest size category and 9, 21, 46, and 213 employees, respectively, in the larger establishment size categories.

It is likely that workers in the two smallest establishment size classes (1–19, and 20–49 employees) would travel to facilities outside the firm to take the audiometric exam. As explained above, the estimated annual cost for these establishments in each SIC sector would be the number of workers exposed to noise at or above a TWA of 85 dB × (2 hours at the industry hourly wage + $15 per test). For workers in the third and fourth largest size categories (50–99, 100–249 employees), the best assumption is that hearing conservation firms with mobile vans will service the employees. Since each employee would miss only about a half-hour or work time, the annual cost per industry for these intermediate-sized firms is the number of workers exposed to noise at or above a TWA of 85 dB × (.5 hours at the industry hourly wage + $12 per test).

Most firms in the over 250 employee size group would choose in-house audiometric programs. The annual cost for these firms, as detailed above, is estimated at ($650 × the number of establishments) + [the number of workers exposed to a TWA of 85 dB or greater in these establishments × ($4.17 + .5 hours at the industry hourly wage)].

The data needed to complete the above calculations include the percent of workers exposed to a TWA of >85 dB as shown in Table 11, the number of production workers and plants by establishment size in each industry as presented in Table 10, and the 1979 industry average hourly wage as reported by BLS (*Employment and Earnings*, March 1980). However, workers employed for less than 120 days with one firm are exempt from this provision. Employment data from the BLS as well as submissions to the record (Ex. 14–279; Ex. 14–512) indicate that SIC's 20 and 21 hire a substantial number of seasonal employees. In fact, the 1979 BLS average monthly employment estimate would fall by 17,100 and 1,400 in SIC's 20 and 21, respectively, if employment in each industry's 120-day peak employment period were adjusted downward to the level of the following month. The data from Table 10 were revised to reflect this exemption in order to estimate the cost of audiometric testing. Temporary workers in other industries will also take advantage of the exclusion, but the lack of appropriate data have prevented further adjustments to these calculations.

In addition to the annual audiogram, some workers will need to be retested during the year owing to threshold shifts, operator errors, or inconsistent test results. A number of workers will exhibit temporary threshold shifts if they are tested toward the end of the workday after being exposed to excessive noise. Wearing effective and properly inserted hearing protectors prior to the test would lower the incidence of temporary threshold shifts, whereas testing at the start of the day would substantially eliminate their detection. The number of permanent threshold shifts recorded will depend upon the intensity of the noise exposures, the worker turnover rates, and the effectiveness of the hearing protectors. In addition, the requirement for a recheck is waived if the annual test is conducted after 14 hours free from workplace noise. If as many as 20 percent of the workers require rechecks, the overall cost of audiometric testing would total $92,352,000 or about $18 per worker tested.

This discussion has assumed that no audiometric testing is currently provided. The noise record, however, indicates that many industrial establishments already offer audiometric testing to their employees. For example, a survey by the Forging Industry Association revealed that 82 percent of the 151 member firms responding do periodic testing, (Ex. 321–25), while Table 90 of the NOHS (Ex. 321–14D) shows that in their sample, 40 percent of the manufacturing workers exposed to continuous noise above 85 dB received audiometric exams. Table 13 of this same exhibit indicates that primarily the largest-sized establishments provide this service for their workers. Still another NIOSH hearing conservation survey shows that annual and biannual audiometric tests account for about 23 percent and 13 percent, respectivey, of current industry testing programs, with retesting periods in other programs ranging from 6 months to every 5 years (Ex. 321–14B, p. 30). For cost estimating purposes, it seems reasonable to assume that on average, these tests are already provided on a biennial basis to 40 percent, or on an annual basis to 20 percent of the workers in plants with more than 250 employees. Since the number of establishments providing these services is unknown, an accurate accounting of the costs already accepted by industry is not possible. Reducing only the labor-related cost of the largest firms by 20 percent to reflect current practice brings the total cost of this provision to $87,199,000 a year (See Appendix B in OSHA's Final Regualtory Analysis for an example of the calculations). This estimate is not significantly different from BBN's 1976 estimate of 89.1 million even though BBN did not adjust their data to acknowledge current programs and simply used a $20 per worker cost (Ex. 192, p. 3–33).

Hearing Protectors

Hearing protectors used in industry include ear muffs, disposable ear plugs, molded plugs, and custom-molded plugs. Unfortunately, there is no survey information on the percentage of workers who wear each type of protector. In hot, humid environments, workers are likely to choose plugs. It is probable that plugs will be chosen in more than a majority of instances as

they are often associated with a lesser degree of discomfort.

Substantial data on the price of ear protectors have been collected for the record. For example, disposable foam ear plugs can be purchased for $0.15 a pair (Ex. 319 A–41) and are reusable. If employees use two pair a week, the yearly cost is $15.00. Disposable non-foam ear plugs cost only from $0.06 to $0.07 a pair (Ex. 319 A–30; Ex. 319 A–37). For a new set of plugs each day, these costs would average about $16.50 a year per employee. Molded ear plug prices are quoted at about $1.50 (Ex. 319 A–30; Ex. 319 A–37), and would cost $6.00 a year if workers used 4 pair per year. Custom molded plugs can be purchased in a kit that makes up to 50 pair of ear plugs at $3.10 a pair (Ex. 319 A–35). These plugs, with minimum care, will last 2 or 3 years (Ex. 319 A–36). Ear muff prices are listed at $9.50 (Ex. 319 A–30), $7.60 (Ex. 319 A–31), and $8.40 (Ex. 319 A–37). The estimated cost of about $10 per year per employee reported by the Industrial Fasteners Institute (Tr. 1611), Bethlehem Steel Corporation (Ex. 145), and BBN (Ex. 192, p. 3–33) appear consistent with these rates. Based on a cost of $10 per year per employee, if hearing protectors were provided to all employees exposed to noise at or above a TWA of 85 dB, the cost of this provision would be $51,296,000.

The NIOSH NOHS survey also indicates that about 20 percent of the workers exposed to continuous noise at or above 85 dB are subject to attempts to reduce exposures (See Vol. III, Table 51). Moreover, the data in Table 90 of the NOHS study show that hearing protectors are almost always the method selected to accomplish this reduction. Since the data show that 20 percent of the workers exposed above 85 dB are provided hearing protectors, this implies that more than 20 percent of those exposed above 90 dB have them. This is because it is probable that most of the current worker use of hearing protectors takes place among workers whose exposures exceed 90 dB. However, if we assume that just 20 percent of the workers exposed to noise above a TWA of 90 dB are already supplied with hearing protectors, the total cost of this provision is $45,534,000. This may be an overestimate of the cost to the extent that not all workers exposed between 85 and 90 dB are required to use the hearing protectors.

Training Program

The major cost elements for the training program will be the cost of the production lost while the workers are being trained, and the cost for the individuals providing the training. Because the training session may last about an hour, the cost for production time lost while training takes place can be estimated by multiplying the industry average hourly wage times the number of workers trained. The cost for the people conducting the training will vary with the size of the establishment. The data from Tables 10 and 11 imply that establishments with under 100 employees average less than 21 workers exposed to noise at or above a TWA of 85 dB. A training program consisting of one hour per year per establishment seems appropriate for these size classes. For establishments with more than 100 employees, it is reasonable to assume that one individual could train 30 people in one session.

Consequently, the cost of training can be estimated at (the average production worker hourly wage × the number of workers exposed to noise > a TWA of 85 dB) + (the number of establishements with less than 100 employees × the cost of providing one hour of training) + (the number of exployees exposed at >85 dB in establishments larger than 100 employees divided by 30 workers per session × the cost of providing one hour of training). If we assume that the cost for the person providing the training is $10 an hour, the cost estimating equation for each SIC is:

$$\$Tr = (W)(PW)(P) + \$10\,e + \$10/30\,(PWE)(P)$$

were:

$Tr = the cost of training
W = the hourly production worker wage
PW = the number of production workers (Table 10)
P = the fraction of workers exposed to >85 dB (Table 11)
e = the number of establishments with less than 100 employees (Table 10)
PWE = the number of production workers in establishments with over 100 employees (Table 10)

Summing over all SIC's, the total cost of training for the 19 industry sectors is estimated at $40,029,000. Although a number of comments described well organized training programs already in operation (Ex. 307, J2C, p. 11; Ex. 147C, p. 335; Ex. 147A, p. 6), and it is likely that many firms do some training, no estimates were available of the total number of such programs currently in existence. Therefore, the above estimate for the cost of this regulatory provision is overstated by the extent that industry already provides this instruction.

Warning Signs

The cost for noise warning signs will vary with the plant layout and the number of entrances into the noisy area. Signs are available for slightly over a dollar (Bilsom International, Inc., Product Order Form, etc.). If, on the average, one sign accommodates ten workers and takes 15 minutes to install, the cost to a firm for placing one sign would be about $3.50 at a $10 hourly wage, and the total cost of the provision would be $1,795,000. Although OSHA's calculations treat this estimate as an annual cost, it is probable that most signs will last for considerably longer than one year.

Recordkeeping

Updating records of noise exposure should take no longer than 10 minutes per worker measured. This amounts to 5 minutes per worker per year. Recordkeeping of audiograms, could also take about 5 minutes per employee per year. The cost of this lost work time would equal 1/6 of an hour × the industry hourly wage × the number of workers exposed to noise at a TWA of >85 dB.

In addition, recordkeeping of periodic calibration of audiometers could take 20 minutes per year. If every establishment with over 250 employees in the SIC's studied maintained an audiometer, the total cost for the activity would be 2/6 of an hour × the industry hourly wage × the number of establishments. It can reasonably be assumed that most firms that market hearing conservation services already keep these records so that their additional costs would be negligible. Thus, the total recordkeeping costs are estimated to amount to $6,033,000.

Conclusion

Overall, the above calculations show that the annual cost of compliance with all of the provisions of this regulation would amount to about $53 for each of the more than five million workers protected by the program. The total cost of hearing conservation programs, as measured in current dollars, is about $270 million a year. After adjustment for some of the compliance activities already taking place, the total new costs fall to $254 million per year.

OSHA's estimates do not appear inconsistent with industry statements. For example, testimony from the Industrial Fasteners Institute implies an annual cost of $50 per employee (Tr. 1611, 1612), and the American Boiler Manufacturers Association commented that $35 per production worker is a conservative estimate (Tr. 1573). Dupont stated that its comprehensive program cost the firm between $10 and $20 per worker per year (Ex. 306–J5c). Moreover, a study submitted by the American Textile Manufacturers Institute estimated an annual cost of $14.16 per

employee (Ex. 275 B, Attachment I). BBN offered the only industry-wide calculation. However, as described above, their cost estimate of $65 per worker does not reflect significant changes from the proposal to the final rule.

Table 13 displays the new compliance costs attributable to this amendment as estimated by OSHA for each industry sector. To the extent that many establishments in the industries studied are not affected by noise, or already comply with most of the requirements, or that rental equipment is easily available for monitoring purposes, actual costs would be substantially below the estimates provided.

Table 13.—*Estimated New Annual Compliance Cost of Hearing Conservation Amendment*

SIC	Industry	Estimated cost
20	Food	$17,319,440
21	Tobacco	224,058
22	Textiles	17,756,670
23	Apparel	6,134,562
24	Lumber & Wood	30,864,350
25	Furniture & Fixtures	6,117,161
26	Paper	9,076,951
27	Printing & Publishing	22,264,030
28	Chemicals	10,944,270
29	Petroleum & Coal	4,454,069
30	Rubber & Plastics	6,721,314
31	Leather	909,841
32	Stone, Clay & Glass	7,348,522
33	Primary Metals	23,072,240
34	Fabricated Metals	23,505,250
35	Machinery, Except Electrical	25,519,890
36	Electrical Machinery	6,843,939
37	Transportation Equipment	12,914,530
49	Utilities	22,310,000
	Total	254,321,000

Source: OSHA, Office of Regulatory Analysis.

VII. Economic Impact

Introduction

The cost of the hearing conservation amendment will generate a series of economic effects on those industries that expose their employees to significant amounts of noise. It is difficult to forecast precisely the magnitude of the specific impacts that will occur because they depend in part upon decisions by individual employers on how best to respond to the costs of the amendment. However, the economic framework within which the decisions will be made can be described, and the potential range of subsequent impacts can be identified. For example, compliance costs will exert upward pressure on the prices of the products produced in those industries. Conversely, profits and employment may decline if sales cannot be maintained at the higher price levels. However, the analysis presented below indicates that the economically adverse effects of the program will be exceedingly small compared to each industry's ability to finance them. Moreover, it is shown that the most severe of these impacts will hardly influence the various financial indexes used to assess each industry's economic well-being.

The anaylsis that follows is based upon the assumption that the cost of production in each affected industry will rise by the full extent of the compliance costs as estimated in the previous section. However, even if these compliance cost estimates are approximately correct, it is probable that the accounting ledgers of the impacted industries will not reflect the full burden of these costs. In fact, studies cited in the Benefits section above support the view that the amendment may cause significant cost savings due to decreased rates of industrial accidents, absenteeism, and worker's compensation premiums. To the extent that dollar outlays for these business expenses are reduced following the implementation of the amendment, the net regulatory cost to industry will diminish. However, to demonstrate conclusively the economic feasibility of the amendment, this section does not adjust the above compliance cost estimates for these potentially important cost reductions.

Price Impact

Economic reasoning indicates that firms will attempt to pass on higher production costs by increasing the selling price of their products. If an industry faces a perfectly inelastic demand for its output, the manufacturers would shift the entire cost of complying with the amendment to their customers through a price increase without a contraction of industry sales. This market condition, however, is seldom the case. On the other hand, if the industry supply curve is perfectly elastic, product prices will rise by the full amount of the cost increase, but industry output will fall to the extent that sales are inversely related to price. Except for over very long time periods, this industry response would also be considered unusual.

In general, firms will try to pass on cost increases by raising product prices, and consumers will respond by reducing their purchases of the industry's products. Most firms, therefore, will find that they cannot quickly recoup all of their profits through price hikes, but must settle for price increases allowing less than a full cost passthrough. If firms could pass on their entire cost increase, however, the maximum expected price rise can be calculated by dividing the estimated compliance cost for each industry by the sales of that industry, and expressing the result as a percentage. Table 14 presents the percentage price increase that would be attributable to the amendment if the entire cost is passed on solely and exclusively in the form of price increases.

Table 14.—*Maximum Price Increase*

(In millions of dollars)

SIC	Industry	Estimated cost of amendment	1979 total shipments	Maximum price increase (percent)
20	Food	$17.32	$234,628	0.0074
21	Tobacco	0.22	12,173	.0018
22	Textiles	17.76	46,992	.0378
23	Apparel	6.13	[2] 40,060	.0153
24	Lumber and wood	30.86	[1] 39,781	.0776
25	Furniture and fixtures	6.12	[1] 16,853	.0363
26	Paper	9.08	66,033	.0136
27	Printing and publishing	22.28	[1] 49,527	.0450
28	Chemicals	10.94	149,181	.0073
29	Petroleum and coal	4.46	134,041	.0033
30	Rubber and plastics	6.72	44,742	.0150
31	Leather	0.91	[1] 7,506	.0121
32	Stone, clay, glass	7.35	46,185	.0153
33	Primary metals	23.07	140,122	0.164
34	Fabricated metals	23.51	109,463	.0215
35	Machinery, except electrical	25.52	157,695	.0162
36	Electrical machinery	6.84	110,713	.0062
37	Transportation equipment	12.91	194,461	.0066
49	Utilities	22.31	[1] 117,024	.0191
	Total	254.32	1,719,402	.0148

[1] Data for 1977. See U.S. Department of Commerce, Bureau of the Census, *Preliminary Report, 1977 Census of Manufactures*, Table 2, p. 4-23.

[2] Revenues from sales to customers for electric power and gas utilities. See U.S. Department of Commerce, *Survey of Current Business* (July 1960): S-23. This figure slightly understates total revenues for the entire SIC 49 because it does not include revenues from sanitary services.

Source: OSHA, Office of Regulatory Analysis. U.S. Department of Commerce, *Survey of Current Business* (July 1960): S-4.

The table shows that the overall impact of the proposed amendment, if all of the costs were passed on, would be to increase prices by 0.01 percent, i.e. one hundredth of a percent in the 19 industrial sectors studied. This clearly implies a negligible change to any of the nation's more aggregated price index series. While there is variation among industries, in only a few cases are the estimated price increases greater than a few hundredths of a percent. The largest increase in price, 0.078 percent, is recorded for the lumber and wood sector, an industry estimated to have over 94 percent of its production workers exposed to noise levels above 85 dB. However, even this price increase is of such a small magnitude that its effect would be hardly noticeable among all of the other cyclical factors affecting the industry product prices.

Financial Impact

The discussion above illustrates the impact on prices if the costs of the amendment were shifted entirely to industry customers through higher prices. Alternatively, the entries in Table 15 show the impact upon profits if the costs were solely and exclusively absorbed from profits. The percentage decrease in profits was calculated by dividing the cost of the amendment for each industry by its estimated 1979 profit level. Table 15 indicates that even in the highly unlikely event of no price change, overall profits would decrease by only 0.19 percent. Profits would fall by under 1 percent in all industry sectors, and in the great majority of cases, the anticipated decline is less than one-half of one percent. Moreover, to the extent that output prices rise at all, profits will fall by a smaller amount than listed. Thus, even these fractional values must be considered estimates of the maximum reduction in industry profits.

Table 15.—*Maximum Profit Reduction*

[In millions of dollars]

SIC	Industry	Estimated cost of amendment	1979 pre-tax profits	Profit reduction (percent)
20	Food	$17.32	$10,061	0.1718
21	Tobacco	0.22	2,237	.0098
22	Textiles	17.76	2,291	.7752
23	Apparel	6.13	[1] 2,033	.3015
24	Lumber and wood	30.66	[2] 3,140	.9628
25	Furniture and fixtures	6.12	[2] 883	.6931
26	Paper	9.08	4,814	.1886
27	Printing and publishing	22.28	6,077	.3666
28	Chemicals	10.94	13,372	.0818
29	Petroleum and coal	4.45	25,239	.0176
30	Rubber and plastics	6.72	1,929	.3484
31	Leather	0.91	647	.1406
32	Stone, clay, glass	7.35	3,650	.2014
33	Primary metals	23.07	6,215	.3712
34	Fabricated metals	23.51	6,830	.3442
35	Machinery, except electrical	25.52	15,484	.1648
36	Electrical machinery	6.84	10,884	.0628
37	Transportation equipment	12.91	8,665	.1490
49	Utilities	22.31	[3] 7,138	.3126
	Total	254.32	131,609	.1932

[1] The *Quarterly Financial Report* aggregates income for "Other Nondurables" (SIC's 23 and 31). The pre-tax income of $2,660 million was allocated to the respective SIC's on the basis of the 1976 Internal Revenue Service (IRS) data. The IRS survey gives 75.84 percent, of "Net Income (less deficit)" to SIC 23 and 24.16 percent to SIC 31. See Internal Revenue Service, *Preliminary Report, Statistics of Income—1976, Corporation Income Tax Returns*, (Washington, D.C., 1979), p. 6.

[2] The *Quarterly Financial Report* lists income for "Other Durable Manufacturing Products" which is composed of SIC's 24, 25, and 39. The pre-tax income of $5,934 million was also allocated on the basis of the 1976 IRS data (see [1] above). The distribution was 52.91 percent for SIC 24, 14.88 percent for SIC 25, and 32.21 percent for SIC 39. Since 39 was not included in this study, the profits from that industry are excluded from this table.

[3] This amount is also based upon the 1976 IRS data (see [1] above). The 1976 profit rate was calculated by dividing Net Income (less deficit) by total receipts. This profit rate, 6.1 percent, was then multiplied by the total 1979 revenues presented in Table 14.

Source: OSHA, Office of Regulatory Analysis. U.S. Federal Trade Commission, *Quarterly Financial Report*, First Quarter 1980, pp. 19–53.

The ability of the affected industries to raise sufficient compliance funds through normal commercial channels is another relevant consideration. Table 16 presents several financial indicators for U.S. manufacturing industries as presented in the *Quarterly Financial Reports* published by the U.S. Federal Trade Commission. The three indicators—cash on hand, outstanding short term loans, and net working capital—have been chosen because each helps to establish the ability of an industry to finance the costs of the amendment. Comparing the magnitude of these variables to the volume of required funds indicates whether the dollar outlays would be disruptive to the traditional financial operations of the affected industries.

Table 16 shows that for the 19 industries studied, the cost of the amendment is only about 0.6 percent of current cash on hand. The table also indicates that for those industries where data are available, compliance costs average only about 0.7 percent of the short-term debt, and 0.1 percent of the net working capital. Although some industry-to-industry variation exists, none of these ratios is above 2.66 percent. This clearly demonstrates that the cost of compliance will be small relative to each industry's ability to comply with the regulation. On this basis, the record indicates that the regulatory burden would not be an undue financial hardship for each of these sectors.

Table 16.—Compliance Cost as a Percent of Selected Financial Indicators (1979)

SIC	Industry	Cost as a percent of cash on hand	Cost as a percent of short-term loans	Cost as a percent of net working capital
20	Food	0.57	0.37	0.09
21	Tobacco	.12	.10	.01
22	Textiles	2.40	2.32	.23
31	Leather	.58 [1]	.34 [1]	.06 [1]
23	Apparel	.58 [1]	.34 [1]	.06 [1]
24	Lumber and wood	2.66 [2]	NA	NA
25	Furniture and fixtures	2.66 [2]	NA	NA
26	Paper	.60	1.92	.12
27	Printing and publishing	1.04	2.61	.26
28	Chemicals	.33	.68	.04
29	Petroleum and coal	.08	.15	.03
30	Rubber and plastics	.99	.65	.11
32	Stone, clay, glass	.58	1.59	.11
33	Primary metals	1.04	1.13	.14
34	Fabricated metals	.99	1.04	.15
35	Machinery, except electrical	.62	.57	.08
36	Electrical machinery	.18	.36	.03
37	Transportation equipment	.21	.84	.06
49	Utilities	[3] .66	NA	NA
	Total	.60	[4] .70	[4] .10

[1] FTC reports only aggregated data for the non-durables group which consists of SIC's 23 and 31.

[2] FTC reports aggregated data of $2,105 million for the Durables group consisting of SIC's 24, 25, and 39. This value was allocated according to IRS data indicating that SIC 24 had 50 percent and SIC 25 about 16 percent of the "Cash" balances reported by firms in these industries in 1975. See U.S. Department of the Treasury, Internal Revenue Service, *Source Book, Statistics of Income—1975, Corporation Income Tax Returns* (Washington, D.C., 1979), p. 52.

[3] "Cash" as defined by the IRS for tax purposes, and thus not strictly comparable to the FTC definition. See IRS, *ibid*, p. 52.

[4] Excludes SIC's 24, 25, and 49.

Source: OSHA, Office of Regulatory Analysis. U.S. Federal Trade Commission, *Quarterly Financial Report*, First Quarter 1980, pp. 18–53.

Other Sectors

The 19 industrial sectors for which detailed feasibility data were presented above include almost all manufacturing and utility industries. These sectors were initially selected by BBN (see their "Economic Impact Analysis of Proposed Noise Control Regulation," Ex. 192 p. 2-1) because they were believed to be the areas under OSHA's jurisdiction which were most likely to have occupational noise problems. However, industrial noise may also be found in some service-oriented industries. Nevertheless, there is no reason to believe that firms in other industries could not also provide adequate hearing conservation programs for the estimated average cost of $53 per exposed worker. Therefore, there is no reason to expect other major adverse economic impacts.

In addition, the industries covered by OSHA's vertical standards for the maritime industries may also be affected by this hearing conservation amendment. These industries include shipbuilding, ship repair, shipbreaking, and longshoring. Shipbuilding and ship repair are included in SIC 37 (Transportation Equipment) for which cost estimates were presented above. Shipbreaking (or the disassembly of ships) and longshoring are included in SIC 44 (Water Transportation) which was not among the 19 two-digit SIC's studied by OSHA. According to the Bureau of Labor Statistics, in 1979, there were 225,300 total employees in SIC 44.[7] Using the $53 per worker cost, even if all of these employees are exposed to noise

[7] U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, 27 (March 1980): 83.

levels >85 dB (TWA), the total cost of the hearing conservation amendment for this industry would be $11.9 million. Since this amounts to less than 0.2 percent of total business receipts and only 2.1 percent of net income,[8] it is clear that the hearing conservation amendment would have a minor economic impact on this industry. Moreover, this estimated cost and economic impact are substantially overstated because the total employment figure used includes white collar workers as well as those production workers who are exposed to noise levels below 85 dB (TWA). Since, for the most part, the number of workers exposed to severe noise in the nonmanufacturing sectors is small compared to the number in heavy manufacturing, it is even less probable that compliance costs in these industries would be the cause of major economic disruption.

Small business

OSHA has always attempted to minimize the regulatory burden on small business as long as it would not jeopardize worker safety and health. To conform with this practice, as well as to comply with the spirit of the Regulatory Flexibility Act, the Agency has made a concerted effort to analyze the special problems that small business might face in complying with this amendment. (The requirement for a Regulatory Flexibility Analysis applies only to proposed regulations issued after January 1, 1981, not to final regulations issued after that date.) Where possible, the proposed regulation was modified to ameliorate potential hardships. For example, the requirement for monitoring may affect smaller businesses disproportionately because they will often rely on consultants, whereas it is easier for larger firms to develop an in-house monitoring capability. After analyzing the record, OSHA drafted the present provision to allow the obligation to recur every other year in most situations, rather than at least annually as was originally proposed. Also, the proposal required that a worker repeat the audiometric exam if a significant threshold shift was detected. The final amendment deletes this requirement for workers who were tested after 14 hours away from workplace noise. Although it may not be practicable for large firms to schedule morning tests for all of their exposed workers, small businesses should be able to take full advantage of this exemption.

Despite these efforts, small business firms may find compliance more of a burden than large firms. Table 10 in the Cost of Compliance section shows that there are only 1–19 employees in almost two-thirds of the 311,094 establishments in those industries primarily affected by noise. The table implies that a firm classified in this size group hires an average of five production workers. Based on the BBN exposure data (see Table 11) an average of 34.4 percent, or only about 2 workers, would be exposed to noise at or above 85 dB in these small establishments.

Small firms will often find ways to reduce monitoring costs by working together to share equipment or by renting monitoring equipment to measure noise exposures. However, following the cost estimation procedures developed above, if these firms do hire consultants to satisfy their monitoring requirements, the annual monitoring cost would average $206 per firm. Using BLS data to calculate a weighted average hourly earnings of $6.76 for production workers in these industries, the estimated cost of sending two workers for audiometric testing is $68 per year. Annual costs for these small firms to provide training and hearing protectors come to about $24 and $20 respectively, while costs for recordkeeping and the posting of signs add $6.00 per firm. Thus, compliance costs for establishments in the smallest size category may average about $324 per year.

Costs of this magnitude are obviously significant to the smallest firms. However, except for the most marginal of these establishments, they are not likely to affect the economic viability of an otherwise profitable operation. Moreover, these costs may be substantially offset by the potential financial benefits of reduced worker absenteeism and workplace accidents. In addition, OSHA offers free onsite consultation in every state, funded under Section 7(c)(1) of the OSHA Act. This service is delivered by State governments or private sector contractors using trained and qualified professional staff. To the extent that these resources allow, OSHA will make a special effort to respond to requests from employers for professional advice and assistance. Also, OSHA is in the process of developing printed pamphlets that will assist employers in providing appropriate training to their workers. The availability of these additional resources should significantly enhance the ability of small business to comply with the provisions of the hearing conservation amendment.

[8] In 1974, receipts for SIC 44 totalled $6,959,289,000 while net income was $570,287,000. See U.S. Department of the Treasury, Internal Revenue Service, *Statistics of Income—1974, Corporation Income Tax Returns*, (Washington, D.C., 1976), p. 12.

VIII. Resource Availability

For the compliance activities of the hearing conservation amendment to be feasible, industry must have the specialized equipment and personnel essential to an acceptable program. As documented in the following paragraphs, the noise record indicates that industry need not develop new technologies to implement hearing conservation programs since the equipment required by the new rule is already being manufactured and sold to industrial purchasers.

A substantive issue that remains to be addressed, however, is the general accessibility of the necessary human and material resources. An assessment of the present availability of equipment and personnel would be useful but it would not provide a realistic indication of the future availability of these resources following the promulgation of the amendment. In the absence of a detailed requirement for hearing conservation programs, many employers have not felt obligated to protect workers from hearing loss. As a result, there has been little incentive for manufacturers to step up the production of appropriate equipment. Similarly, the number of properly trained hearing professionals has been limited by the demand for their services. As industry begins to implement the hearing conservation activities mandated under this rule, it is anticipated that the supply of these resources would rapidly expand to satisfy the new requirements.

Monitoring

The feasibility of the monitoring provision, which requires the determination of a representative noise exposure for each worker exposed to an 8 hour TWA of 85 dB or more, depends on the availability of appropriate instrumentation for firms performing in-house monitoring or of qualified monitoring consultants for firms that choose not to obtain the necessary noise measuring equipment. Comments to the noise record indicate that currently at least 6,000 dosimeters are manufactured each year (Ex. 319 A–1; Ex. 319 A–7; Ex. 319 A–12; Ex. 319 A–20; Ex. 319 A–69; Ex. 319 A–72). Although not all of these dosimeters meet the specifications of the final rule, some appear to comply with the amendment by meeting the range and lower threshold requirements as well as the specifications of ANSI § 1.25–1978 (Ex. 319 A–8; and OSHA telephone survey to dosimeter manufacturers). Kampernan (Ex. 321–32) has tested one of these instruments

and found that it meets a test OSHA believes to be more rigorous than the one this amendment requires. Other manufacturers should also have little difficulty building units that comply with the amendment as the technology is available to both domestic and foreign firms. In addition, there are at least 5,300 sound level meters manufactured each year that can be used to measure worker exposures (Ex. 319 A–1; Ex. 319 A–7; Ex. 319 A–12; Ex. 319 A–72).

The analysis described in the Cost of Compliance section concludes that only the larger industrial establishments are likely to purchase monitoring equipment. In the 19 industrial sectors studied, there are less than 34,000 establishments with over 100 employees (see table 10). It is not known how many of these firms already possess acceptable monitoring instruments. However, the rates of production listed above for units that will last a number of years imply that a substantial amount of equipment is already available. Further, because many of the smaller establishments will opt to rent or share equipment, each instrument will frequently be used by numerous employers.

The significant increase in the demand for monitoring instruments which will follow the implementation of the hearing conservation programs will provide a sharp stimulus to their production. Of the 12 companies currently manufacturing dosimeters, only 2 manufactured acoustical measurement equipment prior to the passage of the 1969 noise standard. Since that time, the remaining companies either expanded their product lines to include sound level meters and dosimeters or were established in response to the anticipated demand for noise measurement equipment. In similar fashion, existing manufacturers and new firms will be able to supply dosimeters and sound level meters to meet the new demand. To provide adequate time for this increased scale of production, OSHA is allowing a 2-year period before the more stringent specification requirements for dosimeters become effective.

In addition, the widespread occurrence of industrial noise has fostered the establishment of numerous acoustical consulting firms that will be available to accommodate those employers who choose to rely on specialized acoustical technicians to measure worker exposures (Ex. 319 B–8; Ex. 319 B–9; Ex. 319 B–11; Ex. 319 B–15). Audiometric testing firms also frequently offer monitoring services (Ex. 319 B–9; Ex. 319 B–12; Ex. 305; Ex. 321–7). This approach is acceptable as long as employers ensure that the consultants use qualified personnel and appropriate equipment and that they follow the requirements of the amendment. Each consulting firm can provide monitoring services to numerous industrial clients as the surveys do not always require a substantial degree of technical expertise (especially where dosimeters are used), and the smaller establishments can be surveyed in no more than one day (see Table 8). Although the record does not indicate the number of consulting firms that currently have the capability to conduct noise measurement surveys, the capacity of such firms would be expected to expand accordingly if the current supply of these services proves to be insufficient.

Audiometric Testing

The data developed in the cost of compliance section indicate that there will be about 5,126,000 workers in audiometric testing programs. The amendment requires that an otolaryngologist, an audiologist, or in their absence, a qualified physician oversee each program. In addition, the audiometric examination must be administered by one of these professionals or a certified technician trained in a course that contains material equivalent to that approved by the Council for Accreditation in Occupational Hearing Conservation, or The Guidelines of the Inter-Society Committee on Audiometric Technician Training.

In 1975, the American Speech and Hearing Association (ASHA) reported that course work in industrial hearing conservation was offered by 100 university and college programs. The ASHA estimated that there were 3,500 audiologists at that time and that this number would probably double in the next five years. (Ex. 15–30, p. 4). Indeed, by 1980, the American Speech-Language-Hearing Association (ASLHA) reported that there were currently 6,052 audiologists who are members of ASLHA, another 2,000 who are licensed, and an additional 1,600 students who were about to receive masters' or doctoral degrees (Ex. 319 B-7). Thus, within the near future, there will be about 9,652 audiologists who can supervise audiometric programs. Although it is unlikely since many firms will have a medical doctor to oversee the program, if only these audiologists supervised audiometric testing for all 5,126,000 workers, they would see an average of 531 workers each. The number of workers tested per audiologist, therefore, is about 2 per day, which is clearly a manageable task.

In addition to audiologists, otolaryngologists and other qualified physicians can oversee audiometric testing programs. The American Council of Otolaryngology (ACO) estimated that there were almost 5,000 practicing otolaryngologists in 1973 (Ex. 321–5, p. 17). According to the ACO, by 1985 there will be a surplus of 253 otolarynogologists (Ex. 321–5, p. 94). Moreover, in 1977 there were 382,000 professionally active M.D.'s in the U.S. (Statistical Abstract of the U.S., 1979, p. 106), and a major study recently submitted to the U.S. Department of Health and Human Services concludes that the U.S. will have an oversupply of 70,000 physicians by 1990 (Report of the Graduate Medical Education National Advisory Committee, Vol. I, GMENAC Summary Report, Sept. 1980, p. 3).

Currently, the Council for Accreditation in Occupational Hearing Conservation (CAOHC) indicates that they have certified about 6,700 audiometric technicians (Ex. 319 B–4), and there are about 700 course directors approved by the CAOHC to provide training for 20–30 technicians per course. If each course director teaches only one course per year to 20 people, this represents an additional 14,000 technicians. Thus, within a year, about 21,000 technicians could be available to perform audiometric tests, which averages to about one technician per 244 workers. However, many technicians have received training and certification by institutions and professionals other than the CAOHC, and audiologists and physicians other than those certified as instructors by the CAOHC will be able to train additional technicians. Thus, the supply of technicians is likely to be even larger than the 21,000 estimated here.

As explained in the previous section on the cost of compliance, about 829,000 workers will receive audiometric tests supervised by physicians or audiologists at clinics and in private practices. The 253 excess otolaryngologists that the ACO predicted to be available in 1985, alone, could provide 1,170,000 office visits (Ex. 321–5, p. 94). Thus, there is no indication that the total supply of otolaryngologists, audiologists, and physicians could not meet this demand.

About 1,447,000 workers were estimated to receive audiometric tests from mobile vans which can travel to virtually any plant facility. At a testing rate of 48 persons per day (Ex. 319 B–8 suggests 56 per 8-hour day), the workers could be tested in 180 days by 167 mobile vans. The use of these vans is already a common practice for many hearing conservation firms. Although the

number of vans presently equipped to provide audiometric services was not submitted to the record, it is reasonable to expect that the existing audiometric firms, along with new firms entering the market will be able to supply these mobile services.

Approximately 2,850,000 workers were estimated to have their hearing tested at in-house programs in 13,285 of the largest industrial establishments. Many of these firms already offer audiometric tests to their employees. Moreover, additional audiometric technicians can be readily trained by sending employees at each facility to an appropriate institution for training. Thus, it is unlikely that these large firms will have difficulty finding appropriately qualified personnel.

In general, the trained personnel are widely disseminated throughout the nation. For example, there are about 2.1 otolaryngologists per 100,000 people in the U.S., with a range from 1.7 in the east south central region to 2.5 in the pacific region (Ex. 321–5, p. 21). By federal geographical region, the distribution of audiologists listed on the ASLHA mailing list ranges from 285 ASLHA audiologists in Region 8 to 1,186 ASLHA audiologists in Region 5. Nevertheless, one objection raised against audiometric testing was that some commercial activities, such as logging operations, would not be accessible to qualified personnel (Ex. 14–264; Ex. 14–260). However, OSHA believes the record shows that in almost all cases, the widespread availability of professional and technical personnel supplying mobile audiometric services should be adequate for even outlying industrial sites.

The major equipment required to perform audiometric examinations are audiometers and audiometric test booths. Based on 2,000 hours of use per year and a 10-minute examination period, each audiometer can potentially be used to provide 12,000 tests. If the audiometers are operated at only half this rate, it would take about 1,000 audiometers to test 5,126,000 workers. The current production of this equipment, each unit of which is expected to operate for about 10 years, is at least 5000 per year. (Ex. 319 A–51; Ex. 319 A–60; Ex. 319 A–64; Ex. 319 A–67). Moreover, all of the manufacturers who commented indicated that they could meet an increased demand, and it is likely that most of the existing audiometers currently used by industry are acceptable under the amendment.

There are three major manufacturers of audiometric test booths in the U.S. Although there is no information in the record about the number of units produced each year, manufacturers could increase their production fairly rapidly by adding second and third shifts if the current supply proves to be inadequate to meet an increased demand. In addition, other firms could expand into this area. However, some users of audiometric test booths may have difficulty complying with the maximum octave band sound pressure levels allowed in the booth during audiometric testing. This may be particularly difficult in the 500 Hz octave band. In an effort to alleviate this difficulty, OSHA has chosen to use 27 dB as the maximum sound pressure level in the 500 Hz octave band rather than the more stringent level of 21.5 dB specified in the ANSI S3.1–1977 standard. Although there is evidence on the record that the levels specified by ANSI S3.1–1977, with the adjustment at 500 Hz, can be met during industrial audiometry (Ex. 266A, p. 73; Ex. 295), some users may have to relocate their booths to a quieter location in order to comply with this provision. Since only the largest industrial establishments will develop in-house audiometric facilities, quieter enclosed areas should be generally available. Nevertheless, barrier walls could be constructed or double-walled booths purchased where a problem persists. Since this part of the requirement does not become effective until 2 years after the effective date of the amendment, most users should have sufficient time to make the necessary adjustments.

Other Provisions

The resources required to comply with the use of hearing protectors, training, the posting of warning signs, and the keeping of records will not be difficult for companies to find. The general availability of hearing protectors is amply demonstrated by the list of 175 models of hearing protectors from 46 different manufacturers or suppliers published by NIOSH in 1975 (Ex. 321–14A). Training materials, warning signs, and record forms also can be readily purchased from many safety supply houses.

IX. Additional Matters

It has been shown that this standard will result in a significant reduction of a significant risk of hearing impairment. Indeed, even assuming full compliance with the present hearing conservation requirements set forth in § 1910.95(b)(3), the new standard is reasonably necessary and appropriate to reduce a significant risk, in that it will result in 38,000 fewer cases after 10 years, 143,000 after 30 years, and 189,000 at equilibrium. It has also been shown that the costs of the standard, $53 per employee covered, and the total new costs, averaging 0.0148% of sales and less than .2% of profits, are economically feasible and that the amendment is technologically feasible. Hearing impairment reduces a worker's effectiveness on the job, makes life much more difficult and when noise-induced, is essentially nonreversible and cannot be cured through use of hearing aids. OSHA has issued this standard because of these reasons and findings. Thus, in accordance with the Agency's traditional interpretation of Sections 3(8) and 6(b)(5) of the Act, and its legislative history, the Secretary is issuing this standard to reduce a significant risk of material impairment.

OSHA rejects the view that the Agency should weigh costs and benefits in issuing this standard. OSHA believes such a course would contravene its statutory mandate. We note, however, that the question of whether OSHA must balance costs and benefits is presently pending before the Supreme Court in *American Textile Mfgs. Institute, Inc.* v. *Marshall*, U.S. Nos 79–1429, 79–1583. If required to do so as a formal finding, OSHA would find that the prevention of a year of hearing impairment is worth many times more than the cost of this standard in preventing that impairment. Losses of workplace effectiveness, inability to hear safety warnings on the job, inability to communicate with family and friends, and inability to enjoy many of the benefits of a media oriented society are very real and very substantial losses, even if exceedingly difficult to quantify in dollars. The basis for this alternative cost-benefit finding are contained in the Final Regulatory Analysis (Section VII) which contains several evaluations of the comparison between costs and benefits. That discussion is incorporated here by reference. However, we briefly summarize it below.

Some of the financial savings created by this amendment, such as reductions in absenteeism and worker's compensation payments have been estimated above. However, the value of preventing the serious hardship of hearing impairment, though large, cannot be quantified in dollars.

The data available in the noise record are much more extensive than can normally be expected to be available in the health area. It is possible to make a reasonable estimate that hearing conservation programs over the next 70 years will prevent 43.3 million person-years of hearing impairment at a cost of $436 per year of hearing impairment

prevented (discounting neither costs nor benefits).

OSHA has placed a detailed numerical analysis of the benefits of the standard in the preamble because the data available permits it. But in most cases of health regulation, such detailed analysis cannot be done because data are not available. As the Supreme Court pointed out, the inability to do such detailed analysis does not inhibit the agency from issuing appropriate regulations (*I.U.D v. API, supra,* slip. op. p. 45).

As discussed above, this standard creates massive benefits, has a low cost per employee covered and creates no feasibility problems. In fact, it would even be appropriate for health and safety regulations to be issued and fully justified by the OSH Act though the reduction in risk were much less and the economic impact greater.

X. Environmental Impact

On February 19, 1974 OSHA announced in the **Federal Register** its intention to prepare an Environmental Impact Statement assessing the impact of a standard that would be proposed for occupational noise exposure (See 39 FR 6119). Information was solicited from the public on a variety of environmentally related issues including possible environmental impacts of the recommended standard and any irreversible commitments of resources which would be involved if the standard should be implemented.

A draft Enviornmental Impact Statement was made available to the public on June 16, 1975 (40 FR 25525) and environmental impact was specifically an issue at the first hearing held in 1975. Approximately 29 comments were received on the environmental impact of the proposal.

A Final Environmental Impact Statement has been prepared in accordance with the Council on Environmental Quality (CEQ) Guidelines (40 CFR § 1500 et seq.) and the Department of Labor's regulations setting out procedures to be used by Department of Labor agencies to insure compliance with the National Environmental Policy Act (29 CFR Part 11). The Final Environmental Impact Statement concluded that the hearing conservation amendment will beneficially impact the workplace environment by reducing both the incidence and the degree of hearing loss among workers. The incidence of other adverse health effects associated with noise exposure may also be reduced. In addition, the environment outside the workplace should not be significantly affected.

The Final Environmental Impact Statement discussed a number of alternatives including:

(1) Revision of the permissible exposure level for noise.

(2) Initiation of a hearing conservation program at 85 dB.

(3) Initiation of a hearing conservation program at 80 dB, and 90 dB.

(4) Revision of the monitoring, testing, and training provisions in the proposal.

(5) No regulatory action.

The alternative which would be the most preferable environmentally is the one which would result in the greatest reduction in hearing loss and other adverse non-auditory health effects associated with noise exposure in the workplace without resulting in any significant adverse environmental impact. Theoretically at least the most preferable alternative would have been to revise the permissible exposure level downward; this would have the effect of protecting more employees from suffering material impairments of hearing and of lessening the severity of the impairments that might be suffered anyway. At the other end of the continuum was the alternative of no regulatory action. This would result in approximately 5.4% of employees and retirees (940,000) suffering material impairments of hearing due to occupational noise exposure. The Agency felt that more information was needed before it could make a decision to reduce the permissible exposure level. The decision as to the appropriate permissible exposure level was deferred pending the acquisition and evaluation of the necessary data.

Various alternative monitoring, testing and training provisions were generally considered. Many of these were suggested by interested persons in comments and were discussed at the rulemaking hearing. For example, the appropriate frequency of monitoring and audiometric testing was the subject of somewhat varying opinions. While it is not possible to isolate the contribution of any particular element to the overall efficacy of an employee hearing conservation program, OSHA has endeavored to select a combination of provisions which together will provide adequate protection to employees while minimizing the burden on employers. The hearing conservation program prescribed in the final standard is consistent with the advice and recommendations of numerous experts in the field of hearing conservation.

Initiation of hearing conservation programs at employee exposure levels of both 90 dB and 80 dB was also considered. Initiation of a hearing conservation program at 90 dB was rejected because it was not considered adequate to reduce the significant risk of material impairment faced by many employees at this level. Implementation of this alternative, even assuming perfect compliance, would still result in approximately 351,00 occupationally-exposed persons suffering material impairment of hearing. Initiation of a hearing conservation program for all employees exposed to 80 dB, although it would have provided a substantial reduction in the number of hearing impairments resulting from noise exposure, was deferred. Lowering the initiation level for hearing conservation programs to 80 dB would greatly increase the number of workers and establishments included in these programs. This would increase the demand for the various resources needed to implement effective hearing conservation programs including individuals trained in the evaluation of hearing and persons trained in conducting audiometric examinations, as well as increase the demand for the equipment and supplies used in such programs. The current record does not contain enough information to enable OSHA to determine if the resources available are adequate to meet this increased demand.

After considering the various alternatives the Agency decided to mandate hearing conservation programs when workers are exposed to TWAs of 85 dB. This is an environmentally pragmatic decision and should result in preventing 898,000 persons from suffering a material impairment of hearing as a result of occupational noise exposure. This represents an additional 778,000 material impairments over the estimated number of material impairments that are being prevented by hearing conservation programs currently in effect.

The alternative selected by the Agency will not eliminate all environmental harm due to occupational noise exposure since some persons will continue to suffer material impairment of hearing even after implementation of the hearing conservation program required by the amendment. However it was chosen by the Agency because it will extend the benefits of hearing conservation programs to approximately 5.1 million U.S. workers while the Agency resolves various feasibility issues surrounding the permissible exposure level and priority of various methods of compliance. By its action in promulgating the hearing conservation amendment, the Agency has taken all practicable means to minimize

environmental harm within these feasibility constraints.

This action will help to preserve the nation's human resources by protecting workers from occupational noise exposure. It has been designed to minimize the irretrievable commitments of human and physical resources needed in order to implement hearing conservation programs.

Summary and Explanation of the Standard

Exposure Monitoring

Noise monitoring is necessary for the following reasons:

(1) to identify employees who should be given audiometric tests and the other benefits of the hearing conservation program;

(2) to identify those employees for whom hearing protection is mandatory under the provisions of this amendment;

(3) to determine the amount of attenuation that hearing protectors need to provide; and

(4) to instruct both employers and employees in the degree of the noise hazard.

The monitoring requirements of this amendment are imposed pursuant to section 6(b)(7) of the Act, which mandates that standards promulgated under section 6(b) shall, where appropriate, "provide for monitoring or measuring of employee explosure at such locations and intervals, and in such a manner as may be necessary for the protection of employees." In this amendment the word "measurement" is used to mean the quantification of an employee's noise exposure. Monitoring refers to a program that includes calibration, measurement, and calculation of dose or noise exposure. Although the current standard requires noise exposures to be controlled to within specific limits, it does not explicitly require the collection of personal noise exposure data. This amendment makes monitoring requirements explicit for purposes of the hearing conservation program.

Briefly, the amendment requires employers initially to determine if any employee's exposure equals or exceeds a TWA of 85 dB. This determination must be based on the employer's good faith inquiry into any factors which would tend to indicate that noise exposures in the workplace are in the vicinity of an 8 hour TWA of 85 dB. Factors meriting a positive determination include any employee complaints about noise, any difficulties in communication at a distance of about 2 feet, or any measurements made with a sound level meter or dosimeter. If the employer's determination indicates any employees are or may be exposed to a TWA at or above 85 dB, then employers must obtain noise exposure measurements which are representative of all such employees.

This initial determination/monitoring cycle must be repeated every 2 years. Of course, the employer may, at his own option, skip the initial determination procedure entirely, and simply measure employee exposures.

Where employees have a TWA of 85 dB or more, measurements must be made at least every 2 years. Measurements must also be taken within 60 days of any change in process, equipment, or personnel assignment which increases employee exposure to the extent that some employees may be newly exposed to a TWA of 85 dB or above, or increases exposure to the extent that any personal protective equipment being used no longer provides enough attenuation. Rather than measure every worker, in such cases, employers have the option of measuring the exposure of only one member of an employee group so long as the other members are engaged in a similar kind of work and are reasonably expected to have approximately the same noise exposure. In this case the employer must select for measurement the employee in the group whom he reasonably believes has the highest exposure. The exposure of the measured employee is then attributed to the other members of the group. Measurements of new employees must be taken (or exposures must be attributed to them) within 60 days of their exposures to a TWA of 85 dB or above. Workers must be notified of their exposures in writing within 21 days of the measurement.

Expression of Noise Exposure

In the proposal, an employee's noise exposure was expressed in terms of a fraction of allowable exposure or dose, often expressed as a percentage. Noise dose is a measure of the total noise to which an employee is exposed during a workshift. It is measured directly by a noise dosimeter or it can be computed from sound levels and the amount of time of exposure to each level. In this amendment, the concept of an "8-hour time-weighted average sound level," abbreviated TWA, is used as an alternative descriptor of noise exposure. The TWA as a single numerical value is the sound level which, if experienced continuously for an 8-hour workshift, would lead to the same noise dose as was measured or calculated, even if the duration was shorter or longer than 8-hours. Since noise exposure levels vary throughout the day in most industrial establishments, the TWA represents the integration of these levels (according to the 5-dB exchange rate), referenced to a duration of 8 hours and an exposure level of 90 dB. OSHA believes that since TWA is an exposure level expressed in decibels, it may be more easily understood by workers, management, the public, and others who are not familiar with the field of acoustics. To summarize, for purposes of the hearing conservation amendment, a dose of 0.5, or 50 percent, is equal to a TWA of 85 dB, computed in accordance with Appendix A of the amended noise standard.[9]

Since noise dose and TWA are equivalent in that one can be calculated from the other, since there does not appear to be much possibility of confusion between the two terms, and since one or the other may be preferred under different circumstances, both terms are defined in this amendment and either may be used by employers. Table A–1 in Appendix A has been added as a convenience so that where the value of one descriptor is known, the value of the other may easily be found.

There were relatively few comments in the record that addressed the issue of whether to describe noise exposure in terms of dose to TWA. There were, however, some instances where witnesses and commenters seemed to confuse noise *levels* with noise *exposures* (for example Ex. 14–96, p. 1; Ex. 14–79 p.

(1) OSHA wishes to clarify the fact that both "dose" and "8-hour, time-weighted, average sound level" are descriptors of employee noise *exposure*. Noise levels are addressed by this amendment only to the extent that they are experienced by employees. Even then, it is the time integration of noise levels that is of importance.

When To Implement the Program

The hearing conservation program must be implemented when any employee's noise exposure equals or exceeds an 8-hour TWA of 85 dB,[10] or when the dose equals or exceeds 50 percent (0.5). The final standard requires the initiation of a hearing conservation program at this point because as explained earlier, a substantial

[9] Technically TWA is not a true average, either arithmetic or exponential, since it represents a theoretical value derived from an accumulated dose. To be more precise, TWA should stand for "time-weighted accumulation." However, the Agency has chosen to use the word "average" so as to be consistent with other OSHA standards, such as the asbestos standard (29 CFR 1910.1001) and the acrylonitrile standard (29 CFR 1910.1045), as well as to be more easily understood.

[10] Unless otherwise noted, where the term TWA is used in the preamble an 8-hour duration is assumed.

percentage of the population whose exposures exceed this level over a working lifetime will incur noise-induced hearing loss constituting material impairment unless preventive measures are applied. This is similar to setting an "action level" of 85 dB. Setting an action level for noise monitoring at approximately one-half the permissible exposure level (PEL) is consistent with other OSHA health standards (for example the standards on Arsenic (29 CFR 1910.1018) and Acrylonitrile (29 CFR 1910.1045)). This is done primarily because of uncertainties that can affect the employer's measuring program. The employer may not be absolutely certain that the day on which he or she measures is representative of the employee's actual exposure throughout the year. Therefore, requiring noise exposure measurements and other elements of the hearing conservation program at an action level the PEL safeguards employers against exceeding the permissible level, as well as identifies the more susceptible workers so that steps may be taken to protect their hearing. Many comments in the record supported initiating noise monitoring at a TWA of 85 dB (Ex. 162, p. 48; Ex. 189–6, p. 25; Ex. 114, p. 5; Ex. 23, p. 4; Ex. 2B, p. 6; Ex. 2C–126, p. 1). In fact, many people who opposed a PEL of 85 dB supported the idea of initiating monitoring and audiometric testing at 85 dB (Ex. 114, pp. 4–5; Ex. 175, pp. 10–11).

Dose Computation

The amendment requires noise dose to be computed in accordance with Table G–16a and the formula $D=100\ C/T$. In cases where the measured levels are not specified in the table, noise dose may be computed using the equation given in the footnote to Table G–16a.

The sound levels to be included in the calculation of the noise dose, whether one uses a sound level meter or a dosimeter, extend from 80 to 130 dB. A-weighted sound levels are assumed throughout the standard and preamble unless otherwise specified. The term "dBA" is not used because it is technically incorrect to do so. (It is the sound level that is weighted, not the decibel). According to acoustician Dr. Robert W. Young (Ex. 2C–121, p. 1) "The decibel is not A-weighted. The quantity . . . is A-weighted sound level (dB)."

Noise dose is relatively simple to compute when the sound level is constant throughout the workshift. The dose in percent, D, is given by $D=100\ C/T$, where C is the total length of the workshift in hours and T is the reference duration corresponding to the measured sound level L, as given in Table G–16a of the amendment.

For example, consider a worker who is exposed to a continuous sound level of 96 dB for a 7-hour workshift. As specified in Table G–16a, the reference duration for 96 dB is 3.5 hours. Entering this reference duration into the previous formula: $D=100(7/3.5)=100(2)=200\%$. Two hundred percent is the dose for a 7-hour day's exposure to 96 dB.

When the employee's noise exposure level fluctuates, or consists of two or more levels, the total noise dose is computed as follows: $D=100(C_1/T_1+C_2/T_2+\ldots+C_n/T_n)$, where C_n represents the total time of exposure at a specific level, and T_n represents the reference duration for that level given in Table G–16a or by the equation in the footnote to that table.

For example, if a worker is exposed for 5 hours to 85 dB, 2 hours to 87 dB, 15 minutes (0.25 hour) at 95 dB, and 45 minutes (0.75 hour) at 97 dB, the total noise dose would be:

$D=100\ (5/16+2/12.1+.25/4+.75/3)$
$D=100\ (0.31+0.17+0.06+0.25)$
$D=100\ (0.79)=79\%.$

The 8-hour time-weighted average sound level (TWA) can be computed from the employee's dose by use of the formula: $TWA=16.61\ \log_{10}(D/100)+90$ where the dose, D, is given in percent. Conversely, the dose may be computed from TWA using: $D=100\times 10^{(TWA-90)/16.61}$.

Values of TWA corresponding to various doses are tabulated in Appendix A, II. For the two examples given above, the TWA for a dose of 200 percent is approximately 95 dB, and that for a dose of 79 percent is approximately 88 dB. Since Table A–2 in Appendix A does not provide values above a dose of 999 percent or above a TWA of 106.6 dB, the formula must be used to convert from dose to TWA, or from TWA to dose in cases where exposures exceed these values.

Note that TWA is the sound level that would produce a given noise dose if an employee were exposed to that sound level continuously *over an 8-hour workday. This is true regardless of the length of the actual workshift.* OSHA requires the initiation of monitoring at a noise dose of 0.5, or 50 percent. This corresponds to a TWA of 85 dB. It is important to understand that the exposure is to be averaged over 8 hours. Thus, if an employee only works for 5 or 6 hours, the exposure can be higher during those hours than if the employee works for 8 hours. For example, for purposes of the hearing conservation amendment a 4-hour workday at a steady sound level of 90 dB, an 8-hour workday at 85 dB, and a 12-hour workday at 82 dB all correspond to a noise dose of 50 percent and to a TWA of 85 dB.

Table G–16a is essentially the same as the table presented in the proposal except that levels above 115 dB and below 85 dB are included so as to help clarify the fact that they are to be included in the determination of noise dose.

There are several reasons for the extension of Table G–16a. The current standard does not permit exposures above 115 dB, regardless of duration. This provision was not intended to preclude such levels, where they actually exist, from being included in the computation of an employee's actual total exposure. Indeed, it would be patently unreasonable to exclude the highest levels which are the most damaging (Kamperman, Ex. 321–32, p. 1; Ex. 321–21E, p. 5). The extension of the table above that level has been done to make explicit the requirement that, for purposes of the hearing conservation program, exposures above 115 are to be included in the dose. This is important so that where noise exposure levels exceed 115 dB, the actual exposures above that level are assessed accurately, so that employees will know that they need to select hearing protection with maximum attenuation capabilities, and to take steps to ensure that protectors are effectively fitted and worn. To avoid giving the impression that levels above 115 dB are permitted, values above that level in Table 16a have been added in italics.

Similarly, Table G–16a gives values below 85 dB so that such levels also can be included in the dose for purposes of the hearing conservation program. These values are primarily relevant for those employees with workshifts longer than 8 hours. To ensure that exposure measurements taken with a dosimeter are equivalent to those obtained using a standard sound level meter, and to those in Table G–16a, an operating range of 80 to 120 dB is required for dosimeters. The upper limit of 120 dB ensures that levels above 115 are included in the dose. The lower limit of 80 dB is consistent with accepted measuring techniques for dosimeters. It is generally accepted that the lower threshold of a dosimeter should be 5 dB below the level for which measurements are being taken. Evidence in the record supports this requirement.

Dr. George C. Maling, Jr., representing the Institute of Noise Control Engineering, commented that selection of the same level as the point at which integration (or accumulation of noise dose) begins may lead to serious measurement errors. He recommended setting the threshold 3 to 5 dB below the lowest "action point" (Ex. 14–334, p. 2).

Kenneth Eldred, as Chairman of the ANSI Sound Level Meter Standards Working Group, also supported this concept. He stated that should a sound level of 85 dB for 8 hours trigger the hearing conservation program, there might be considerable measurement error unless the threshold level of the dosimeter is required to be at a lower level, such as 80 dB (Ex. 321–19, p. 2). For example, with continuous noise levels that fluctuate between 84 dB and 86 dB, instruments with lower thresholds of 84.5 dB, 84.8 dB, or 85 dB could read anything from zero percent to more than 100 percent dose in exactly the same noise conditions. Setting the threshold well below 85 dB would prevent this confusing situation, and would ensure that the appropriate employees receive the benefits of the hearing conservation program.

There were some comments during the hearings that by initiating the hearing conservation program at a TWA of 85 dB, OSHA was, in effect, lowering the permissible exposure limit, thereby making new requirements for engineering controls (Ex. 14–341, p. 1; Ex. 14–288, p. 2). However, the Agency has made it clear throughout this preamble that the PEL remains unchanged at this time, and that an action level of 85 dB, calculated as set forth in the amendment, is an appropriate action level to trigger monitoring and other hearing conservation measures. The lower threshold of 80 dB for measurements merely facilitates the proper identification of employees to be included in the hearing conservation program, and does not change the requirements for engineering controls.

Monitoring Requirements

The proposal stated that employers have an obligation to determine if any employee is exposed to a daily noise dose of 0.5 or above (50 percent or above). The American Trucking Association (Ex. 14–878, p. 3) suggested that the proposal gave insufficient guidance on when monitoring is required. In order to ensure that monitoring will be conducted when necessary, OSHA has stated conditions upon which employers must base their determinations.

In order to comply with this amendment employers must determine whether or not they need to monitor workers' noise exposures. The initial determination is based on any information, observation, calculations, or exposure measurements that indicate exposures are or may be at or above 85 dB. This includes personal noise exposure surveys, area noise surveys, and other information such as manufacturer's information about noise emitted from specific machines. The employer must also consider other factors which may tend to suggest noise exposures at or above a TWA of 85 dB. Such factors include employee complaints about noise, indications that employees are losing their hearing, or are finding that normal conversvation between two people is very difficult when those attempting to communicate are facing each other in the work area at a distance of 2 feet (Ex. 1, Table 5; Ex. 31, Fig. 6–1). Employers shall make this determination at least every two years so as to identify any new employees in need of periodic noise monitoring.

The Agency received a number of comments favoring an initial determination as a practical approach to monitoring. Dr. Robert Benson, representing the American Iron and Steel Institute (Ex. 64–10, p. 11), stated that a preliminary screening method should be used to determine whether or not extensive measurements must be applied. S.E. Cyc for the Timken Co. (Ex. 14–978, p. 3) suggested that employers establish "noise centers" where noise samples could be made on a regular basis to see if certain areas need further investigation. The Evaporated Milk Association (Ex. 14–295, p. 2) suggested that Type III sound level meters could be used to make cursory measurements for such determinations. OSHA agrees that all of these methods could be appropriate.

John J. Ahern of General Motors Corp. (Ex. 14–883, pp. 8–9), as well as H. Grady Gatlin of the Air Transport Association (Ex. 14–860, p. 3), recommended area monitoring as a way to estimate employee exposure. Area monitoring is a good way to determine the need for further monitoring, and it is useful for planning engineering control strategies. However, since employees move around within the workplace, and since area measurements are not made at the worker's ear, area monitoring is not sufficient to describe actual worker exposures. Area monitoring would constitute compliance with the requirement for an initial determination, but not with the actual monitoring requirement.

It is intended that the initial determination direct the employer's attention to the workplace noise exposures. Because of the ubiquity of noise, it is contemplated that all employers covered by the standard will have to make initial determinations, yet only a small fraction of them will actually have to monitor their employees' noise exposures. The initial determination is essentially a screening device which balances the need to protect employees by measuring their exposures against the undue burden on employers if the standard were to require measurement of every employee's exposure. Such a requirement would result in the monitoring of many employees who do not have significant noise exposures. The final standard does not require the initial determination to be written. While it is thought that a written initial determination might force the employer to focus more on the rationale for deciding not to monitor, it was felt that in this case imposing such a requirement would result in an extremely large amount of paperwork due to the ubiquity of noise. It should be noted, however, that initial determinations which are incorrect do not protect an employer from a citation for failure to monitor employee exposures. There is little to gain from incorrect initial determinations and it is expected that initial determinations will be carefully done.

The proposed standard required annual monitoring. However, some commenters suggested less frequent monitoring. The J.I. Case Company (Ex. 189–1, p. 3) suggested every 2 years, and John Stenmark of the American Iron and Steel Institute recommended every 3 years (Ex. 2C–126, p. 4). In the final amendment the proposed annual monitoring requirement has been relaxed to every 2 years. The Agency believes that monitoring every 2 years is sufficient, as long as additional monitoring is conducted whenever the employer has reason to believe that employees' exposures may have increased so that those not in the hearing conservation program would need to be included or that the attenuation provided by hearing protectors already in use is insufficient. Therefore the amendment requires employers to remonitor whenever there is an increase in the level or time of exposure sufficient to render an employee's hearing protectors inadequate. Monitoring more often than every 2 years will probably be unnecessary in industries where production processes change relatively little.

Some commenters opposed a requirement for periodic monitoring at all, especially in conditions where noise levels tend to be uniform over long periods of time. Groups such as the Air Transport Association (Ex. 142, p. 4–5), the American Iron and Steel Institute (Ex. 64–4, p. 3–4), and the Can Manufacturers Institute (Ex. 14–862, p.

12) believed that periodic monitoring was unnecessary unless there was a significant change in production process.

After considering these arguments OSHA has, in this amendment, required periodic monitoring for all industries, where initial determinations indicate exposures may equal or exceed a TWA of 85 dB, but has substantially reduced the frequency of the required monitoring. Periodic monitoring is necessary because noise levels tend to increase as equipment ages and wears, and in the absence of actual measurement employers are often unaware of these changes. Changes in noise level may cause workers whose exposures have been below a TWA of 85 dB to exceed that level, and therefore these workers would need the benefits of the hearing conservation program. Workers who have been exposed to a TWA between 85 and 90 dB may exceed the permissible exposure limit (PEL) and at this point the employer has an obligation to implement feasible engineering controls (or hearing protection whenever engineering controls are infeasible). Workers exposed above the PEL and whose exposures have increased may need additional hearing protection, such as an earplug with greater attenuation, or a change in type of protector. In addition, periodic monitoring is expected to serve an informational purpose since the amendment requires employers to inform employees of their exposures. Therefore workers will be reminded of the nature and extent of their exposures and will be better motivated to participate cooperatively in the hearing conservation program, and to wear properly fitted hearing protectors. (Ex. 147C, p. 335).

The monitoring procedure outlined in the final standard requires that once every 2 years the employer make an initial determination as to whether any of the employees may be exposed to a TWA of 85 dB. Even in the case of a negative initial determination, a new initial determination must be conducted every 2 years. If the initial determination is positive, then the employer must determine actual exposure through measurement.

In order to minimize the employer's burden while affording adequate protection to employees, the final amendment allows employers to measure fewer than all noise-exposed employees. The employer must select a group of employees who are engaged in a similar kind of work, and whose noise exposures are expected to be similar. The employer must then select for monitoring the worker within this group whom he or she reasonably believes has the highest noise exposure. When this employee has been monitored, his or her noise exposure is attributed to and written on the record of each member of the group. If the employer finds that the monitored employee's noise exposure is so high that it does not accurately reflect the exposure of other members of the group the employer may, of course, divide the group into smaller subgroups and pick an employee within that subgroup to monitor. This employee's exposure may be attributed to the rest of the employees in the subgroup. Of course nothing in the amendment prevents the employer from monitoring the exposures of all employees.

The proposal required additional monitoring with 30 days of any change or modification of equipment or process, or other workplace or work practice modifications affecting the noise level. There was considerable debate about this requirement. Some companies, such as the Outboard Marine Corporation, (Ex. 14–242, p. 4), pointed out that noise levels in their facilities were constantly changing from day to day. Others agreed (Air Transport Association, Ex. 14–860, Attach 2, p. 3; National Concrete Masonry Association, Ex. 14–247, p. 4; Oklahoma General Contractors, Ex. 14–306, p. 1) and stated that remonitoring should not have to occur unless there was a "significant" or "substantial" change in exposure levels. The Can Manufacturers Institute (Ex. 14–862, p. 12) equated a "significant increase" with an increase in level of 5 dB or greater. Many witnesses supported the 30–day "grace period" in which to remonitor when a significant change had occurred (Ex. 14–287, p. 2; Ex. 14–306, p. 1), but some recommended longer periods. Bill Johnson, representing Keystone Steel and Wire (Ex. 14–232, p. 1), suggested that 30 days was insufficent due to limited personnel and time constraints. William Hughes, representing the Composite Can and Tube Institute (Ex. 14–984, p. 4), supported monitoring within 90 days of a change in process so that employers could be sure that new conditions were not temporary, and that they had stabilized.

In response to these arguments the Agency has relaxed the proposed requirements for additional measurements. OSHA agrees that it is unreasonable and unnecessary for purposes of deciding who should be included in the hearing conservation program to require employers to remonitor with *any* change in exposure level since work environments will often change from day to day. The Agency does not intend employers to have to monitor workers' exposures continuously, but to monitor whenever changes in exposures are sufficiently great to require new hearing protectors or, for those employees who are not already in the hearing conservation program, to require training, audiometric testing, and the availability of hearing protectors. To minimize the need for interim monitoring, employers should take the periodic noise measurements on days when workplace conditions are noisiest, and plan the hearing conservation program accordingly. Due to potential feasibility problems, the time period for interim monitoring has been lengthened to 60 days. The Agency recognizes that employers who use consultants may have a scheduling problem and thus has provided this longer period. However, employers are urged to remonitor sooner than 60 days whenever possible, in order to minimize the time during which employees might be subjected to higher noise exposures without adequate protection.

This option of representative sampling is consistent with many comments in the record, and was generally supported by General Motors and Alcoa. Mr. Ahern of General Motors Corporation (Ex. 14–883, pp. 8–9) said that monitoring every employee was costly and unnecessary. Mr. Cyc. (Ex. 14–978, p. 3) suggested that employers could sample the noise exposures of certain groups of employees in an area and use the average of those samples. Thomas Bonney of Alcoa Corporation (Ex. 14–969, p. 2) suggested that monitoring a representative sample of employees be allowed when noise dosimeters are used. The draft California Noise Standard (Ex. 321–50A, pp. 5–6) recommended the following: "Where several employees work at the same job, the daily noise dose may be measured for a representative sample of employees and the highest noise dose thus determined shall be considered representative of all such employees in the group." OSHA believes that the provisions of the final standard are responsive to these suggestions and that a method such as this effectively reduces the monitoring burden but still provides adequate protection for employees.

The proposal did not explicitly provide how soon a new employee should be monitored. The Agency recognizes a need for such an explicit requirement so as to identify employees who need audiometric testing and ear protection. If employers wait until the regular biannual monitoring employees might not be identified for up to two years. Therefore the amendment

requires new employees to be monitored within 60 days of their first exposure to noise at or above a TWA of 85 dB.

The need for actually monitoring new employee exposures would depend upon the circumstances. If the new employee replaces an employee who did the same job, the old employee's noise exposure measurement may represent the new employee's measurement until the next biannual monitoring. If the new employee is assigned to a work activity for which employee exposure measurements have been made, that exposure would then be attributed to the new employee. If the new employee does not replace anyone, and does not become part of a group with a measured representative, the employer must do an initial determination and, where the determination is positive, must measure the exposure of the new employee. In either case the new employee must be apprised of his or her noise exposure, (which is actually the representative noise exposure) within 21 days of the determination.

Initial monitoring of all employees exposed to a TWA above 85 dB shall be completed within 180 days after the effective date of the amendment. This extra time has been provided because the Agency recognizes that a great many employees will need to be monitored. Although many employers already possess noise measuring equipment, and have an ongoing monitoring program, most of the 2 million employees exposed to TWAs between 85 and 90 dB (Ex. 192, pp. 2–7) will not have been monitored previously. Those employers who have not monitored before will need to purchase or rent equipment, or engage consultants to perform the monitoring. It is felt that this extra time, when added to the delayed effective date of the standard, will not result in an undue burden on employers or tax available equipment and services. Initially OSHA will accept previous monitoring results done within the past two years if they are done in accordance with this amendment.

Employee Notification

The hearing conservation amendment requires employers to notify workers of their noise exposure individually and in writing within 21 days of the monitoring. Each worker shall be notified of his or her own exposure, or of the exposure of the measured employee who represents the group.

The proposal required the employer to notify employees within 5 days of the time the employer discovers overexposure. Comments to the hearing record generally favored longer time periods because of administrative difficulties (Ex. 105, p. 8; Ex. 145, Comments p. 5; Ex. 14–215, p. 3; Ex. 14–223, p. 8; Ex. 14–308, p. 4). Therefore the Agency has relaxed the requirement to 21 days from the time of monitoring. It is the Agency's belief that the additional time will minimize administrative difficulties without significantly lessening employee protection. For example, in the event that a consultant takes the measurements the longer period will allow for communications between the consultant and the employer. Also, this period should allow the employer sufficient time to include the written notice in the employee's pay envelope. Periods longer than 21 days are not satisfactory since employees need to know the nature and extent of the hazard as quickly as possible in order to carry out their responsibilities in the prevention of adverse effects. The grace period now extends from the time of the monitoring rather than the time the employer discovers "overexposure" so as to discourage long delays or lapses of communication between employers and their technical staffs or consultants.

The proposal required employees whose exposures exceeded the prescribed noise levels to be notified "of such excessive exposure." Employers were required to keep a record of each employee's noise dose, which would be accessible to the employee. The proposal did not specifically require that employers notify employees of their actual exposures, but the accessibility of the record partly fulfilled that function. The final amendment modifies this requirement in that the employer must notify each employee of his or her actual exposure, or of the exposure of the employee who is representative of his or her exposure.

The amendment clarifies the proposal's requirement for employee notification since it is important for workers to know more than merely whether or not they are overexposed. This is especially true for purposes of a hearing conservation program where much of the burden of protection falls on the employee. By informing workers of their actual exposures, employees will have a better understanding of the extent of the hazard, and in many cases will be better motivated to wear their hearing protectors effectively. A worker who is told that his or her TWA is 103 dB will have a better sense of the need for protection than will a worker who is only told that he or she is exposed above the permissible level (90 dB) or the action level (85 dB). Since the field use of hearing protectors shows significantly lower average attenuation values than laboratory tests would indicate (Ex. 308, p. 27; Ex. 301, p. 35; Ex. 300A, p. 91), and since the worker is the only one who can know on a continuous basis whether the protector fits snugly, it is very important that the worker be properly apprised of the hazard.

Method and Accuracy of Measurement

In order to evaluate employee noise exposure accurately, OSHA has established specific requirements for instruments and techniques to be employed in measuring noise. In some instances the amendment requires that measuring instruments adhere to, and calibrations be performed according to, consensus standards developed by the American National Standards Institute (ANSI). In other instances the amendment specifies exactly the steps that employers must follow in order to meet a certain requirement. These specifications are considered necessary in order to standardize and evaluate the measurement results.

By specifying minimum requirements for noise measuring instruments the Agency believes that it will better identify those workers needing audiometric testing and will help ensure that those workers requiring hearing protectors because of a significant threshold shift will be given protectors with proper attenuation to afford them adequate protection. Other elements of the program are also dependent upon accurate noise measuring instruments, namely measurements of sound levels inside audiometric test rooms, audiometer calibration, and the calculation of hearing protector attenuation. Moreover, it should be noted that these specifications merely provide a floor, or a minimum level of compliance. Employers are always free to use instruments that are more precise or more sophisticated than the ones specified in the amendment.

The use of consensus standards, such as those of ANSI, is supported by section 6(b)(8) of the Occupational Safety and Health Act, which calls for the Secretary of Labor to explain the reasons why any rule adopted by OSHA differs from any existing national consensus standard. Although the Agency recognizes that ANSI standards are revised periodically, the amendment refers to specific standards by number and year. In the event that a referenced ANSI standard is revised, the Agency will consider proposing a revision to the noise standard whenever the Agency believe that the revision is necessary and feasible for industry.

The hearing conservation amendment permits noise exposure measurements to be made either with a noise dosimeter or a sound level meter. Sound level

meters must meet the Type 2 requirements of the American National Standard Specification for Sound Level Meters (ANSI S1.4–1971) (R1976)), and they must be set to the A-weighting network and the "slow" meter response. An appropriate sampling strategy must be used in order to measure accurately the employee noise exposure. Appendix B has been provided to advise employers of an acceptable strategy. Appendix B is intended as a guideline; reasonable alternatives that will ensure sufficient numbers of measurements for the range of sound levels encountered may also be used. All sound levels between 80 dB and 130 dB must be included, as specified in Table G–16a, in computing noise dose or TWA from measured sound levels.

The amendment also permits the use of dosimeters to measure the noise exposure of employees. The use of dosimeters is preferred in situations where there is a significant component of impulse noise, because the dosimeter can integrate all noise levels automatically, whereas individuals who use a sound level meter and a stopwatch are likely to miss certain transient sounds. Therefore, in situations where there is a significant impulse noise component, a dosimeter can be expected to result in more accurate exposure data than can be obtained using a sound level meter. It is also important to note that, in most industrial settings where the noise levels are not constant, the use of a dosimeter will be less burdensome than the use of a sound level meter. Nevertheless, employers have the option of using a sound level meter providing it is used in a manner which, like the procedures suggested in Appendix B, ensures the maximum accuracy.

Two years after the effective date of this amendment dosimeters must meet the requirements for Class 2A–90/80–5 according to the American National Standard Specifications for Personal Noise Dosimeters (ANSI S1.25–1978) (Ex. 313). "Class 2" corresponds to Type 2 tolerances of ANSI S1.4–1971 for sound level meters; "A" refers to the A-weighting network; "90" refers to the 90 dB level at which an 8-hour exposure yields 100 percent of the allowable dose; 80 refers to the lower cutoff or threshold below which the dosimeter does not respond, and "5" refers to the exchange rate between noise level and duration. Dosimeters must have an "operating range," as defined in ANSI S1.25–1978, from 80 to at least 120 dB, and in addition they must meet the requirements of section 7.5 of ANSI S1.25–1978 for a test signal at an average sound level of 90 dB, when the signal has a "crest factor," also as defined in ANSI S1.25–1978, of 30 dB.

Crest factor is the ratio of the peak sound pressure to the average sound over a specific time period. The "crest factor capability" of an instrument indicates the maximum crest factor for which the instrument meets specified tolerances. Since section 7.5 of the ANSI standard requires a crest factor of approximately 10 dB above the upper limit of the operating range (which must be at least 120 dB), such instruments will be capable of including short-duration sounds up to 130 dB in the integration. The final standard requires that dosimeters meet an additional test beyond that required by section 7.5 of the ANSI dosimeter standard. The additional test using a signal with a 90-dB average sound level and a 30-dB crest factor has been included to ensure the proper integration of short duration sounds having peak levels that are considerably higher than the average sound level. Because not all existing dosimeters can be adjusted to meet these specifications, the requirement for a lower threshold of 80 dB and a crest factor capability of 30 dB are not mandatory for 2 years. Until that time, employers may conduct monitoring with existing dosimeters using a lower threshold setting as low as the instrument permits. In addition, during this interim period dosimeters without a crest factor capability of 30 dB may be used.

The proposal permitted the use of dosimeters with accuracy and precision equivalent to that of a sound level meter, but specific performance requirements were not given, chiefly because no performance standard existed at that time. This led the Can Manufacturers Institute to point out (Ex. 14–962, p. 13) that dosimeter performance was suspect in the absence of a performance standard.

In 1978 the Acoustical Society of America completed and published an American National Standard Specification for Personal Noise Dosimeters, ANSI S1.25–1978 (Ex. 313). The standard was submitted to the public record, and the public was invited to comment on it. There were no adverse comments on the document. The existence of this concensus standard greatly facilitates the specification of noise dosimeter performance for use in conjunction with this amendment.

Considerable general support for the use of dosimeters is found in the record (Ex. 2A, p. 252, 9–25–73; Ex. 14–969, p. 2; Ex. 14–952, p. 2; Ex. 2C–117–1, p. 4; Ex. 14–247, p. 4; Ex. 315, p. 3730; Ex. 316, 40760). Dr. Floyd Van Atta (Ex. 2A, p. 2,5–9–73) pointed out the advantages of dosimeters when sound levels vary throughout the workshift. There is also specific support in the record for incorporation of the performance requirements of ANSI S1.25–1978 (Ex. 321–15, p. 3; Ex. 321–17, pp. 1, 2; Ex. 321–19, p. 1).

The American National Standard Specification for Personal Noise Dosimeters, S1.25–1978 (Ex. 313, p. 4) in itself, does not sufficiently define dosimeter performance since several operational parameters are left for the user to define. For example, the operating range can be quite different for purposes of community noise as opposed to industrial noise measurement, (such as 40–90 dB or 80–130 dB respectively). For measurements to be made in conjunction with this amendment, a Class 2A–90/80–5 dosimeter is required; this corresponds to the accuracy requirements of a Type 2 sound level meter, and to A-weighted response, and thus is consistent with the performance requirements for a sound level meter in the proposal. Similarly, the 90–dB level for 100 percent dose and the 5–dB exchange rate are consistent with the proposal. The class designation defines tolerances, frequency weighting, criterion sound level (meaning the 100 percent dose level), threshold level, and exchange rate. It is also necessary to designate the operating range—the range between the threshold level and an upper sound level within which the dosimeter operates within stated tolerances.

Noise dosimeters designed in the past few years, and particularly those designed since S1.25–1978 became available, have an operating range that extends, at least, from 90 to 115 dB if those dosimeters were intended for monitoring compliance with 29 CFR 1910.95 (a) (Ex. 319A–8, p. 22; Ex. 319A–2, p. 2).

The proposed standard did not specify a lower threshold. However, the 80–dB requirement is included in the amendment to permit reliable measurement of noise doses down to 50 percent (a TWA of 85 dB).

There are several suggestions in the record that support upper limits for dosimeters that are well in excess of 115 dB. The draft California noise standard (Ex. 321–50A, p. 6) recommends an upper limit of at least 130 dB. Mr. Eldred, as chairman of the working group that is responsible for the ANSI standards for both sound level meters and dosimeters, suggests (Ex. 321–19, p. 3) an upper limit "in the region of 115 to 140 dB." Col. Johnson introduced (Ex. 321–21E, p. 1) a draft ANSI standard on the effect on human hearing of intense (impulse or

impact) noise, that considers average A-weighted sound levels of up to 142 dB. Kamperman (Ex. 321–32, p. 1) advocated a dynamic response from 80 dB to "greater than 140 dB and preferably greater than 150 dB."

OSHA has considered all of the factors and recommendations cited above. Because of the known adverse effects of high-level noise on human hearing, it would be very desirable to require dosimeters to integrate sound levels accurately up to 140 dB or higher. However, an informal survey of dosimeter manufacturers indicated that many of the instruments currently on the market could not easily be modified to operate accurately over a dynamic range from 80 to 140 dB. In order not to rule out the use of existing dosimeter designs, OSHA has decided to require dosimeters that meet the performance requirements of ANSI S1.25–1978 only over an operating range from 80 to 120 dB. (As discussed above, a dosimeter that accurately integrates average sound levels up to 120 dB should be able to handle peak instantaneous sound levels up to approximately 130 dB.) In the purchase of new dosimeters, employers are encouraged to consider instruments that have a larger operating range than that which is required by this amendment. OSHA intends to follow closely the availability of instruments having a larger operating range (e.g., 80 to 140 or 150 dB) and will consider amending the standard to require a larger operating range when such instruments become more readily available.

T. A. Rockwell (Ex. 321–47, p. 1) correctly pointed out that noise dose will, in some cases, be significantly higher when impulses are included in the calculation. He contrasts sound level meter measurements using the "fast" response mode with those using the "slow" response mode. By using the "fast" mode one is able to ignore the contribution of impulses and report only the level of the background noise.[11] The hearing conservation amendment requires that noise exposures be measured with a standard sound level meter set to the slow response or a dosimeter with a crest factor capability of at least 30 dB.

[11] The current standard indicates that employee exposure should be measured with a standard sound level meter "at slow response." Thus the PEL under 29 CFR 1910.95(a) is, by definition, that total amount of noise that is reflected by measurement with a standard sound level meter set to the slow response. A recent revision of the Industrial Hygiene Field Operations Manual directing compliance officers to use the "fast" mode to measure noise where there is both continuous and impulse noise present is clearly at variance with the present standard and is being deleted.

Use of this instrumentation will, as Mr. Rockwell asserts, include the impulsive component of the total noise exposure in the calculation of the dose. This result is intended. As stated above (see discussion of impulse noise), for purposes of determining which employees should be included in the hearing conservation program it is important to consider the employees' total noise exposure: continuous, intermittent, and impulsive. The dosimeter specified in the final standard is capable of integrating impulse noise accurately into the total dose. Appendix B provides guidance to employers on an appropriate sampling strategy when using a sound level meter to measure exposure even where impulse noise is present.

John Stenmark, for the American Iron and Steel Institute (Ex. 321–15, p. 2) and Mr. Kamperman (Ex. 296, p. 1) suggested that public hearings be held to permit consideration of the exposure requirements for impulse noise. As discussed above, the final decision has not been made on the PEL, which includes the exchange rate and any specific requirements for impulse noise. Until that time, the Agency does see the necessity of including impulses in the computation of dose for purposes of the hearing conservation program.

The evidence submitted to the record supports OSHA's conviction that impulsive noise must not be ignored—that it is as harmful to hearing as continuous noise of equivalent sound energy, and that it is especially harmful when it is combined with high levels of continuous noise. Dr. Van Lee (Ex. 294, p. 1) points out that the superposition of impulsive or impact noise is very common in industrial noise environments. Dr. Lee recommends extending Table G–16 to include the computation of impulsive noise. The evidence also supports the conclusion that instrumentation that will include impulses in the noise dose is currently available. Kamperman (Ex. 321–32, p. 2) found that several units of one dosimeter model could meet a fairly rigorous test to incorporate the energy from impulses. Although he conducted the test on one model only, he stated that engineers employed by other manufacturers believed that his "dynamic response test requirement was reasonable and meaningful although they had not actually performed the test on (their) dosimeters."

In the present amendment, the total noise dose must include intermittent and impulsive contributions, as well as continuous sound levels. Instrumentation requirements must be consistent with this intent and therefore noise dosimeters and sound level meters must be capable of handling intermittent and impulsive signals with proper accuracy. Although the scope of the American National Standard Specification for Personal Noise Dosimeters, S1.25–1978, states that this standard is not intended for use with noises that are "predominantly" impulsive, the Agency recognizes, based on its experience, that most industrial impulses are superimposed on a background of continuous noise, and therefore, would not be considered *predominantly* impulsive. However, there are many industrial situations where impulses exceed the continuous background noise by more than a few decibels. Therefore, there is a need for instrumentation with crest factor capability sufficient to measure these impulses. Since such a test is not available in ANSI S1.25–1978, this amendment includes a crest factor test that is conducted according to the method described in section 7.5 of the ANSI standard. This test is necessary to ensure that dosimeters used to measure employee exposure meet the needs of the standard.

Section 7.5 of ANSI S1.25 requires that the dosimeter respond with an accuracy of ±1.5 dB to a tone burst having a crest factor of approximately 3 (which, being a ratio, translates to approximately 10 dB). For a dosimeter with an operating range of 80 to 120 dB, this test signal would be applied at an average level corresponding to 85 dB and also at 119 dB. Such a test should assure that the instrument functions properly for an average sound level of 85 dB with instantaneous peak levels up to 95 dB and for an average level of 119 dB with peaks up to 129 dB. For many instrument designs, these tests would assure proper operation for an average level of 85 dB with peak levels up to 129 dB, thus yielding reliable readings for continuous sound levels with high crest factors due to impulsive content. However, some dosimeter designs could result in an instrument that could not record a rapidly increasing sound level (such as that commonly associated with impulse noise), thus resulting in erroneously low dose readings, or an instrument that could not record the rapid decrease in sound level after an impulsive event and therefore would yield erroneously high doses. To preclude such possibilities, OSHA has added an additional test using a test method from the ANSI standard. The Agency is requiring a dosimeter that is capable of performing the function required by the standard:

namely, the integration of sound levels from 80 to 130 dB. Thus, the amendment requires that the test included in Section 7.5 of S1.25–1978 also be carried out with a signal corresponding to an average sound level of 90 dB but having a crest factor of 30 (approximately 30 dB). The instrument reading must be correct to within ±1.5 dB, which is the tolerance stated by the ANSI standard. OSHA anticipates that most instrument manufacturers will conduct the test and specify in their brochures whether the instrument meets it. According to Kamperman (Ex. 321–32, p. 2) there is currently available at least one dosimeter that meets a similar test which OSHA believes is more stringent than the test which is being required herein.

Although there are some instruments currently available that meet the new provisions, (e.g. Ex. 319A–8, p. 22), there are others where adjustments would have to be made, and still others that would not be usable for compliance with this amendment after the end of the 2-year period. OSHA advises employers who already own noise dosimeters to consult the specifications and, if necessary, the distributor or manufacturer, to learn the extent to which their dosimeter complies with the new regulations. The amendment allows employers up to 2 years in which to check their existing instruments, have them adjusted if appropriate, or obtain new ones. The Agency has provided this 2-year grace period also for the sake of manufacturers, who may need to alter the design of their instrument and manufacture new models.

There were some comments in the record that questioned the accuracy and reliability of noise dosimeter measurements (Ex. 14–46, pp. 1–3; Ex. 14–161, p. 3; Ex. 14–978, p. 3; Ex. 321–15, pp. 3, 4; Ex. 321–28A, section 18, pp. 1, 2). Stenmark cited a number of articles that describe in detail the problems of erroneous results from noise exposure evaluations using personal dosimeters (Ex. 321–15, pp. 3, 4). However, all but one of these articles were published before 1978, the date of the ANSI dosimeter standard. In fact, two of the authors cited were members of the ANSI work group that drafted the dosimeter standard. The introduction to ANSI S1.25 states that the standard should "help minimize variations between results obtained with various makes and models . . . (of dosimeters)" (Ex. 313, p. 1). Moreover, the employer has the option of using sound level meters to measure employee noise exposure, although, where noise levels fluctuate, they are admittedly more difficult to use. In addition, NIOSH made a strong case for the use of dosimeters, which will be discussed below.

OSHA believes that some of the problems experienced in the past may have been due to the fact that different models of dosimeters had slightly different lower thresholds, crest factors, and ranges. The Agency has determined that OSHA's new requirements for the 80-dB lower threshold and the 30-dB crest factor capability should minimize discrepancies among these instruments.

The DuPont Company expressed a number of concerns about the use of dosimeters (Ex. 321–28A, Section 18, pp. 1, 2). Among their concerns was the fact that dosimeters are not identical to sound level meters in such respects as meter ballistics, microphonics, and system diffraction characteristics. Naturally the two instruments are different in some ways because the dosimeter carries out a function automatically that must be done by the measurer when a sound level meter is used. Also the dosimeter is worn on the body of the individual whose exposure is to be measured, whereas the sound level meter is carried by the measurer. Therefore, the measurement locations would be slightly different with respect to the sound source. OSHA does not believe that these kinds of differences should cause significant differences in measurement results, so long as measurements with each instrument are taken properly.

DuPont was also concerned (Ex. 321–28A, Section 18, p. 1) that none of the existing hearing loss criteria are based on studies correlating dosimeter measurements with audiometric test results. Only sound level meters were used. OSHA believes that this fact should not detract from the use of dosimeters for compliance purposes since dosimeters and sound level meters are expected to produce the same results when properly used. Moreover, record evidence indicates that the company already uses dosimeters as part of their hearing conservation program (Ex. 306, Section J2B, p. 4). The company manufactures and sells dosimeters as well, claiming that their product "is designed to accurately measure and record personal noise exposure . . ." (Ex. 319, A–21, cover).

Many of the concerns about the use of dosimeters have been addressed by NIOSH in its "Findings of Fact on Use of Noise Dosimeters" (43 FR 3729 (1978)] (Ex. 315). NIOSH supported the use of dosimeters for making noise exposure measurements in coal mines. On the basis of evidence presented at its hearing, and on other available information, NIOSH made certain significant findings, which are summarized below:

1. Field and laboratory comparisons of personal noise dosimeters with other noise survey instruments or systems meeting ANSI S1.4–1971 tolerances for Type I or Type II instruments, indicate that noise dosimeters will yield comparable results to these other noise measurement instruments.

2. Inadvertent and extraneous noise may be integrated by personal noise dosimeters, thus, affecting dosimeter readings; however, this problem can be minimized by spot checking of noise levels with sound level meters, or by full-shift observation of the measurement by a "qualified" person.

3. Instrument errors (including calibrator error) are less than 1 dB, and these errors combined with other possible errors associated with microphone placement and calibration drift will be withing the ±2 dBA tolerance permitted by the Mining Enforcement and Safety Administration for purposes of citing noise violations (Ex. 315, pp. 3730, 3731).

OSHA recognizes that some people will prefer to use a sound level meter and a timing device, rather than a noise dosimeter, to determine employee noise dose. For continuous sound levels and relatively immobile workers, this is an acceptable procedure. Hess, Reed, Jensen, and Jokel (Ex. 303, p. 717) report that careful sampling techniques used in conjunction with a sound level meter can yield noise exposure data with an accuracy that approaches that of a dosimeter. However, such techniques, which involve following a worker around with a sound level meter held near his ear, taking many measurements, and making involved calculations, may necessitate expertise and time that many employers will not want to provide.

If a sound level meter is used, an appropriate sampling strategy must be used in order to determine the noise dose with adequate accuracy (Ex. 303, pp. 718–719). Appendix B has been provided to advise employers of an acceptable strategy. Since Appendix B is intended as a guideline, reasonable alternatives may be used. The number of necessary measurements will depend primarily upon the range of sound levels. In most circumstances, the greater the range, the more measurements will be needed. It is the employer's obligation to assure that the sampling procedure is adequate. The sampling procedure detailed in Appendix B is a simplification of a procedure developed by Hess, Reed, Jensen, and Jokel (Ex. 303). Except for the inclusion of impulsive sounds, Appendix B is similar to the sound level meter measurement method found in the proposed revision to the ISO standard 1999 (Ex. 321–43, pp. 11–20).

It has been stated (Ex. 321–47, pp. 1–2) that in certain conditions a noise dosimeter overestimates the noise dose relative to that which would be obtained using a sound level meter and timing device. OSHA believes that this situation should not occur for the following reasons: A dosimeter essentially consists of a sound level meter followed by a circuit that integrates the proper function of the A-weighted sound level. When only a sound level meter is used, sufficient data as to the temporal distribution of sound levels must be taken so as to enable the integration to be done numerically. Assuming that each instrument performs accurately and that the microphone positions are the same, the noise dose obtained with a dosimeter and that obtained using a sound level meter and a timing device should agree when the daily noise exposure is the result of several essentially constant sound levels, each experienced for an easily determined duration. OSHA has observed this kind of agreement in its compliance experience. In such cases, the noise dose can easily be obtained with a sound level meter using Table G–16a and the procedures given in Appendix A, I. However, if the sound level varies over a range of more than a few decibels and, particularly, if the sound level undergoes rather rapid excursions due to intermittent or impulse noises, it can be very difficult to obtain accurate noise doses using a sound level meter and a timing device. If the sound level is fluctuating more or less randomly, without sudden rapid excursions, a sampling strategy and calculation procedure such as that described in Appendix B can result in reliable determinations of noise dose.

OSHA therefore concludes that a properly calibrated dosimeter reads the correct dose but that the use of a sound level meter, for intermittent noise or noise with significant impluse content, may lead to an *underestimate* of the correct dose.

Microphone Placement

There are three popular methods for positioning a microphone to monitor noise:

(1) The microphone (typically on a dosimeter) is located near one of the employee's ears (on the shoulder), usually occupying that position for the entire workday.

(2) The microphone is maintained near the employee's head, with the measuring instrument (typically a sound level meter) usually held by an individual who follows the employee during a portion of the workshift.

(3) The microphone is placed at a fixed location in the workplace.

OSHA requires that the microphone be placed according to either Method 1 or Method 2. As mentioned earlier in this preamble, Method 3, area monitoring, cannot be used to determine personal exposure. While Method 3 may be useful for planning engineering control strategies, area monitoring alone is not sufficient to assess employees' personal exposure. Workers move around too much for this method to be accurate.

The use of either Method 1 or Method 2 requires consideration as to whether or not it is necessary to specify more precisely the actual microphone location and orientation. The NIOSH criteria document (Ex. 1, pp. 1–5) required measurement at the "appropriate head position," and the Advisory Committee (Ex. 2B, p. 1) required the microphone to be located at the point that most closely approximates the noise levels at the employee's head. The proposal required the noise to be measured at the employee's point of exposure. Comments in the record suggested a more specific location and microphone orientation than was stated in the proposal. One, for example (Ex. 2C–72, p. 1), wanted the microphone placed on the head using a free-field microphone and a random incidence corrector with the axis of the microphone perpendicular to the floor. Another (Ex. 14–231, p. 2) stated that the microphone should be positioned 12–18 inches from the head. The American Speech and Hearing Association (Ex. 2C–14, p. 3) recommended that a free-field microphone and random incidence corrector be used, and that the microphone be held at various angles of incidence and an average taken. Other comments called for OSHA to specify a standardized microphone position (for example, Ex. 186, p. 5).

In the noise exposure standard for surface and underground coal mines, (30 CFR Part 70 and Part 71; 43 FR 40760–40762 (1978)) (Ex. 316, p. 40761), the Department of Labor's Mine Safety and Health Administration (MSHA) requires dosimeter microphones to be positioned as follows:

> For the miner whose noise exposure is under consideration, noise exposure measurements shall be made with the personal noise dosimeter microphone located at the top of the shoulder, midway between the neck and the end of the shoulder with the microphone pointing in a vertical upward direction. . . .

MSHA's standard shows a diagram to facilitate compliance with the requirement. The standard's preamble justifies the requirement by citing studies that show the importance of exact and standardized microphone positioning for "limiting measurement errors associated with body baffle and absorption effects."

OSHA agrees that uniform placement of the dosimeter microphone is good measurement practice in order to minimize error. However, the Agency is aware that different kinds of microphones need to be placed at different angles of incidence with respect to the sound source. Also, the advent of newer, smaller microphones (½ inch and ¼ inch in diameter) may tend to reduce errors caused by microphone directionality, and positioning may become less critical. Miniaturization of dosimeters in the future may lead to their placement on the ear or on the top of the head (positioned on a helmet or a headband). OSHA does not want to preclude the development of more advantageous positioning techniques by requiring microphone placement only on the shoulder. However, the Agency does recognize the need for uniformity of placement of most 1-inch microphones. Therefore, unless the dosimeter manufacturer specifies otherwise, the Agency strongly recommends positioning the 1-inch microphone midway between the neck and the end of the shoulder with the microphone pointing vertically upward, as required by MSHA. In order to retain some flexibility to respond to technological advances, the amendment only requires the dosimeter microphone to be placed somewhere on the employee's shoulder or head.

In addition, because of the diversity of working situations, OSHA has decided not to specify an exact location for the microphone of the sound level meter. Instead the amendment only requires employers to position the sound level meter microphone not less than 2 inches nor more than 2 feet from the worker's ear. Care must be taken to be close enough so that the measurements are representative of what the worker actually hears, but not so close that the body acts as a baffle or a reflector. Again, OSHA advises the employer to follow the manufacturer's instructions concerning the microphone's angle of incidence with respect to the sound source.

There was some discussion in the record as to whether measurements should be made with or without the worker present. The Institute of Noise Control Engineering (Ex. 14–334, p. 2) stated that the measurements should be made without the worker. The proposal was unclear on this point but could be

interpreted to mean either with or without the worker present.

Whenever an object (a worker) is placed in a sound field, it distorts the field to some extent and the measured sound level will be different from that which would be measured if the object were not there. Measuring the noise in the worker's absence may be preferred for the development of engineering solutions to the noise problem of a particular machine. However, since actual exposure takes place in the worker's presence, OSHA requires measuring the noise in the presence of the worker for purposes of the hearing conservation amendment.

Calibration

To check the calibration of a sound level meter or noise dosimeter an acoustical calibrator, of known frequency and sound pressure level output, is connected to the sound measuring instrument, and a test is made at least at a single frequency and sound level. The appropriate controls, such as amplifier gain, on the instrument are then adjusted, if necessary, so that the instrument reads correctly, within certain tolerances, for that test signal. This procedure is often called "field calibration."

The proposal required such calibration before and after each day's use. Also, the MSHA amendments to 30 CFR Part 70 state that dosimeters "shall be acoustically calibrated in accordance with the manufacturer's instructions before and after each shift on which the meter is used" (Ex. 316, p. 40761). There was some discussion in the record of the proposal's requirement for daily field calibration.

Some commentors, such as the International Paper Company (Ex. 14–345, p. 2) and the California Manufacturer's Association (Ex. 14–169, p. 2) believed that daily field calibration would take too long. Others such as Clayton Ruyle of Aerospace Industries Association of America, (Ex. 105A, p. 7) said that it was impractical to calibrate a dosimeter before and after daily use. However, OSHA's requirement was supported in comments by Dr. Bruce Karrh on behalf of the American Occupational Medicine Association (Ex. 321–34A, p. 1), and the Motor Vehicle Manufacturers Association (Ex. 2C–1, p. 6). Washington Occupational Health Associates, Inc. (Ex. 321–49, p. 1) stated: "We encourage the application of uniform calibration procedures which will work to the advantage of all parties involved." It has been the experience of OSHA personnel that field calibration of a sound level meter can be done in a matter of seconds, and that a dosimeter can be calibrated in a few minutes.

The Agency has determined that the advantages of daily field calibration warrant any inconvenience that might be experienced. Such calibrations are necessary to assure any degree of accuracy or uniformity in employee noise exposure measurements, which are a crucial and integral part of the entire hearing conservation program. Therefore, the amendment requires that an acoustical calibrator shall be used to verify the calibration of all equipment used to measure employee noise exposure prior to and after each day's measurements. In establishing this requirement OSHA believes that:

1. the accuracy of the instrument will be less subject to question when it is field calibrated at least before and after each day's measurement;

2. if meter/dosimeter performance does drift over the time between field calibrations, only one day's data will be lost;

3. it is good acoustical practice to check instrument performance as often as practical.

Although the amendment does not require calibration *immediately* prior to and following each day's use, it is good measurement practice to calibrate as close as possible to the time of instrument use.

In the broadest technical sense, the "calibration" of noise-measuring equipment involves precise evaluation of instrument performance relative to the specified ideal performance. Such calibration is a complex procedure that should be carried out in a sophisticated laboratory with specialized facilities by skilled people knowledgeable in acoustics and electronics. The amendment requires that instruments used to measure employee noise exposure—the noise dosimeter and the sound level meter—conform to ANSI S1.25–1978 for noise dosimeters, or ANSI S1.4–1971 for sound level meters. In order to ensure that instruments continue to meet the ANSI standard, it may be necessary for them to be calibrated in a laboratory.

The amendment does not specify how often the laboratory calibration should take place. Prudent practice requires that instruments, should be kept well maintained, that the manufacturer's instructions concerning maintenance and upkeep should be carefully followed, and that instruments should be carefully tested at appropriate intervals by the manufacturer or by a qualified laboratory to ascertain that their performance meets specifications. The intervals between laboratory calibration would depend upon the amount of usage. Based on the Agency's estimates of the frequency of monitoring according to the size and type of the company, OSHA estimates that employers will send noise measuring equipment for laboratory calibration approximately every 2 years. Instruments that are used often, or are inadvertently bumped or dropped, should be calibrated more frequently, as should instruments that require frequent and extensive adjustment as a result of the field calibration.

NIOSH presents support for this type of requirement in its "Findings of Fact on Use of Noise Dosimeters" (43 FR 3729 (1978)) (Ex. 315, p. 3730).

Most failures are attributable to microphone interferences resulting in an inability of the instrument to achieve calibration tolerances. Thus, there is a need for annual recalibration of personal noise dosimeters including as a minimum frequency response testing and visual inspection of the microphone for any foreign matter or defects.

Another Federal agency, the U.S. Department of Transportation, Federal Highway Administration, recommends that "The Equipment should be checked annually by its manufacturers or other certified laboratory to verify its accuracy." (Ex. 321–42A), p. 7).

Although the proposed standard was silent on the subject, OSHA agrees with MSHA, NIOSH, and the Department of Transportation, on the merits of periodic recalibration of noise-measuring instruments. However, the Agency does not require that these tests be conducted at any particular time interval because the appropriate intervals between calibrations are highly dependent upon instrument usage. Some businesses will use the instruments only occasionally, and store them in between uses. These instruments may maintain their calibration for longer periods of time if they are cared for according to the manufacturer's instruction.

Although the proposal required acoustical calibrations to be accurate to within plus or minus 1 dB, the amendment has not made this 1–dB precision and accuracy mandatory. However, a draft American National Standard Specification for the Performance and Use of Acoustical Calibrations has been prepared (Ex. 321–17B), and when this standard is issued, employers are encouraged to use acoustical calibrators that conform to it.

Audiometric Testing Program

Audiometric testing is an integral part of hearing conservation. Since the hearing loss process tends to occur gradually, a worker often does not realize that he or she is developing a hearing loss until quite a bit of damage

has occurred. Because noise-induced permanent threshold shift is not reversible, it is very important to identify it as early as possible in order to prevent further deterioration. If if is not identified, the hearing loss will continue and the resulting impairment will be even more debilitating. Audiometric testing, to identify employees who are losing their hearing and to try to prevent further hearing loss, is therefore necessary to reduce the risk of material impairment.

Not only does audiometric testing establish a baseline and a continuing record of hearing acuity, but it provides the employer a tool with which to educate employees about the importance of hearing conservation (Ex. 2A, p. 1–101 8–9–73). It also provides workers with information about their hearing acuity and the need for protection. A well run audiometric testing program will document the extent to which the entire hearing conservation program is effective.

In the words of Dr. John Fletcher, professor at the University of Tennessee Medical School:

> Another essential in hearing conservation programs is monitoring audiograms. To restate the obvious, these are periodic hearing tests after the worker has begun work or after he has started this program. These are important because they give us some feedback about the effectiveness of the program. They are necessary, we need that effectiveness. (Tr. 210).

Dr. Norman Righthand went on to say:

> The effectiveness of an industrial hearing conservation program is dependent upon proper assessment by audiometric testing. The accuracy of such testing is a function of many factors, including the training and experience of the audiometric technician, background noise levels, and the cooperation and attention of the persons being tested. Of equal importance is the state of calibration of the audiometer. (Ex. 281, attach 1, p. 1).

This amendment requires testing of employees who are exposed to an 8-hour time-weighted average sound level of 85 dB (or equivalently a dose of 50 percent) or more. Baseline audiometric tests must be administered, then retests must be performed annually. Employees who experience significant shifts of hearing thresholds with respect to the baseline test must be retested within 60 days. Baseline and retest audiograms must be preceded by at least 14 hours free from workplace noise. Follow-up procedures are required in cases where a significant threshold shift is permanent. Medical or audiological referral is required in caes where the test results are ambiguous, or where medical problems are suspected. Requirements for personnel, audiometric testing, follow-up procedures, audiometric test rooms, test frequencies, instrument specifications and calibration are specified. These requirements are addressed in the following paragraphs.

Personnel

The hearing conervation amendment requires that certain functions be performed by a licensed or certified audiologist or otolaryngologist, or in the absence of one of these specialists, a qualified physician. This professional is responsible for administering the audiometric tests or supervising the conduct of the tests by technicians, for ensuring that the audiometer is properly calibrated and that the tests are conducted in a room that is sufficiently quiet, and for reviewing audiograms, making a determination as to whether a hearing loss is work related, and determining the need to refer employees for further evaluation. Under certain circumstances employees will need to be evaluated more thoroughly than can be done on-site. Sometimes resources may not be available through the industrial audiometric program, and employees must be sent to a physician or an audiology clinic in the community. For example, although the supervising professional may be an audiologist, he or she may determine that the employee needs an otological evaluation by a physician. On the other hand, the professional supervisor may be an otolaryngologist, who may determine that the employee needs further audiological evaluation in a facility where more sophisticated audiological equipment is available.

The proposed standard did not require that an audiologist or otolaryngologist supervise the program. A wide range of opinion about this issue was expressed. Some recommended that licensed or certified otologists or audiologists supervise audiometric testing as opposed to technicians (Ex. 14-172, p. 2; Ex. 14–68, p. 4; Ex. 14–243, p. 4; Ex. 129, p. 4; Ex. 147, p. 7; Ex. 81A, p. 9). Others who regarded audiometric testing as a medical program said that only a physician should supervise (Ex. 14–158, p. 1; Ex. 2C–113, p. 1; Ex. 2A, p. 154, 5–30–73). Dr. Robert McLauchlin, of the American Speech and Hearing Association (ASHA) recommended that only audiologists supervise audiometric testing because of their extensive knowledge of audiometric testing (Ex. 2C–83, p. 3).

Either licensed or certified audiologists or otolaryngologists should supervise the audiometric testing program since these professionals are highly trained in hearing loss and are familiar with audiometric protocol. Individuals who are knowledgeable of audiometric configurations and the associated causes, are in the best position to assess the validity of audiograms and the need for medical referral, and to assess work relatedness by interpreting the results of the audiometric test. Although other physicians also may supervise the audiometric testing, it is recommended that audiologists and otolaryngologists be used because they are likely to be more knowledgeable of audiometric procedures and the patterns of hearing loss.

The amendment requires that these individuals review the audiograms to determine the existence of threshold shifts and to determine whether the shifts are due to occupational noise exposure. Since many large companies and consulting firms may wish to computerize the audiometric test results, the supervising professional does not need to review actual audiograms, so long as a professional is involved in preparing the computer program. In this way the professional will be able to determine what kinds of audiograms need to be identified for review, and review the results on a selective basis. For example, audiograms that show large losses at 500 Hz, or audiograms where there is a substantial difference in hearing thresholds between ears may need to be reviewed, as well as audiograms that show significant threshold shift, as defined below.

OSHA advises employers to see that the audiometric testing program is well supervised by either an audiologist or otolaryngologist, although the professional does not need to be present at the time of testing. Although technicians may actually conduct the audiometric tests, they must be under the direction of the professional who is responsible for the proper conduct of the tests, and the calibration of equipment. In cases where the validity of the audiogram is in question, or when problems of a medical nature are suspected, the professional must decide whether another test, or referral is necessary. Examples of cases where medical referral would be appropriate are audiograms that show large differences in hearing thresholds between the two ears, or predominantly low-frequency hearing losses. Examples of cases where retesting would be indicated would be unusual hearing loss configurations, thresholds that are not repeatable, and invalid results on self-recording audiometers. Another good use of the audiologist, otolaryngologist, or other qualified physician supervising

the testing would be in the training and counseling of employees with significant hearing threshold shifts, because they will be able to answer employee questions.

The hearing conservation amendment requires that appropriate professionals or trained audiometric technicians administer the audiometric tests. This is similar to the proposal's requirement for certified audiometric technicians or individuals with at least equivalent training and experience. There was some discussion in the record concerning the qualifications of the person actually administering the test. Most commenters, such as Dr. McLauchlin (Ex. 129, p. 4) and others (Ex. 2C–22, p. 1 and attach., p. 2; Ex. 2C–31–1, p. 2; Ex. 2A, 157, 5–30–73, Ex. 2B, p. 6) stated that the tests should be conducted by physicians, audiologists, or trained audiometric technicians. OSHA's decision to require appropriate professionals or trained audiometric technicians to administer the tests is consistent with the proposal and the above comments. While OSHA believes that the quality of testing should be as professional as possible, the Agency recognizes that a well-trained technician can do a satisfactory job. Aside from the actual test procedures, the tester must recognize when the audiometer is not working properly and know what to do about it, and should be familiar with the proper testing conditions. The tester must be able to check the functional operation of the audiometer, although he or she is not necessarily required to perform an acoustical calibration.

Employers must be able to show that technicians are competent in the administration of hearing tests and in the care and use of audiometers. One of the best ways for technicians to achieve this competence is to successfully complete a course that is especially designed for the training and certification of audiometric technicians. Such courses usually will include sessions in the anatomy and physiology of the ear, the hearing mechanism, causes of hearing problems, different types of audiometric configurations, care and use of the audiometer, daily checking of the audiometer's functioning, administration of valid audiometric tests, selection and fitting of ear protection, and recordkeeping. These topics are covered by courses that are specified by the Council of Accreditation of Occupational Hearing Conservation (CAOHC) (1619 Chestnut Ave., Haddon Heights, N.J. 08035) (Ex. 319–B4) or the Guidelines of the Inter-Society Committee on Audiometric Technician Training, (see American Industrial Hygiene Association Journal, Vol. 27: 303, May–June 1966) (Ex. 4, p. 37775). The Agency recognizes that more extensive training courses are available, and therefore, that the CAOHC and Inter-Society courses should be considered minimum curricula. The Agency strongly advises that technicians be given a refresher course at least every 5 years. The frequency of retraining necessary would be dependent upon the degree of supervision provided by audiologists or otolaryngologists, with technicians who are more closely supervised needing less retraining. Professionals with advanced degrees, such as audiologists and physicians, need not be certified as technicians.

The Agency advises (but does not require) that an otoscopic examination be conducted before audiometry as well as before the fitting of hearing protectors. This examination can be conducted by a professional supervisor or a trained technician. This practice, suggested by Dr. Thomas (Ex. 102 sec. 9 pp. 28–29), is helpful to ensure that the ear canal is not blocked with excessive wax which would preclude accurate results on the hearing test and accurate fitting of hearing protectors.

Employees To Be Included in the Program

All employees who are exposed to an 8-hour time-weighted average sound level of 85 dB or greater must be included in the audiometric test program, except for those who work less than 4 months (120 days) for one employer. This 120-day delay means the length of time from the start to the termination of employment; it is not variable or dependent upon duration of exposure, that is, the number of days or hours within the 4-month period actually worked. All employees who are subject to the noise standard, including those engaged in part-time work for less than 35 hours a week, as well as temporary workers who work for a given employer for more than 4 months are required to be tested if their TWAs exceed 85 dB.

There was considerable concern over the proposal's requirement to test within 90 days, which would have required the audiometric testing of all seasonal employees (the Larsen Company, Ex. 2C–8, p. 1; the Michigan Canners and Freezers Association, Ex. 14–279, p. 1; the American Frozen Food Institute, Ex. 14–512, p. 2; and other organizations (Ex. 2C–11–1, pp. 2–4; Ex. 2C–15, p. 3; Ex. 14–867, p. 2; Ex. 15–36, p. 2; Ex. 164, p. 3; Ex. 188–4, pp. 1–2)). Commenters stated that audiometric testing for seasonal employees would not be useful or protective, because these workers are located at several job sites in a season or over the year which makes monitoring their hearing very difficult. The decision in the final amendment to allow 120 days for the baseline audiogram is in response, at least in part, to the comments and objections raised by the above groups.

The Agency believes that allowing employers 4 months in which to perform the baseline audiogram, will have the effect of excluding most temporary and seasonal employees. OSHA has allowed the 4-month period, at least in part, as an administrative convenience so that employers who use distant consulting services for audiometric testing need only schedule the mobile van three times a year or less. Also, the Agency believes that it would be fruitless to require a testing program for workers who move from job to job because follow-up testing would be difficult or impossible.

However, OSHA does not believe these workers should be unprotected merely by virtue of the relatively short tenure of their employment. Therefore, all workers exposed to a TWA of 85 dB or above must be offered a variety of personal protective equipment and encouraged to use it, and must be educated in the hazards of noise.

Audiometric Testing

Audiometric testing consists of measuring an individual's hearing level at various frequencies in both ears. An audiogram, which is a graph showing hearing sensitivity at each frequency, provides a record of the status of that individual's hearing. When new audiograms are compared to previous audiograms, a picture of an individual's hearing sensitivity over the course of years emerges. It is important that employers observe all of the standard's requirements concerning the various components of the testing program to ensure that the test results are valid and can be compared in a meaningful manner.

There are three types of audiograms. The first is the baseline against which all other audiograms will be compared. The second is the annual audiogram, which serves to identify individuals who are developing hearing loss, and to track the effectiveness of hearing protectors and other hearing conservation measures. The third is the retest audiogram, which is required when there appears to be a significant threshold shift, or if there is any doubt about the accuracy of an audiogram.

Baseline Audiograms

The baseline audiogram is extremely important since it is the reference

against which future audiograms are compared in order to determine the extent to which an employee's hearing is deteriorating. If the baseline audiometric test is not conducted properly, it will not reflect the employee's true thresholds, and any real changes between baseline and future tests may be masked. For example, if the baseline audiogram is not taken after at least 14 hours of relative quiet, it may include some temporary threshold shift (Ex. 102, sec. 9, p. 5; Tr. 2340–2341), and hearing thresholds would be somewhat inflated. Consequently, differences between the baseline and subsequent annual audiograms would appear to be less than if the baseline had been accurate. This process would mask the true amount of hearing loss. Therefore, employers must follow the requirements of the amendment to ensure the accuracy of the baseline audiogram. OSHA requires that workers must have been away from workplace noise for at least 14 hours before the baseline audiometric test is conducted so that the baseline will accurately reflect the employee's hearing thresholds.

The hearing conservation amendment requires baseline audiograms to be established for new employees within 4 months of an employee's first exposure to noise at or above a TWA of 85 dB. The proposal required baseline audiograms to be established within 90 days for all employees. NIOSH (Ex. 1, p. I-5) and Dr. Larry Royster (Ex. 102, sec. 4, p. 12) suggested that less time be allowed before the baseline. As explained above, OSHA has chosen the 4-month grace period, which gives employers an opportunity to exclude seasonal employees. OSHA has determined that to delay audiometric testing of employees longer than 4 months, as suggested by the American Frozen Food Institute (Ex. 164, pp. 3–4) and General Foods Corporation (Ex. 2C–105, p. 2) would not be appropriate since employees might begin to incur hearing loss. To safeguard the purity of the baseline audiogram as much as possible, employers are advised to encourage all employees exposed to a TWA at or of 85 dB to wear hearing protectors until the baseline test has been performed. (All employees exposed over the PEL must already be wearing ear protectors, if engineering and administrative controls are not sufficient to reduce their exposure). Employers are encouraged to conduct pre-employment baseline audiogram where possible. Both employers as well as employees may benefit in the long run from this practice. Early testing would probably provide the employer with a more accurate indication of the effectiveness of the hearing conservation program. Early testing also will identify, at a stage where there can be no question, individuals whose hearing losses are not attributable to noise exposures within that particular workplace.

For employees presently exposed to a TWA of 85 dB or above a baseline audiogram must be obtained within 1 year of the effective date of this amendment. The Agency has allowed this amount of time because many employers will be initiating hearing conservation programs for the first time, and will need additional time to make preparations. Employers whose audiometric testing programs already meet the requirements of this standard may use audiograms taken before the effective date of the amendment to fulfill this requirement.

There are two circumstances recognized in the amendment in which the baseline audiogram must be revised. This is a change from the proposal, which had no provision for revising the baseline. Comments submitted by Dr. Royster (Ex. 321–22D, pp. 5, 47; Ex. 321–22E, p. 40), and by R. V. Durham, director of Health and Safety for the International Brotherhood of Teamsters (Ex. 81A, p. 1), discussed cases where subsequent audiograms reveal better thresholds than the original baseline. It was suggested that this might be due to a "learning effect" where an individual becomes slightly more skillful at taking the test. Or it can be caused by a reduction in temporary threshold shift due to the beneficial effects of hearing protection. The amendment requires that when a subsequent audiogram shows improved thresholds in at least two test frequencies with respect to the baseline, this later audiogram becomes the new baseline audiogram, and subsequent audiograms must be compared to it. The Agency believes that the audiogram with improved thresholds must more closely resemble an employee's true, non-noise-exposed baseline, and that significant threshold shifts would be detected that might otherwise have been overlooked by using this audiogram from as the revised baseline. Of course the old baseline audiogram must be retained, according to the recordkeeping requirements to be discussed later in the preamble.

Where the retest or annual audiogram is considered to be free of TTS, e.g., when it is conducted after 14 hours free from noise, the audiogram may show a deterioration in thresholds with respect to the baseline due to the harmful effects of noise exposure. If the change in threshold is "significant" (as defined in the amendment and discussed later in this section) the audiogram with the reduced thresholds shall become the baseline audiogram and subsequent audiograms will be compared to it. This provision is in response to a number of comments, which pointed out the futility of identifying the same significant threshold shift year after year, even though the hearing loss may have stabilized, an unintended result of the way the proposal was worded (Ex. 317, p. 3; Ex. 321–1, p. 2; Ex. 321–24A, p. 9; Ex. 321–38, p. 3). Revising the baseline each time a new significant threshold shift occurs should prevent this problem.

Annual Audiograms

The annual audiometric test has a number of purposes. It detects shifts in hearing level, indicates the need for followup procedures identifies employees who are particularly susceptible to noise-induced hearing loss, monitors the effectiveness of hearing protectors, and detects medical problems.

OSHA proposed that employers test their employees' hearing annually. Dr. McLauchlin (Ex. 2A, p. 1–101, 8–9–73), the Architectural Woodwork Institute (Ex. 127, p. 2), and many other organizations and witnesses supported annual testing (Ex. 2C–2, p. 2; Ex. 2C–31–1, p. 2; Ex. 81, p. 9; Ex. 14–166, p. 1; Ex. 102, sec. 4, p. 12; Ex. 29–2, p. 3; Ex. 110, p. 3; Ex. 321–50, p. 9). NIOSH (Ex. 1, p. I–6) and some others (Ex. 130, p. 5; Tr. 2138) favored testing every 2 years since it was postulated that a period of this length is needed to identify shifts that are truly significant.

OSHA has chosen to retain the annual audiometric test requirement because of the potential seriousness of the hearing damage that can occur within a 2-year period. For employees exposed to high levels of noise, a 2-year period between audiograms might allow too much hearing loss to occur before identifying the loss and taking remedial steps. Annual audiometric tests can aid employers and workers in detecting temporary threshold shifts before they become permanent, and they can also detect minor threshold shifts before they become significant. In both cases increased awareness of the hazard reflected by the audiometric test results will lead to more prompt protective action, and as a result more hearing will be saved.

The proposal required that all audiograms be conducted after 14 hours of quiet. This provision has been modified in the final rule to allow annual audiograms to be taken anytime during the workshift. This is consistent with the recommendation of Jeffrey

Morrill, President of Impact Hearing Conservation, Inc. (Ex. 293, p. 1), and may result in increased employee protection in that audiograms taken during the workshift are likely to show TTS. Since TTS is a harbinger of permanent threshold shift (Ex. 188–27, sec. 11, attach., p. 730), it is an important symptom or warning sign, and protective measures can then be taken before the change in threshold becomes permanent. Some employers may find this procedure more convenient than testing before the beginning of the workshift. Employers are encouraged to conduct annual audiometric tests during the workshift since the early identification of TTS can result in the prevention of permanent hearing loss.

Retest Audiograms

In cases where the annual audiogram reveals a significant threshold shift, the employee must be retested within 60 days. The retest must be performed after at least 14 hours free from workplace noise. The purpose of the retest after 14 hours of relative quiet is to determine the extent to which the significant threshold shift is permanent. Hearing protection and educational steps may be taken to prevent a temporary loss from becoming permanent, and to prevent a permanent loss from progressing. Also, the Agency recommends that a medical history be taken at the time of the retest. This may be in the form of a simple questionnaire that should contain questions relevant to the employee's work and auditory history. The purpose of the history is to aid the professional reviewer in making determinations of work relatedness, and the need for medical or audiological referral.

Although NIOSH (Ex. 1, p. I–6) had recommended a retest within 60 days, the Advisory Committee (Ex. 2B, p. 8) and the proposal required the retest within 30 days. However, OSHA received some negative comments on the 30-day retest provision. Individuals such as Dr. J. Ronald Bailey of North Carolina State University (Ex. 2C–33, p. 6) recommended a period of 60 days within which to retest employees. Companies such as the International Paper Co. (Ex. 14–344, p. 3) maintained that a 30-day retest period is impractical since it creates a hardship for employers who must rely on mobile audiometric test vans, which may not always be available. OSHA had decided that 60 days is an appropriate period within which to require retests. Professionals who must review the audiograms, might not be available within a shorter time frame; time would therefore be needed to send the audiograms to the professional, have them reviewed, and then reschedule the mobile van for any necessary retests. While some employers may choose to send employees to a local hospital or audiology clinic instead of rescheduling a mobile van, this may not always be possible in small towns or rural locations. In any event, to provide the employer maximum flexibility, 60 days are allowed for the retest audiogram.

A retest audiogram is not required if the annual audiogram is conducted after 14 hours free from workplace noise, because recovery from TTS would have occurred and the threshold shift can be presumed to be permanent under these circumstances. Although the Agency recommends the two-stage procedure, OSHA does not require annual testing during the workshift and retest in the event of significant threshold shift in order to distinguish temporary shifts from permanent shifts, since scheduling large numbers of retests may pose a feasibility problem in some cases, and employers may choose to perform all audiometric tests before the workshift. Employers may be able to use this two stage approach by scheduling the retest for the next morning before workers are exposed to noise.

Significant Threshold Shift

A definition and an understanding of what OSHA considers to be a significant shift of hearing threshold is very important in the proper implementation of the amendment's requirements. Without such a definition workers and employers are unable to know the seriousness of the noise-induced hearing loss.

Identifying a threshold shift as significant means that it is outside the range of audiometric error (±5dB), and it is serious enough to warrant prompt attention because it is a precursor to material impairment of hearing. When threshold shifts are significant, employers must provide and fit hearing protection, and take other remedial actions depending upon whether or not the shift is permanent.

The definition of the term "significant" is critical to the effective operation of the hearing conservation program. If the definition is too stringent, spurious threshold shifts may occur and workers will be identified because of audiometer or technician error. If the definition is not stringent enough, workers will be allowed to lose too much hearing before protective actions are taken. Correctly identifying significant threshold shifts of hearing is particularly important for workers who have already begun to lose their hearing, so that the progression may be stopped before the hearing loss becomes handicapping.

OSHA's proposed standard defined significant threshold shift as an average shift of more than 10 dB at the frequencies 2000, 3000, and 4000 Hz in either ear, relative to the baseline audiogram. These frequencies were selected with the understanding that hearing loss occurs earliest and most severly in the higher audiometric frequencies.

However, a number of witnesses criticized the leniency of the proposal's definition of significant threshold shift. The Environmental Protection Agency (Ex. 9, pp. 37, 41, 51; Ex. 5, p. 43802) and others (Ex. 51, pp. 10–11; Ex. 80, p. 2; Ex. 82, attach 1, p. 2) pointed out that under certain circumstances the proposal's definition would allow shifts of up to 30 dB at single frequencies.

According to Dr. McLauchlin:

> Workers should be identified when the first signs of noise induced threshold shift occur. With a more rigid criteria the risk of allowing workers to develop compensable hearing impairments is lessened. Further, a more stringent interpretation of "significant threshold shift" provides more adequate means for evaluating the performance of ear protective devices. (Ex. 129, p. 3).

Support for a more stringent definition of significant threshold shift is provided in the NIOSH Criteria Document (Ex. 1, p. I–6), which defined it as a shift that equals or exceeds 10 dB at 500, 1000, 2000, or 3000 Hz, or 15 dB at 4000 or 6000 Hz when that audiogram is compared to the most recent age-corrected audiogram. Some commentors such as John R. Franks of the Department of Audiology and Speech Services, Purdue University (Ex. 14–68, p. 3), and Donna Dickman, director of the Industrial Hearing Conservation Program at the Washington Hearing and Speech Society (Ex. 14–320, p. 2), suggested a very stringent definition, which was a 10–dB shift at any frequency from 500 to 4000 Hz. The Armstrong Rubber Company (Ex. 14–50, p. 1), Dupont Company (Ex. 308, sec. J2C, p. 8), and others (Ex. 2B, pp. 7–8; Ex. 14–289, p. 4), suggested more stringent threshold shift criteria (10 dB) at the lower frequencies of 500, 1000 and 2000 Hz, and larger values (up to 25 dB) at the higher frequencies of 3000, 4000 and 6000 Hz.

The Agency has chosen to use the more protective approach suggested by McLauchlin, Dickman, and Franks for workers who already have a hearing loss, while allowing a less stringent criterion for those with normal hearing. Thus, the amendment's definition of significant threshold shift reflects a "sliding scale" approach, with the amount of hearing loss constituting a

significant threshold shift becoming smaller as the worker's hearing loss becomes greater. The use of a "sliding scale" for determining hearing loss was the result of suggestions to OSHA (Ex. 2B, pp. 7–8; Ex. 14–289, p. 4; Ex. 48, p. 16; Ex. 321–38, p. 2; Ex. 317, pp. 3–4) from various audiologists and others who were concerned about workers who have a pre-existing hearing loss or workers who have already demonstrated threshold shifts. Also, the Advisory Committee recognized the need for such an approach (Ex. 2B, pp. 7–8), by recommending a more stringent definition of significant threshold shift for employees whose hearing levels at any test frequency were worse than 25 dB.

Thus, the amendment requires that for employees whose hearing is within 25 dB of audiometric zero and who have not previously suffered a significant threshold shift, the significant threshold shift criterion is a fairly lenient one—a 20–dB shift at any frequency. For employees who have lost some hearing (more than 25 dB at any test frequency), the criterion is more strict—10 dB or greater at 1000 and 2000 Hz, 15 dB at 3000 and 4000 Hz, and 20 dB at 6000 Hz. For employees who already have a mild to moderate hearing loss (worse than 25 dB *average* at 1000, 2000, and 3000 Hz) or who have previously incurred a significant threshold shift, the criterion is a nore stringent 10 dB at any test frequency.

OSHA believes that this more complex definition of significant threshold shift will be more efficient, and more protective. Identification of spurious threshold shifts would be minimized by a fairly lenient (20–dB) criterion for workers whose hearing was within normal limits. Yet workers whose hearing had begun to deteriorate, in other words, those with less hearing left to lose, would be watched more closely as a result of the stricter criteria. In these cases employers would need to take protective measures. Making the criteria more stringent for workers who have lost some hearing would minimize the possibility of allowing progressive deterioration to go unnoticed in workers who change jobs frequently and may have constantly worsening baseline audiograms against which annual audiograms are compared.

Unlike the proposal, the amendment includes 1000 Hz in the definition of significant threshold shift because of its importance in the undertanding of speech, and the amendment also includes 6000 Hz in the definition because of its importance as an early indicator of noise-induced hearing loss. The amendment addresses each frequency separately instead of averaging them so as to avoid the situation where a worker might lose up to 30 dB at one frequency before the shift is considered "significant".

Like the proposal, the final hearing conservation amendment excludes the 500 Hz frequency form the definition of significant threshold shift. OSHA agrees with certain industrial audiologists (Ex. 317, p. 4), that the 500 Hz frequency does not need to be included in the criteria for significant threshold shift because hearing at 500 Hz is the last and least affected of any of the test frequencies (500 through 6000 Hz) as a result of noise exposure. By the time the hearing level at 500 Hz has shifted, all of the higher frequencies will have been affected more severely, and the worker would have suffered considerable hearing loss. Noise-induced hearing loss at 500 Hz alone is very unlikely to occur, even in workers who are exposed to predominantly low-frequency noise.

Aging

The hearing conservation amendment permits the application of an age (presbycusis) correction to the audiometric test results in order to discount the results of aging in determining whether a significant threshold shift has occurred. When applying an age correction, the most recent audiogram is corrected according to the procedures outlined in Appendix F. In this appendix, OSHA has adopted the procedures and the age correction tables used by NIOSH in the criteria document (Ex. 1, pp. I–14 to I–17).

Although the proposal does not address the issue, the record contains a substantial number of comments recommending the use of an age correction, many of which stated that hearing loss can occur from aging, nonoccupational noise, and other factors, and such hearing loss should not be considered part of a significant threshold shift within the context of the OSHA standard (Ex. 14–110, p. 2; Ex. 14–150, p. 2; Ex. 14–160, p. 2; Ex. 14–188, p. 1; Ex. 14–200, p. 1; Ex. 14–215, p. 3; Ex. 14–248, p. 3). Lawrence Hodge of the J. I. Case Company told OSHA that an analysis of approximately 40,000 audiograms from over 10,000 employees revealed that the proposed criterion for significant threshold shift was not appropriate without addressing presbycusis. He urged OSHA to adjust audiograms accordingly (Ex. 321–24A, p. 1).

The NIOSH criteria document (Ex. 1, pp. I–14 to I–17, III–6) recommended adjusting the baseline audiogram for hearing loss that occurs naturally due to the aging process. The adjusted baseline could then be subtracted from the most recent annual audiogram in order to determine whether or not a significant threshold shift had occurred. If employers wish to correct for aging, the amendment directs them to make the adjustment to the annual audiogram rather than to the baseline, so that the baseline will not be changed (and remain changed) by mistake. The NIOSH presbycusis values are similar to those of other well known presbycusis data bases. Although there may be slight variations at individual frequencies, the NIOSH values are generally consistent with other presbycusis data such as the U.S. Public Health Service data, and those used by Robinson and Burns, and by Passchier-Vermeer (found in "Derivation of Presbycusis and Noise Induced Permanent Threshold Shift (NIPTS) To Be Used for the Basis of a Standard on the Effects of Noise on Hearing", (Ex. 310, p. 31)). It is the differences in hearing level between age groups that actually form the age corrections.

OSHA is responding to employer's concerns that if a stringent significant threshold shift criterion is not coupled with an age correction, many people would be referred unnecessarily for follow-up. Employers need not use these corrections if they choose not to.

The Agency recognizes that many workers will be exposed to nonoccupational noise that could result in some amount of hearing loss. Most presbycusis data bases include some amount of nonoccupational hearing loss, although these populations usually are screened to avoid such cases to the extent possible. It would not be appropriate to include more than a small value for nonoccupational hearing loss in the age correction since these noise exposures vary greatly among individuals.

Follow-Up Procedures

When a significant threshold shift has been identified, the employee must be provided with and required to wear adequate hearing protection and be trained in how to use and care for this protection. If the threshold shift is shown to be temporary as a result of a retest audiogram, employees exposed to TWAs between 85 and 90 dB may discontinue the use of the hearing protection. However, OSHA advises such employees to continue to wear protectors as the fact that they have suffered TTS may indicate an increased susceptibility to noise. If the threshold shift is found to be permanent, employers must require workers to wear hearing protection. Workers exhibiting

significant threshold shift have shown an increased susceptibility to noise; the permissible exposure limit is not sufficiently protective for them, and additional measures, such as ear protectors are needed to protect these individuals. In addition, the worker must be informed in writing of a permanent, significant threshold shift within 21 calendar days of the determination. Although the proposal did not require that notification be made in writing, Durham (Ex. 321–18, pp. 2–3), and those who prepared the draft California noise standard (Ex. 321–50, p. 9) recommended it. Durham stated that workers should be notified in writing "to prevent any misunderstandings or ambiguities . . ." (Ex. 321–18, pp. 2–3). A period of 21 days was chosen in order to give the professional reviewer time to interpret the test results and review previous audiograms. A period of 21 days should allow the employer the convenience of enclosing the notice with the employee's paycheck.

So as to make the notification more meaningful to employees Dr. McLauchlin (Ex. 2A, p. 103, 8–9–73) and others (Ex. 2C–83, p. 4; Ex. 81A, p. 8) urged that OSHA require employees to be informed of their hearing levels at the time of audiometric testing. Dr. Thomas (Ex. 102, sec. 9, p. 31) asserted that "this is the best time for a good individualized education program on a one-to-one basis and companies which fail to take advantage of this time are missing an excellent opportunity." At this time the employees are interested in their test results and can be shown a graphic display of their hearing sensitivity. Workers should be informed at the time of testing of *any* change in hearing level that is discovered, even if the threshold shift is not yet "significant." However, the Agency does not require this procedure in the final amendment because the individual giving the test may not have the employee's previous records available at the time.

The company must refer the employee for an audiological or otological examination under certain circumstances. The determination for this referral will usually be made on the advice of the professional reviewer. Follow-up examinations were not required by the proposal. However, the Agency agrees with suggestions from interested persons that such examinations are necessary under certain limited conditions. Employees must be referred under the following circumstances:

a. Sometimes an employee is unable to take a hearing test on a self-recording audiometer. He or she may not understand the directions, or may not be able to produce an audiogram that meets the requirement in section (ii)(E) of Appendix C, that at least six tracings or excursions must be made at each frequency for the audiogram to be considered valid. Fewer tracings would be indicative of very slow or uncertain responses, and the determination of hearing threshold would be questionable. Since the standard requires a valid audiogram, the test would have to be administered on a manual audiometer in order to obtain a valid audiogram for such an employee (Ex. 102, sec. 9; Ex. 321–1, pp. 2–3). If a manual audiometer is not available to the employer, the employee must be sent to a clinical audiologist or otolaryngologist for further testing.

b. In other cases the employee may not respond reliably to a test given on a manual audiometer (Ex. 321, p. 3). In such cases the employee must be retested. This may happen in situations where the employee has a language problem and has not understood the directions, or where an employee may have tinnitus (ringing sounds in the ears) that can interfere with taking the test, or occasionally where an employee may exaggerate the hearing loss. If upon retesting satisfactory results are not obtained, the employee must be referred to a clinical audiologist or an otolaryngologist for a diagnostic evaluation.

c. The supervising professional may feel that the audiogram is valid, but may suspect that the loss is due to a nonoccupational cause (such as ear infection or illness) (Ex. 321–1, p. 2); these suspicions may be based on an audiogram that reveals large amounts of low frequency hearing loss, large hearing threshold differences between ears, or some other audiometric configuration that is not typical of noise-induced hearing loss. Unless the employer is willing to enter the hearing loss as work related on the OSHA Form 200, the employee must be sent to an otolaryngologist or audiologist for further evaluation to attempt to ascertain whether the hearing loss is occupationally related.

OSHA recognizes that noise-induced hearing loss may not always be due to occupational exposure. Many people raised this point at the hearing (E. 14–160, p. 2; Ex. 14–188, p. 1; Ex. 14–248, p. 3; Ex. 144, pp. 2–3). However, since this amendment covers workers who are occupationally exposed to significant amounts of noise, the occupational loss can be expected to be the dominating component in most cases. Even though people may hunt or engage in noisy hobbies, most workers' NIPTS will be work related because the average person spends infinitely more time on a routine basis at work than in recreational activities.

d. A problem may arise where the employer or the supervising professional suspects that hearing protectors are either causing or aggravating an irritation or infection of the ear canal. The symptoms may include pain upon insertion of the ear plug, visible irritation of the ear canal, or draining ear, etc. The possibility of such conditions was reported by labor union witnesses (Tr. 2026–2027; Ex. 79, p. 7; Ex. 88, p. 7; Ex. 73, attach 4, p. 1). In this case the employer must refer the worker for an otological examination so that medical treatment will enable the worker to wear ear protectors comfortably and without any adverse medical consequences.

In some circumstances a medical pathology of the ear may be suspected that is clearly unrelated to the wearing of ear protectors. Examples could be infection or irritation prior to the fitting and wearing of protectors, or an otoscopically abnormal ear drum related to a cold or allergy. Regardless of the amount or kind of hearing loss, if the employer feels that an employee needs medical treatment, the employee should be informed of the need. In these cases the amendment does not require medical or audiological referral, but employers are advised to inform workers of the need for examination or treatment. (Ex. 321–1, p. 1).

Quiet periods

The amendment requires 14 hours free from workplace noise prior to conducting baseline and retest audiograms. Ear protection is not permitted as a substitute for this quiet period.

The proposed standard specified that audiometric tests (of any kind) must be preceded by at least 14 hours during which there was no exposure to workplace sound levels in excess of 80 dB. The requirement could be met by wearing hearing protectors.

OSHA received many comments favorable to requiring a quiet period prior to taking audiograms (Ex. 2A, pp. 51–54, 5–31–73; Tr. 2340–2341; Ex. 321–34, p. 2; Ex. 321–51, p. 10). Since the baseline and retest audiograms must not be influenced by temporary threshold shift, some time away from noise is necessary in order to allow the ear to recover. Therefore, baseline and retest audiograms will have to be conducted before the workshift. Morrill (Ex. 293, p. 1) supported the option of the using hearing protectors under controlled

conditions to achieve the necessary quiet period. The draft California noise standard (Ex. 312–50, p. 10) also included this option. However, this amendment does not permit the use of hearing protections to fulfill the 14-hour quiet requirement since studies have shown (Ex. 300, p. 2; Ex. 300A, p. 91; Ex. 308, p. 27) that common fitting and wearing practices can greatly reduce hearing protector effectiveness. This reduction in effectiveness would contribute to the risk of contaminating the baseline and retest audiograms by temporary threshold shift, so that neither would reflect the emplyee's true hearing threshold levels.

The proposal specified a maximum workplace noise exposure level of 80 dB immediately preceding the baseline audiogram. The amendment does not specify any maximum noise exposure level for the 14-hour quiet period, since employers cannot be responsible for their employees' noise exposures away from work, if employees are in the hearing conservation program to begin with, their workplace noise levels would not meet an 80–dB exposure level without the use of hearing protectors, and therefore the testing would have to be performed before work. Employers should explain to workers why the audiometric tests must be performed after 14 hours of quiet and counsel them that it is in their best interest to avoid recreational noise exposures before baseline or retest audiometric tests.

There was some dispute about the appropriate length of quiet time necessary before the baseline and retest audiograms. The New York State Department of Labor (Ex. 2C–118, p. 2) recommended 48 hours, while most others stated that 14 hours was sufficient (Ex. 2B, p. 6; Ex. 321–34, p. 2; Tr. 2340; Ex. 2A, p. 51, 5–31–73,). While OSHA recognizes that workers with greater exposures will need longer periods of time to recover from TTS than will those who are exposed to more moderate levels, it has also been shown that the major portion of TTS disappears in the first few hours after cessation of exposure (Ex. 279, 11–6, pp. 987–990; Ex. 29, pp. 288–289; Ex. 183–27, sec. 11, p. 735). However, since it is not possible to specify an appropriate recovery time for each individual, OSHA has selected 14 hours as the most appropriate and protective period that is practical. The Agency recognized that some employees exposed to high levels of noise currently are wearing hearing protectors, and therefore they should have minimal TTS if the protectors are being worn properly. Since it is very difficult for employers to know if the ear protectors are being worn properly, and since it is very important for the baseline audiogram to be free of TTS, the amendment requires all employees to be away from workplace noise for at least 14 hours before the baseline and retest audiograms are taken.

The Agency has chosen the 14-hour period as an administrative convenience, since there are usually at least that many hours between the end of an employee's workshift and the beginning of the next shift. Employers who are unable to meet the 14-hour minimum quiet period between shifts (due to overtime or irregular schedules) may prefer to schedule the baseline or retest audiogram before work on the first day of the work week.

Audiometric Test Frequencies

This amendment requires that pure tone air conduction audiometric tests be performed for each ear at the frequencies 500, 1000, 2000, 3000, 4000, and 6000 Hz. This is consistent with the proposal, the NIOSH criteria document (Ex. 1, p. I–6) and the Advisory Committee (Ex. 2B, p. 6) recommendations.

While 500 Hz is not included in the definition of significant threshold shift, this frequency still is included among the required test frequencies in order to provide a more complete audiometric profile. The hearing threshold level at 500 Hz can be very helpful in assessing the validity of the audiogram as a whole since an unusual loss at this frequency can signal the need for a retest. Also, OSHA believes that the hearing threshold level at this frequency can provide important information about the health of employees, even though it is usually the last of the test frequencies to be affected by noise. Hearing loss at 500 Hz may be indicative of job related conductive hearing loss, which could possibly result from an adverse reaction to hearing protection, or from upper respiratory infections due to inhalation of irritating dust. Dr. Gene Del Polito of the American Speech-Language-Hearing Association explained why testing should include 500 Hz:

> 500 Hertz can add information that is useful in detecting most medical problems affecting the function of the outer and middle ears. Detecting these problems by way of hearing measurement could provide an additional measure for assuring the safety and health of the worker. Also, industrial accidents resulting in trauma to the auditory mechanism, such as punctured eardrums or disarticulated ossicles, may affect hearing more in the low frequency range than in the higher frequencies. (Ex. 291, pp. 1–2).

Dr. Joseph Sataloff (Ex. 2A, pp. 35–36, 5–10–73)) recommended the inclusion of 8000 Hz in the required audiometric test frequencies in order to more clearly delineate the characteristic noise-induced "notch," (where hearing levels at 8000 Hz are sometimes less severe than at 4000 or 6000 Hz). A number of comments to the Advisory Committee recommended against any requirement to test at 8000 Hz (Ex. 2C–41, p. 1; Ex. 2C–42, p. 1; Ex. 2C–46, p. 1; Ex. 2C–51, p. 1; Ex. 2C–52, p. 1). OSHA did not accept Dr. Sataloff's recommendation for two reasons. First, the calibration of 8000 Hz is often less stable than it is for other frequencies, and spurious results are likely to occur. Also, there are some audiometers that are incapable of testing at 8000 Hz, and the inclusion of this frequency would preclude their use under this amendment.

Audiometer Specifications

The amendment calls for equipment that meets the specifications of, and is maintained and used in accordance with the American National Standard Specification for Audiometers (ANSI S3.6—1969). Since the ANSI standard does not contain requirements for pulsed-tone and self-recording audiometers these requirements are found in Appendix C of the amendment. (Pulsed-tone and self-recording audiometers interrupt the tone signal automatically, whereas with other audiometers the interruption is performed manually). The requirements in Appendix C are essentially unchanged from those of the proposal.

The ANSI standard contains performance specifications for audiometers. It also contains calibration requirements, and specifications for audiometric zero with respect to sound pressure level at the different test frequencies. OSHA understands that microprocessor audiometers, which computerize the audiometric test are increasingly used by consultants and large companies. They are allowed by this amendment so long as they meet the performance specifications of ANSI S3.6–1969.

The proposal required that audiometers meet the specifications of ANSI S3.6–1969. There was some discussion in the record about the use of older audiometers that fail to meet the 1969 standard, but instead were calibrated to an earlier zero reference level established by the American Standard Association in 1951. Comments by Stenmark (Ex. 2C–134, p. 1) and Edwin Toothman (Ex. 145, attach 1, p. 8) expressed the opinion that industry should be allowed to continue to use existing audiometers conforming to the 1951 standard. Others, such as the American Speech and Hearing

Association (Ex. 129, attach 1, p. 2), the Environmental Defense Fund (Ex. 2C–125–1, p. 7), the Motor Vehicle Manufacturers Association (Ex. 2C–1, p. 9) and the Advisory Committee (Ex. 2B, pp. 8–9) supported adherence to the 1969 standard.

There is an average difference of 10 dB between the 1951 and the 1969 audiometric zero reference levels, the 1969 levels being lower (closer to 0 dB sound pressure level). Because the differences between the older and newer standards vary according to frequency (for example 9.5 dB at 1000 Hz and 5.5 dB at 4000 Hz), allowing both zero reference levels to be used would make it very difficult to compare an individual's audiograms that had been performed on different audiometers. It would also be very confusing for anyone wishing to assess the effectiveness of a hearing conservation program, especially since the criteria for significant threshold shift would have to be adjusted for each frequency. Since the 1969 ANSI standard has been in effect for 11 years, and since OSHA has estimated the average life of an audiometer to be about 10 years (Ex. 319A–60, p. 1; Ex. 319A–90, p. 1), the Agency assumes that there are very few audiometers in existence that are calibrated to the 1951 zero reference level. To the extent that audiometers calibrated to the 1951 zero reference level are still in use, some probably can be recalibrated to the 1969 zero reference level (Ex. 306, p. J5C–3). Therefore, the amendment requires that audiometers be calibrated to the zero reference level specified in ANSI S3.6–1969.

There was some discussion about the use of less common audiometric features, such as sweep-frequency and pulsed-tone types. Comments favored the proposal's requirements for discrete-frequency (as opposed to sweep-frequency) audiometers where the tone is presented in octave or half-octave intervals (Ex. 1, p. I–7; Ex. 2C–1, p. 9). Comments also supported the proposals's requirement that with pulsed-tone audiometers, the on-time of the test tone is at least 200 milliseconds (Ex. 1, p. I–7; Ex. 2C–1, p. 9). There was consensus that self-recording audiometers should be allowed in addition to the manual type. (Ex. 1, p. I–7; Ex. 2B, p. 9; Ex. 48, p. 12; Ex. 102, sec. 9, pp. 25–26, 51; Ex. 306, p. J1C–11; Ex. 2C–26, p. 2; Ex. 2C–30, p. 1; Ex. 2C–125–1, pp. 7–8).

NIOSH (Ex. 1, p. I–7) and the Advisory Committee (Ex. 2B, p. 9) recommended and the proposal required that self-recording audiometers should be subject to the requirements found in Appendix C. These requirements are necessary to ensure the validity of audiograms taken with self-recording audiometers.

Audiometer Rooms

Background sound levels in audiometer rooms must be quiet enough to permit valid measurements of audiometric thresholds. Too much noise can "mask" or artificially shift a subject's hearing threshold level. In other words, the tone would have to be significantly louder before the person could distinguish it from the background noise, making it seem as though the individual hears less well than he or she actually does. While this is not a good practice for any type of hearing test, it is especially serious with respect to the baseline audiogram. For example, a worker might enter a company with hearing as good as 0 dB at 1000 Hz. But background noise could mask this worker's hearing level at 1000 Hz by 15 dB, and cause the baseline to read 15 dB rather than 0 dB hearing level. In subsequent years the worker might actually lose some ability to hear at various frequencies, including 1000 Hz. Not until the worker had already lost more than 15 dB of hearing would any changes begin to show up on the audiogram. Then, the worker would have to have a hearing level of 35 dB (signifying a loss of 20 dB more), before the shift would be considered significant, under the amendment, and protective actions would be taken.

The Agency has determined that background levels in audiometer test rooms should be quiet enough to allow threshold testing to 0 dB hearing level. This is especially important in order to describe accurately the hearing levels of individuals who enter the workforce with hearing as good as 0 dB. According to the DuPont Company (Ex. 306, sect. J1C, pp. 8–9) "most young subjects will have extremely good hearing and will respond to the tone while the hearing dial is still at 0 dB threshold. In these cases it is good practice to obtain . . . responses . . . at these low levels." "Screening" audiometry, (merely registering positive responses at a specific level across frequencies) does not satisfy the requirements of this regulation because actual thresholds, and therefore valid threshold shifts, cannot be identified by this process. Baseline and periodic audiograms should reflect testing to the lowest audible level. These views have also been supported by industrial audiologists (Ex. 317, p. 2; Ex. 319B–2, p. 1; Ex. 319B—3, p. 3), and constitute good industrial audiometric practice, necessary to preserve workers' hearing.

In the proposed standard OSHA required that background levels in audiometric test rooms levels not exceed the following:

40 dB at 500 Hz
40 dB at 1000 Hz
47 dB at 2000 Hz
57 dB at 4000 Hz
62 dB at 8000 Hz

These levels, referenced to 0 dB sound pressure level, were taken from the American National Standard, Criteria for Background Noise in Audiometer Rooms, S3.1–1960.

The amendment retains the background levels specified in the proposal (as Table D–2 of Appendix D) for 2 years, and then imposes a more stringent background noise requirement for audiometric test rooms. After 2 years, background levels shall not exceed the following.

27 dB at 500 Hz
30 dB at 1000 Hz
35 dB at 2000 Hz
42 dB at 4000 Hz
41 dB at 8000 Hz

So that the professional reviewer will know that testing has been conducted in sufficiently quiet conditions, employers must record on employees' audiograms whether the test room meets the requirements of Table D–1 or Table D–2.

These background levels (with the exception of the 27-dB level at 500 Hz) are specified in the American National Standard for Permissible Ambient Noise During Audiometric Testing, S3.1–1977. This standard was submitted to the record as Exhibit 312 and public comment was invited on it (see 45 FR 26366, 4/18/80).

OSHA has required the more stringent background levels in audiometric test rooms which are outlined above to be as consistent as possible with the newer ANSI standard. In previous years, the older (1960) ANSI standard for background levels was presumed to be sufficient for allowing threshold testing to audiometric zero, based on the 1951 audiometric zero (ANSI S3.1–1960, p. 7). However, as mentioned above, audiometric zero was changed (made more stringent) in 1969, and therefore the old ANSI standard for background levels was no longer stringent enough to allow threshold testing to 0 dB. ANSI began revising the standard for background levels, but the new standard was not published until 1977. It is logical for this amendment to require the more stringent background levels so that workers may be tested to the 1969 0-dB hearing threshold level, which is now the nationally accepted norm for

audiometric zero. (In fact, the proposal required the use of audiometers meeting the ANSI S3.6–1969 standard, which includes the 1969 zero reference level).

Although the 1977 ANSI standard for background levels specifies a maximum level of 21.5 dB at the 500-Hz frequency, OSHA has modified this requirement to 27 dB. This change was based in part on a number of recent submissions to the record by audiometric booth manufacturers, employers, and industrial audiologists, who maintained that they were unable to meet the new ANSI requirement of 21.5 dB at 500 Hz with existing equipment (Ex. 287, p. 2, Attach. 1, p. 1, Attach. 3, p. 1; Ex. 291, p. 2; Ex. 295, p. 1, Ex. 319–B1; Ex. 319–B2, pp. 1, 2; Ex. 321–15, pp. 1, 2). Alan Eckel, president of Noise Control Products and Materials Association (Ex. 287, p. 2) stated that ANSI S3.1–1977 was "a clinical research standard and . . . not intended for industrial hearing conservation purposes." However, there is no such distinction made by the ANSI standard (Ex. 312). While the ANSI standard maintains that the exclusion of all ambient noise is not necessary, the levels in the standard will permit measurement of hearing threshold levels as low as those specified in ANSI S3.6–1969, (as explained above) (Ex. 312, p. 1).

Also, the Agency realizes that since 500 Hz is not included in the definition of significant threshold shift, audiometric precision at this frequency is not as important as it is at the other test frequencies. However, is not appropriate to allow background noise up to 40 dB at 500 Hz, (as allowed by the older ANSI standard) since this amount of noise would be capable of masking thresholds at 1000 Hz. The decision to allow a sound pressure level of 27 dB is based on a study by Dr. James Jerger (Ex. 321–20, p. 387), which shows that background levels at 500 Hz may be raised approximately 5 dB without interfering with threshold testing at 1000 Hz.

William Vanke (Ex. 285, p. 2) referred to the statement in ANSI S3.1–1977 (Ex. 312, p. 1) to the effect that some testing programs may be met by measurements at test signal sound pressure levels higher than 0 dB referenced to ANSI S3.6–1969. The objectives of the audiometric testing program required by OSHA can be met by slightly higher levels at 500 Hz, but they cannot be met at higher levels for the test frequencies 1000 through 6000 Hz because these frequencies are used in the definition of significant threshold shift. Testing to 0 dB hearing threshold level is critical to the proper characterization of hearing level for persons with acute hearing, so as to correctly identify significant threshold shift, with the goal of preventing material impairment of hearing.

The amendment does not incorporate the entirety of ANSI S3.1–1977 by reference since the octave band levels at 500 through 8000 Hz stated above are the only ones necessary for the amendment's audiometric testing requirements (frequencies such as 125, 250, and 750 Hz are not included since testing is not required at these frequencies). Also, the amendment has rounded the levels stated in the ANSI standard to the next highest whole number, (e.g., at 1000 Hz the amendment requires 30 dB instead of 29.5 dB). Since the remainder of the ANSI standard consists mainly of appendices, which are not actually part of the standard, only the pertinent allowable levels as modified are included in the final standard.

Although the amendment does not require testing at 8000 Hz, (nor did the proposal), this frequency is included instead of 6000 Hz in the requirements for background sound levels. This is because ordinary sound level meters are not capable of measuring sound pressure levels for the octave band surrounding 6000 Hz. Therefore OSHA has listed the levels to permit testing at the 6000-Hz frequency even though they must be measured with the octave band filter set for 8000 Hz. This procedure was assumed in the proposal, since a 62-dB maximum level was required for audiometric testing at 6000 Hz, although the 8000 Hz frequency was specified for measurement with the sound level meter. The same rationale applies to the 41-dB maximum level to be measured at 8000 Hz setting after the initial 2-year period. Since most background noise tends to be predominantly low frequency, and also since high frequency sound is more efficiently attenuated by typical audiometric test booths (Ex. 312, p. 7), the amendment's requirement for maximum levels of high frequency noise are not expected to pose a feasibilty problem.

Since some employers or consultants may need to retrofit their present audiometer rooms, (Ex. 319B–2, p. 2) or move them to a quieter location, the Agency has allowed them 2 years in which to make these changes. There may be cases where employers need to purchase new test booths, but OSHA believes that these cases will be rare because of the modification of allowable background noise made at 500 Hz.

Quieter booths of the double-walled variety are available but they should not usually be necessary since most factories have some kind of office space, where background noise levels are relatively low. Because none of the comments in the record mentioned difficulties at frequencies above 500 Hz, OSHA concludes that the 1977 ANSI requirements at these frequencies do not present significant problems. Measurements of background levels submitted by audiologist Sue Riggs (Ex. 295, p. 1 and Attachment) indicated some difficulties at 500 Hz, but the 1977 ANSI levels were met at other frequencies. Alan Eckel of Eckel Industries stated that "almost all audiometric booths currently used in industrial hearing conservation programs meet the requirements of the new ANSI standard at 1000 Hz and above. The lower frequencies are difficult to achieve". (Ex. 319 B–1, p. 1).

Measurements by Riggs (Ex. 295, Attachment) indicated that the 27-dB levels at 500 Hz could be met in many of the cases she cited, although the 21.5-dB level specified in ANSI S1.3–1977 could not. Reports by Berger et al. (Ex. 266A, p. 38) and NIOSH (Ex. 28–2, p. 23), showed that the 27-dB level usually was met in the conditions in which these investigators tested. The mobile audiometric van used by Burns and Robinson had a mean attenuation of 79 dB at 500 Hz from outside the vehicle to inside the booth (Ex. 12, p. 71), which when added to the 27-dB allowable level at 500 Hz, must have provided ample attenuation for any ordinary circumstances.

Audiometer Calibration

This amendment requires three types of audiometer calibration. First, the functional calibration of the audiometer must be checked before each day's use. Second, the audiometer's calibration must be checked acoustically with a sound level meter and earphone coupler at least every year. Finally, the audiometer must receive an exhaustive calibration at least every 2 years. In the first two instances the word "calibration" refers to a procedure by which the audiometer is checked to make sure that it is producing the correct level of pure tones at specific frequencies, and that the signals are free from distortion or unwanted sounds, which might lead to invalid audiograms. In the third type of calibration the instrument is thoroughly checked, and adjusted if necessary, so that it meets the ANSI specifications described below. In most cases this type of calibration must be performed in a laboratory or at the manufacturer's factory.

So as to ensure accurate audiograms, OSHA advises employers to measure the background sound pressure levels in

audiometric test rooms periodically. Since the sound levels inside the room are greatly dependent upon the sound levels outside, employers should measure the room levels whenever there is an increase in outside sound levels that might adversely affect compliance with Appendix D. For example, Dr. Thomas (Ex. 102, Sect. 9, pp. 53–56) recommends making these measurements whenever a test room is relocated, or when noisy equipment is moved into the area of the test room.

Audiometer calibration is necessary in order to obtain valid audiograms, which in turn are critical since changes in hearing level initiate a number of different actions. There were many comments in the record supporting required audiometer calibrations. According to William Reich of Gen Rad Corporation, "An accurate and reliable audiometric testing program involves more than the simple purchase of a good audiometer. Periodic calibrations are an essential part of the audiometer program . . ." (Ex. 281, attach. 2, p. 86, Electro-Acoustic Audiometer Calibration). There are several studies that show that audiometers can often malfunction, and this malfunctioning can be undetected by the individual who is using the instrument (Ex. 321–51A, Ex. 281, attach. 2, p. 86). As a consequence, the audiograms that have been produced are of questionable accuracy and value. According to a study by Thomas, Preslar, Summers, and Stewart (Ex. 321–51A, p. 328), of 98 audiometers checked, none was "in condition to do satisfactorily the testing for which it was manufactured. The most frequent defect was incorrect sound level output." This study and also a study performed by the U.S. Air Force School of Aerospace Medicine (Ex. 281, attach., p. 86) indicate that a high percentage (50 percent to 100 percent) of audiometers failed to perform according to ANSI requirements when these instruments were left uncalibrated. It is for these reasons that calibration is mandatory.

The hearing conservation amendment requires that the functional operation of the audiometer be checked before each day's use. The process involves testing a person whose hearing levels are stable and do not exceed 25 dB at any test frequency. This person may be the tester himself or herself, or any other person with normal hearing. The process also includes checking the general function of the audiometer for unwanted sounds, such as clicks, static, and distortion. This functional check is quite simple, and can be done in a few minutes. If the test reveals significant deviations (greater than 5 dB), in hearing level from the subject's known audiogram or unwanted or distorted sounds, a more thorough calibration is warranted. In this case OSHA requires an acoustic calibration. In order to be sure that the audiometer's output is deviating rather than the subject's hearing level (the subject may have a headcold), the tester is advised to test additional subjects (with known stable hearing levels that do not exceed 25 dB). If these subjects confirm the deviation, use of this audiometer for testing must be discontinued until a periodic or exhaustive calibration can be performed since all of the audiograms taken that day would be suspect.

The proposal also required that the functional operation of the audiometer be checked prior to each period of use to ensure that it was in proper operating order. In addition, the proposal required a "biological" calibration at least once a month, which consisted of testing a person having known, stable audiometric thresholds. If the results of the biological calibration indicated hearing level differences greater than 5 dB, the audiometer was to be subjected to a "periodic" calibration. In the final amendment the Agency has combined the functional check and the biological calibration into the same requirement, to be performed before each day's use of the audiometer. This approach has been taken because it is extremely important to ensure that the audiometer produces correct sound pressure levels each time it is used. The process of testing one person's hearing can be done quickly, especially if the individual performing the test tests himself or herself.

This type of calibration check was supported by comments and articles submitted to the record. Even a new audiometer from the factory can lose its calibration especially if it was bumped in transit, and a functional check before each day's use would alert the operator to any malfunctions that might invalidate the test results (Ex. 102, sec. 9, p. 55–56; Ex. 306, p. J5C–8). This type of calibration appears to be accepted audiological practice, and was recommended in many comments to the record (Ex. 2C–14, p. 4; Ex. 2C–31–1, p. 2; Ex. 48, p. 14; Ex. 58, p. 2; Ex. 159, p. 6; Ex. 281, attach p. 2, p. 88; Ex. 306, pp. J5C–6, J1C–4, J1C–12).

Like the proposal, the amendment requires an acoustic calibration at least once a year, in order to check the audiometer's output with calibrated measuring equipment. This calibration is specified in Appendix E, and must be performed with a sound level meter and octave-band filter set, and a National Bureau of Standards 9–A coupler. The amendment's requirements are the same as those of the proposal, except that the listening test and the functional check are not included since they must now be performed before each day's use. The name has been changed from "periodic" to "acoustic" to more accurately characterize this particular calibration.

The amendment's requirements for acoustic calibration are given in Section 4.1.4.3 of ANSI § 3.6–1969, but the actual calibration procedures are given more explicitly in Appendix E, as they were in the proposal. Also, Appendix E gives reference sound pressure levels for both the Telephonics TDH–39 and TDH–49 earphones, which are in popular use today. (Reference levels for the TDH–49 earphone were not included in ANSI § 3.6–1969).

For the acoustic calibration, measurements must be taken acoustically at a reading of 70 dB on the audiometer's hearing threshold dial at all test frequencies (500, 1000, 2000, 3000, 4000, and 6000 Hz). Measurements must then be taken at the 1000-Hz frequency in decreasing steps of 10 dB from 70 dB to 10 dB hearing level. These latter measurements may be taken acoustically with the sound level meter or electrically with a voltmeter. The purpose of these measurements is to check the sound pressure level output at all frequencies, and to check the linearity of the attenuator, to make sure that the audiometer is producing the correct sound pressure level output at all hearing levels. Appendix E gives the following tolerances, which also are stayed in Section 4.1.4.3 of ANSI § 3.6–1969:

3 dB at 500 through 3000 Hz
4 dB at 4000 Hz
5 dB at 6000 Hz

Whenever the audiometric output deviates by more than the above levels, OSHA advises an exhaustive calibration. Until such time as the exhaustive calibration is performed, deviations that exceed these tolerances should be posted on the audiometer, so that the operator can correct the audiograms accordingly. When manual audiometers are used, deviations of 3 or 4 dB should be rounded to 5 dB when adjusting the audiogram. The amendment advises, but does not require an exhaustive calibration when small tolerances are exceeded, because posting deviations and correcting audiograms should serve as a satisfactory interim measure. However, when the deviations exceed 10 dB, an exhaustive calibration is mandatory.

This portion of the amendment reflects a slight departure from the proposal, which specified additional

listening checks. The amendment limits the requirement to an assessment of sound pressure level output, since sound pressure level output is the audiometric function most frequently found to be incorrect (Ex. 321–51A, p. 326).

Comments in the hearing record supported a periodic calibration and some even specified its performance quarterly (Ex. 2C–14, p. 4; Ex. 2C–31–1, p. 2; Ex. 46, p. 14). Since not all audiometers will be in constant service and since an acoustic calibration will be triggered by a functional check that shows the necessity of further calibration, the Agency believes that a regular acoustic calibration once a year should be sufficiently frequent to assure accuracy.

The hearing conservation amendment requires an exhaustive calibration every 2 years. The content of the requirement is essentially the same as that which appeared in the proposal, although the interval between calibrations has been shortened from 5 to 2 years. This calibration will usually be performed in a laboratory or by the audiometer manufacturer because of the need for specialized equipment. (Calibration of frequencies below 500 Hz and above 6000 Hz may be omitted since they are not required test frequencies). During this calibration the audiometer is actually adjusted so that it conforms to the following sections of ANSI § 3.6–1969:

Section 4.1.2 Accuracy of Tone Frequencies. The purpose of the test is to make sure that the audiometer will actually produce tones at the frequency stated on the audiometer dial. For example, the tone should be 2000 Hz, not 2100 Hz or 1900Hz.

Section 4.1.3 Purity of Tones. In this test the audiometer is checked to make sure that harmonics of the test frequencies are not present to the extent that a test subject might respond to the harmonic rather than to the test tone.

Section 4.1.4.3 Accuracy of Sound Pressure Level. In this test the audiometer's sound pressure level output is checked in a similar manner as it is on the acoustic calibration. Reference threshold levels should be appropriate to the type of earphone, as mentioned above.

Section 4.4.1 Sound from Test Earphone. The purpose of this test is to ensure that the earphone will not emit any sound other than the test tone, which might affect the subject's threshold.

Section 4.4.2 Sound from Second Earphone. This test guards against any sound from the nontest earphone, which might affect the subject's threshold.

Section 4.4.3 Other Unwanted Sound. This test guards against any sound from the audiometer itself, which might furnish a clue to the subject being tested, thereby affecting the subject's threshold.

Section 4.5 Tone Switch. The purpose of this test is to ensure that the tone has an adequate rise and decay time, and that operation of the switch does not produce audible transient sounds or extraneous frequencies, which could influence the subject's threshold determination.

The proposal required an exhaustive calibration every 5 years. The amendment requires that the exhaustive calibration be performed every 2 years. Many comments in the hearing record supported an exhaustive (or factory) calibration every year (Dr. Righthand, Ex. 281, Attach. p. 91; Air Force Regulation Ex. 48, p. 13; Dr. Thomas, Ex. 102, Sec. 9, p. 56). Although the DuPont Company calls its yearly calibration an "acoustic" calibration, their requirements are similar to the exhaustive calibration specified in the amendment. The Company states: "This calibration shall check both frequency and intensity at each setting, rise time and overshoot and electrical and mechanical integrity." (Ex. 306, p. J5C–5). A Draft International Standard (Ex. 321–39, p. 3) suggests an exhaustive calibration every 2 years. The NIOSH criteria document (Ex. 1, p. I–19), the Advisory Committee (Ex. 2B, p. 12), and the draft California noise standard (Ex. 321–50, p. 15) supported the 5-year period between exhaustive calibrations.

Since the validity of the audiogram is highly dependent upon the calibration of the audiometer, OSHA believes that 5 years is too long an interval between exhaustive calibrations. Even though employers may find in the acoustic calibration that the sound pressure level output is correct, other malfunctions may occur, such as inaccurate tone frequencies or harmonic distortion. These malfunctions could occur without the knowledge of the operator because they can be too difficult to detect. A shorter interval is all the more important because the exhaustive calibration is advised but not required when an acoustic calibration indicates that the audiometer is up to 10 dB out of calibration. Audiometers that are not used very often (such as only a few days a year) should not need to be thoroughly calibrated more often than every 2 years. However, employers are urged to send their audiometers for exhaustive calibration more frequently when they are heavily used, or when, as a result of periodic calibration, it becomes apparent that they slip out of calibration fairly easily.

The amendment requires employers to record the date of the most recent acoustic or exhaustive calibration on employees' audiograms. This requirement will aid professional reviewers in making the determination that the tests have been conducted with properly calibrated equipment. In addition, employers must make complete calibration records available to professional reviewers, so that the reviewers will have better knowledge of actual function of the audiometer.

Hearing Protectors

The hearing conservation amendment requires employers to make hearing protectors available to all workers whose exposures equal or exceed an 8-hour time-weighted average sound level of 85 dB. When the PEL is exceeded, and employers are unable to reduce exposures through the use of engineering or administrative controls, hearing protectors must be provided and worn, as required by the current noise standard, 29 CFR 1910.95(b)(1). In addition, employers must assure that hearing protectors are provided to and worn by employees exposed to a TWA of 85 dB or greater if their audiograms have indicated a permanent significant threshold shift. Although workers who have not yet received a baseline audiogram are not required to wear protectors if their TWAs are between 85 and 90 dB employers are advised to encourage them to do so.

Employers must provide workers with a choice of hearing protectors. Employers are advised to give workers a choice between at least one type of ear plug and one type of ear muff (preferably more) since individuals may be much more comfortable in one type of protection than in the other. Ear protectors shall be supplied at the employer's expense. The employer is responsible for the proper initial fitting of hearing protection, and for regularly supervising its use to make sure that employees are wearing the protectors, and that they are worn correctly.

Employers must select hearing protectors that attenuate or reduce employee noise exposure at least to the PEL, and for employees who have suffered a significant threshold shift, to a TWA of 85 dB or below. Under the present standard, 29 CFR 1910.95(b)(1), an employee must wear hearing protection whenever his or her exposure exceeds the PEL and engineering controls are infeasible, in the process of being installed, or will not reduce the employee's exposure to within the PEL. The final hearing conservation

amendment requires an additional group of employees to wear hearing protection: those exposed to TWAs of 85 dB or above if they suffer a significant threshold shift of hearing level.

The results of four recent studies indicate that the way hearing protectors are worn in real life conditions significantly reduces the manufacturer's stated estimates of attenuation (Ex. 301, p. 35; Ex. 308, pp. 1, 2; Ex. 321–14C, p. 5; Ex. 321–35E, abstract). NIOSH found that the attenuation achieved in the field was only about one-third of the attenuation achieved in the laboratory (Ex. 308, p. iii). Therefore, employers are advised to underestimate hearing protector attenuation by a few decibels when selecting protectors for employers. (This underestimate may have the effect of slightly overprotecting the employee.)

A given hearing protector must always be suitable for the frequency distribution of the noise environment in which it is to be worn. Therefore employers must estimate hearing protector attenuation for each employee's noise exposure conditions in order to be sure that the attenuation provided will be adequate. Methods for estimating hearing protector attenuation are described, and instructions for their use are given in Appendix G: *Methods for Estimating the Adequacy of Hearing Protector Attenuation.* This appendix is mandatory.

As discussed above in the section on exposure monitoring, the employer must remonitor whenever there is a change in working conditions that may cause an employee's hearing protector attenuation to be insufficient. After monitoring, the employer must re-evaluate the attenuation of the hearing protector being used and provide new protectors as necessary. These measurements could be taken as a result of either a bi-annual monitoring or monitoring due to a change in noise conditions.

The proposal required hearing protectors to be provided to and used by employees exposed to a TWA between 85 and 90 dB if their audiograms showed a significant threshold shift. OSHA has retained this very important requirement since these workers have demonstrated susceptibility to noise exposure (Ex. 310, p. 25; Ex. 5, pp. 43804, 43805; Ex. 138A, p. 1–4) and wearing hearing protectors may help prevent further hearing loss (Ex. 231, p. 11; Ex. 321–53D, p. 3; Tr. 2246; Tr. 755).

Unlike the proposed standard, the amendment also requires employers to make protectors *available* to all employees exposed to a TWA above 85 dB on a voluntary basis. The fundamental reason for this requirement is the fact that hearing loss can occur above 85 dB, as was explained earlier. A significant percentage of workers exposed to 85 dB over a working lifetime will suffer material impairment of hearing (Ex. 138A, p. I–4; Ex. 5, p. 43805; Ex. 189–5, p. 6; Ex. 86, p. 33). These workers should not have to incur significant threshold shifts or any work related diminution of hearing, for that matter, before they have access to hearing protection. Workers should be able to wear protection voluntarily, even where the use of hearing protection is not mandatory. This is fully consistent with the purposes of the Occupational Safety and Health Act (see section 2(b)(1) and 2(b)(4) of the Act).

Generally the amendment does not make the wearing of hearing protectors mandatory until exposure levels exceed the PEL since the permissible exposure level listed in 29 CFR 1910.95(a), Table G–16 has not been changed. This requirement is contained in the present noise standard and the amendment does nothing to change it. Moreover, workers sometimes find hearing protectors particularly oppressive at the more moderate exposure levels where they can cause interference with speech communication to be more noticeable. (More speech communication is likely to occur in moderate levels, especially if the noise is intermittent, allowing speech to take place in the quiet intervals (Ex. 321–35G, p. 3; Ex. 231, p. 12).) Therefore the Agency has decided to require employers to provide ear protectors to employees exposed between 85 and 90 dB, but not to make the use of these devices mandatory for those employees without significant threshold shift until the PEL is exceeded. Since the Agency recognizes that many employees dislike hearing protectors, mandatory use of protectors has been limited to those cases where they are absolutely necessary.

Acceptability of Hearing Protectors

A major issue that was addressed in the record is worker refusal to wear ear plugs because they cause discomfort (Ex. 75–5, p. 22; Ex. 321–45A, pp. 1, 11; Ex. 94, p. 9). Complaints about ear muffs included headaches, claustrophobia, excessive warmth, perspiration, interference with safety glasses and hardhats, and bulk in and around the ear (Tr. 576, 603, Tr. 1371; Ex. 94, p. 9; Ex. 2C–16B, p. 25). Hearing protectors also have been criticized because their effectiveness is so heavily dependent upon individual worker's compliance, rather than on the more consistent protection afforded by engineering controls (Tr. 794). The use of hearing protectors can be more difficult to supervise because their effectiveness depends upon many people (all employees who wear them) rather than on one or two machines (Tr. 1465). Also, supervision is difficult because it is impossible to know whether a hearing protector is being effectively worn just by looking at each employee. Finally, some stated that hearing protectors can be unacceptable for hygienic reasons (i.e., they lead to ear infections) (Ex. 79, p. 7; Ex. 94, p. 9; Ex. 88, p. 7; Tr. 2026–2027).

Leonard Woodcock, former president of the United Auto Workers Union, revealed many potential problems with ear protection:

> The effect of using ear protection shifts the burden and responsibility for compliance from the employer to employee. Ear protection is uncomfortable and irritating. Some workers easily get ear infections or drainage problems from wearing them.
>
> Moreover, experience teaches us that management often selectively enforces the wearing of ear protection. (Ex. 79, p. 7).

Joseph Hafkenschiel of the Communication Workers of America went on to say that:

> Personal protective equipment, cannot be regarded . . . as anything more than an interim control measure. Even in these temporary situations, many people cannot wear this type of protection because of medical problems of the ear. Other individuals find the effective deafness enforced by ear protectors psychologically distrubing. Finally, ear protection may mask shouts or signals and, thus, contribute to industrial accidents. (Ex. 82, p. 8).

In response to these problems many commentors pointed out the necessity to fit hearing protectors correctly and to allow for personal preference in order to assure comfort and acceptance (Tr. 3463–3464; Ex. 14–245, p. 2; Ex. 308, p. 1; Ex. 321–14A, p. 2; Ex. 321–14B, p. 2; Ex. 14–894, sec. 3, p. 6; Ex. 75–2, p. 123; Ex. 321–34A, p. 2; Ex. 321–53D, p. 3). Workers who develop ear infections or have significant amounts of wax in the ears should use muffs, if possible, instead of insert type hearing protectors (Ex. 102, sec. 8, p. 15; Tr. 1803, 1805).

In a program developed for the North Carolina Department of Labor (Ex. 2C–16B, pp. IV–6, 7), Dr. Royster provided an example of a program which emphasized that workers should be able to receive help when protectors are not satisfactory. A supervisor, a nurse, or even a health and safety committee can provide guidance "on the job." OSHA believes that if, after a trial period, (Ex. 75–2, p. 122) the discomfort associated with the use of a particular hearing protector is so great that it cannot be worn successfully, then an alternative protector should be used. The company

must make a concerted effort to find the right protector for each worker—one that offers the appropriate amount of attenuation, is accepted in terms of comfort, and is *used* by the employee. The Agency requires workers to wear hearing protectors as part of the total hearing conservation program. If the protectors do not fit properly will not provide the estimated amount of protection.

There are several reasons why OSHA mandates that employers provide a variety of protectors (Ex. 147C, pp. 336–337). Plant conditions such as dust, temperature, and humidity can cause one type of protector to be more suitable than another (Ex. 102, sec. 5, p. 18). For example, ear plugs can be more comfortable in a hot, humid environment, than ear muffs. Also, individual ear canals come in all shapes and sizes. For people with unusually shaped ear canals, fitting may be difficult, and commonly-used insert protectors may be very uncomfortable (Ex. 2C–16B, p. V–3).

In a survey of industrial hearing conservation programs NIOSH found that:

> Another factor which seemed to affect the willingness of the employee to wear ear protectors was the variety of items offered to him. Many companies supplied a wide range of personal ear protector devices and permitted the employee a trial period to select the one he liked. (Ex. 321–14B, p. 2).

This finding was also supported by Dr. M. Thomas Summar (Ex. 147C, p. 335) and others (Ex. 321–14A, p. 2; Ex. 321–14B, p. 2; Tr. 3464; Ex. 321–34A, p. 2).

Another aspect of worker rejection of ear protectors is safety. The United Auto Workers, for example (Ex. 79, p. 8; Ex. 94, p. 10; Ex. 91C, p. 3), stated that hearing protectors create unsafe conditions in the workplace by reducing the audibility of shouts and warning signals. It is possible that a worker might not hear noises that indicate that machinery is malfunctioning. The Environmental Protection Agency (Ex. 231, p. 12) pointed out that hearing protectors can impede speech communication, especially in situations where the noise is highly intermittent, or in cases where the wearer has a high-frequency hearing loss. Interference with speech communication can cause a safety hazard. This issue is complex, since, in some situations protectors can actually improve hearing of speech in noisy backgrounds (Ex. 14–295, p. 1; Ex. 14–886, p. 1; Ex. 14–907, p. 21). On the basis of this evidence, OSHA concludes that although hearing protectors may in some circumstances pose a safety hazard, this is insufficient reason to abandon their use when workers are exposed to potentially damaging levels of noise and there are no other feasible means of reducing the noise exposure.

There is also some evidence that protectors provide other advantages beyond protection against NIPTS. Studies by the Raytheon Company (Ex. 26–11, p. 5–2) and another by Schmidt, Royster, and Pearson (Ex. 321–22, p. 27) showed that after the institution of a hearing protector program not only was hearing loss reduced, but lower injury rates and higher attendance rates were observed.

Administrative and Financial Responsibility

Another important issue that was raised at the hearings was the placement of administrative responsibility for this part of the program. The American Newspaper Publishers Association (Ex. 14–268, p. 2) and others (Ex. 14–173, p. 2; Ex. 14–290, p. 2; Ex. 14–276, p. 2) stated that it should be the worker's responsibility to use ear protectors. Going one step further, the Air Transport Association of America (Ex. 144, p. 10), and Dr. Raymond J. LeZak (Ex. 14–276, p. 2) felt that each worker should decide whether or not to use protection. Based on this reasoning, if the employee is not diligent in the use of protection, then any hearing loss that is incurred cannot be blamed on the company.

The Occupational Safety and Health Act does not include the concept of "assumption of risk" which would permit workers to decide which rules merit compliance. On the contrary, the Act requires employees to comply with all rules and employers have the responsibility of enforcing all of OSHA's requirements.

The proposal did not specify who should bear the expense of hearing protectors. Some comments in the record, such as those submitted by the Environmental Protection Agency (Ex. 9, p. 5) and others (Ex. 321–18, p. 2; Ex. 321–50A, p. 8; Ex. 103A, p. 4), recommended that ear protectors be provided at the employer's expense. For example, R. V. Durham, director of the Safety and Health Department of the International Brotherhood of Teamsters stated:

> A point we must raise, the burden of cost for personal ear protective devices, is one that is vital although often overlooked. Labor and most employers recognize the reponsibility of the employer to provide a safe and healthful working environment for its employees. Where, in certain circumstances, personal protective equipment is necessary to afford such an environment, it is again almost universally accepted that its purchase is the responsibility of the employer. If personal ear protective devices are necessary to the success of a hearing conservation program, it is vital that the employer provide appropriate ear protectors and maintain control over the proper issuance, maintenance, and use.
>
> An employer's attempt to require its employees to purchase their own personal ear protective devices would cause resentment among the workers and clearly demonstrate to them the lack of commitment on the part of their employer in preventing hearing loss. Such a requirement would discourage the use of ear protective devices and would create an adversarial atmosphere in regard to the hearing conservation program. Finally, requiring workers to buy their own hearing protective devices risks losing the necessary control over the organized and consistent selection, issuance, maintenance, and use of such equipment (Ex. 321–18, pp. 1–2).

On the basis of arguments such as the above, and because ear protectors are vital to the prevention of noise-induced hearing loss, the Agency has determined that employers must bear the expense of providing employees with hearing protectors, incuding the cost of replacing protectors that wear out.

Hearing protectors do wear out, and lose some of their ability to attenuate noise. Malleable inserts eventually become inflexible and unable to attenuate properly. Premolded plugs also can lose their elasticity, and custom molded plugs may shrink. Ear muffs also wear out eventually—the soft seals surrounding the ear cup can become inflexible, and the headband can lose its tension. Employers must replace all types of protectors as often as necessary so as to ensure the necessary amount of attenuation. Certain types of protectors, such as disposable plugs, may need to be replaced daily.

Dr. Royster mentioned that workers might damage or lose their protectors or just want an extra set, presumably to take home (Ex. 2C–16B, pp. IV–3, IV–6). The final standard's requirement that the employer pay for hearing protectors does not go this far. The Agency believes that employers should not have to pay for an unlimited supply of protectors or replace protectors lost due to employee negligence. The issue of how many replacement protectors to supply is up to the individual company as it is with other necessary work items, such as tools. However, if the employer refuses to replace worn out ear protectors, the employer may be subject to citation. On the other hand, the employer should not have to bear the expense if an employee has been irresponsible.

The Agency is aware that many industrialists are concerned about being held responsible for nonoccupationally-

induced hearing loss (Ex. 14–8, p. 2; Ex. 14–86, p. 1 and Ex. 14–288, pp. 3–4). To the extent that an employee's noisy hobby can contribute to noise-induced hearing loss, wearing protectors at home should diminish the loss. Therefore, OSHA suggests that employers urge workers to use protectors at home during noisy activities.

Attenuation

The value of hearing protectors lies in their ability to attenuate or reduce the noise that reaches the ear. Although the proposed standard did not specify requirements for estimating hearing protector attenuation, adequate attenuation is fundamental to worker protection, and for this reason it was suggested that OSHA make its requirements explicit (Ex. 1, pp I–11 through I–13, III–7, III–8; Ex. 2B, pp. 13–15).

The amendment requires employers to evaluate the effectiveness of particular ear protectors in specific noise environments, since the capabilities of the protectors need to be matched to the characteristics of the noise. For example, workers who are exposed to predominantly low-frequency noise levels of approximately 100 dB may need protectors that provide more attenuation in the low frequencies than those needed by workers who are exposed to predominantly high-frequency noise of the same A-weighted level.

Since hearing protectors generally provide greater attenuation in the high frequencies than in the low frequencies, (see Ex. 321–14A, pp. 4–16) and since industrial noise tends to be predominantly low-frequency, (Ex. 26–2, pp. 34–35; Ex. 266A, pp. 77–78) it is important to assess the relative contribution of low-frequency noise in order to select an appropriate hearing protector. As explained in the Introduction, the sound level meter's C-weighting network does not discriminate against (filter out) low-frequency noise, whereas the A-weighting network discriminates strongly against low-frequency noise. Thus, taking the difference between C-weighted and A-weighted sound levels is a simple method of assessing the relative contribution of low frequencies in a given noise spectrum. This method was advocated in a study submitted by DuPont Company (Ex. 188–27, part 4, p. 447) in which Dr. R. Waugh pointed out that the same ear protector could provide 20 dB more attenuation of noise with one frequency spectrum than with another. Dr. Waugh recommended selecting ear protectors according to the difference obtained by subtracting the A-weighted noise level from the C-weighted level.

NIOSH and EPA also found the difference between C-weighted and A-weighted noise levels to be useful for purposes of hearing protector selection (Ex. 321–14A, p. 28; Ex. 314, p. 561B). OSHA also recognizes the value of this approach, and recommends a method that incorporates it, which is EPA's Noise Reduction Rating (NRR) (Ex. 314). EPA requires all manufacturers of hearing protectors to label the package with the appropriate NRR for that protector. The regulation, 40 CFR Part 211, became effective Sept. 27, 1980 (44 FR 56130, 1979).

Appendix G requires the use of the NRR or one of three NIOSH methods. OSHA recommends the NRR since it is simple to use, and it appears to have been reasonably and thoughtfully developed (see NIOSH Ex. 321–14A, and EPA Ex. 314). The NRR concept has been adopted by another Federal agency (the EPA), and the NRR will appear on the label of all hearing protectors manufactured in the United States. Once the NRR of a protector is known, the employer needs to relate the NRR (or a reduction factor determined by one of the NIOSH methods), to an individual worker's exposure to assess the adequacy of the hearing protector for that individual.

Use of the NRR to predict the sound level at the ear drum is dependent upon knowledge of the C-weighted sound level to which the worker is exposed. The NRR is to be subtracted from the C-weighted sound level in the employee's environment. Since sound levels usually fluctuate throughout the day, it is necessary to obtain a C-weighted TWA so that employers can estimate the A-weighted sound level under the protector. The simplest and most efficient way to accomplish this would be to obtain a C-weighted noise dose with a dosimeter. Since contemporary dosimeters do not have C-weighting networks, this method will not be possible unless or until such dosimeters are manufactured and marketed. However, such a method has been included in Appendix G in the event that dosimeters with C-weighting networks become available. In the meantime employers may use the guidelines in Appendix B to calculate C-weighted noise dose, or they may make a correction to the A-weighted dose or TWA to allow for the uncertainty of not knowing the C-weighted exposure level.

OSHA has selected a 7 dB correction factor for cases where the difference between the C-weighted and A-weighted TWA is not known. This correction factor was suggested by NIOSH for use when information about the spectral distribution of a worker's noise environment was not available. However, the NIOSH report stated that a certain amount of caution should be exercised in using this method in workplaces where the difference between C-weighted and A-weighted sound levels might be greater than 7-dB (Ex. 321–14A, p. 31). Thus, when employers are aware of significant amounts of low-frequency noise, they are advised to take C-weighted measurements to make sure that the 7 dB correction factor is sufficient. To make the correction, 7 dB is subtracted from the NRR, and the remaining NRR value is subtracted from the A-weighted TWA in order to estimate the A-weighted sound level under the ear protector. When dosimeters are used, dose must be converted to TWA before the subtraction can be made. Appendix A, II. provides tables with which this conversion can easily be made.

As an alternative, employers may actually measure the employee's C-weighted exposure levels. They are advised to take these measurements whenever the noise is predominantly low-frequency, or whenever exposure levels are fairly high (i.e., above 95 dB). Employers should use temporal sampling procedures such as those described in Appendix B, but they may not need to take as many samples. If employers already have taken the required number of A-weighted measurements with a sound level meter, it is usually necessary only to take a few C-weighted measurements in order to obtain a good estimate of the average C-weighted sound level in each time segment. If employers have not already taken A-weighted measurements with a sound level meter, (in other words if they have used an A-weighted dosimeter), more measurements may be necessary in order to obtain a good estimate of the C-weighted TWA. Then the 8-hour time-weighted average of each segment's C-weighted sound levels must be computed using Figure B–5 in Appendix B and Table G–16a, or an equivalent method. Finally, the NRR is subtracted from the C-weighted TWA to obtain the estimated A-weighted TWA under the employee's ear protector. OSHA has not specified the exact number of measurements needed in order to estimate the level under the ear protector. However, the Agency believes that employers should attempt to assess the C-weighted exposure levels as accurately as possible.

In some instances employers may choose to use a method other than the NRR. For example, an employer may

want to use a protector that is not manufactured in the United States, or a protector that for some reason does not bear the NRR label on the package. Or the noise may have an unusual spectrum, which the employer wants to evaluate by octave-band analysis. In these cases employers may use any of the three methods developed by NIOSH described in the "List of Personal Hearing Protectors and Attenuation Data," by Kroes, Fleming and Lempert, HEW Publication No. 76-120, 1975 (Ex. 321-14A). The NIOSH method #1 is the most complex, but is likely to be the most accurate method since it uses the largest amount of information from the frequency spectrum of the worker's environment.[12] It requires data for each octave band. As with the use of the NRR, employers should be careful to take enough measurements so that a representative sample is obtained for each identified time segment. When using the NIOSH methods the reduction factor, or "R" factor needs to be calculated. Since this "R" factor is already included in the NRR, use of the NRR should be more convenient. Also, OSHA recommends the NRR for the sake of uniformity as well as for simplicity.

Elliot Berger, manager of Acoustical Engineering at the E-A-R Corporation, noted that the real world performance of hearing protectors is significantly overrated by the manufacturer's laboratory data, reflected by the NRR (Ex. 321-35, p. 1). Mr. Berger noted that the NRR incorporates certain corrections that are intended to ensure that 98 percent of the population who "correctly" wear the device in 98 percent of the industrial noise environments will achieve the protection indicated by the NRR (Ex. 321-35D, p. 3). However, Berger cited studies by NIOSH (Ex. 308), Padilla (Ex. 301), Regan (Ex. 300A), and the National Acoustic Laboratory of Australia (Ex. 321-35F), which show that the NRR value is not usually realized in actual use. This occurs because the NRR does not make allowances for improper fitting, for unusually shaped ear canals, or for highly unusual noise spectra.

OSHA recognizes that the NRR is based on laboratory data taken according to standardized procedures in standardized conditions (Ex. 311). At the time of testing the plugs and muffs are new, and they are fitted carefully. Unfortunately, hearing protectors are used in conditions that are less favorable than laboratories. Field tests have revealed that workers receive far less attenuation from several types of earplugs than is predicted by the laboratory test methods. A NIOSH report, for example, found that "half of the workers tested were receiving less than one-third of the potential attenuation of the hearing protectors in terms of noise reduction in dBA" (Ex. 308, p. iii). The report attributed the reduced protection to workers wearing the wrong size plugs and inserting their plugs improperly. In a similar study, Padilla (Ex. 301, p. 35) also concluded that the average earplug was worn incorrectly and suggested a test by which employers could monitor the attenuation of plugs in field use.

A study submitted by Dr. Donald Regan also found that devices worn in the occupational setting showed significantly less attenuation than the manufacturers estimated. Dr. Regan concludes: "The results of this investigation emphasize the 'false sense of safety' that management, industrial consultants, and particularly the individual who is wearing the device is assuming, if they conclude they are being adequately protected from the possibility of hearing loss." (Ex. 300A, p. 91).

As a result of this information OSHA urges employers to use extra caution in the initial selection and fitting of ear protectors so that protectors will fit comfortably, yet snugly, and so that workers will be skilled in refitting and caring for them.

Fitting

The fitting of hearing protectors must be done very carefully. Workers shall be trained in the care and fitting of the protectors, and employers must supervise their use.

Suggestions for proper fitting procedures were offered to the hearing record. Dr. Harold R. Imbus, medical director of Burlington Industries stated:

> It is often little understood that ear canal size can vary on the same individual. We have often found it necessary to use two different sizes of plugs in order to get the proper fit in each ear. We instruct the employee to return to the nurse's office immediately should any unusual soreness develop, because a refitting with a different type of plug may be necessary. (Tr. 3463-3464).

According to Dr. Royster:

> It is not sufficient to simply make available ear protection; the company must make sure that the fitting is done by someone trained in the issuing of ear protectors. This individual, nurse, technician, etc., should be under the supervision of the company doctor, local doctor, (or) audiologist. (Ex. 2C-16B, p. 27).

There was a great deal of comment recommending that trained persons fit hearing protective devices, especially if the protector is custom molded (Ex. 2C-16B, p. 27; Ex. 58, p. 3; Ex. 321-28A-2, p. 12; Ex. 75-5, p. 24). The Agency believes that any trained person, such as most nurses and technicians, will be able to fit ear protection adequately, so long as training on the subject has been included in their short courses, and they are well acquainted with the relevant audiological and/or industrial hygiene literature.

If proper precautions are taken, and if workers and management approach the problem in a spirit of cooperation, noise induced hearing loss should be greatly reduced. Comment and testimony by Dr. Karrh of DuPont Corp. (Tr. 2237; Ex. 306, p. 1), Dr. Sataloff (Ex. 321-53, pp. 5-6), Dr. von Gierke (Tr. 755), and Dr. Kryter (Tr. 794), indicated that well managed hearing protector programs can be extremely effective in conserving workers' hearing. However, employers should not lose sight of the fact that the current standard, 29 CFR 1910.95 (a), requires them to control noise by engineering or administrative means whenever feasible. True cooperation between labor and management is most likely to occur when workers know that management is making every attempt to eliminate the hazard, and that personal protective equipment is a temporary rather than a long term solution.

Observation of Monitoring

Section 8(c)(3) of the Occupational Safety and Health Act requires OSHA to issue regulations for keeping records on employee exposures to toxic materials or harmful physical agents, "which are required to be monitored or measured under section 6." The Act goes on to say, "Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring and measuring, and to have access to the records thereof." Since the hearing conservation amendment requires some monitoring of employee noise exposure, the amendment requires employers to provide workers with an opportunity to observe the process of noise exposure monitoring. The Agency believes that workers who observe the monitoring of their exposures will gain insight into the nature and extent of the noise hazard, and will become more involved in the hearing conservation program. This involvement should increase the motivation for the proper use of ear protection, and thereby increase the effectiveness of the program.

The hearing conservation amendment requires employers to provide monitored

[12] NIOSH developed two additional methods. NIOSH method #2 is very similar to the NRR and method #3 is similar to the NRR plus correction factor, which is described above.

employees or their representatives an opportunity to observe any noise exposure measurements that are conducted for compliance with the amendment. Employees may desire to have someone else observe the monitoring, such as a union health and safety representative. Under certain circumstances, an outside professional may be allowed to observe. Although employers are not obligated to notify workers of the intention to monitor in advance, the Agency recommends that they do so whenever possible.

Without interfering with the monitoring, observers are entitled to receive an explanation of the procedures, observe all the steps related to the noise measurements (with the exception of any calculations made away from the workplace), and record the results.

OSHA received some coments objecting to the observation of monitoring provisions in the proposal. For example, John Harris of the J. I. Case Company (Tr. 2611), stated that observation of monitoring would not prevent occupational hearing loss, but on the contrary would take time, manpower, and money away from the hearing conservation efforts. However, many commenters favored the concept of employee observation. Mr. Ahern of General Motors Corp. (Ex. 14–883, p. 10) said, "We recognize of course, that under 8(c)(3) of the Occupational Safety and Health Act an employee or his duly authorized representative has the right to observe monitoring under certain circumstances." Mr. Bonney of Alcoa (Ex. 14–969, p. 2) stated that "under the OSH Act employees were given the right to observe measuring or monitoring. We certainly cannot take exception to this."

Most of the objections implied that the requirements would be burdensome or disruptive. In response to these comments OSHA has made certain changes to the proposed standard that should make the requirements somewhat easier for employers to implement.

The proposal required employers to give written notice of scheduled monitoring at least 3 days before the event was to occur by posting a notice to this effect in a place regularly visited by employees. One reason why the Agency had proposed this requirement was that in certain circumstances the employees might have a desire to have someone with knowledge of noise measurement present to obseve the monitoring. However, such a person might not be on the premises and it might take some time to get there. The proposal also allowed employers to require employees to give written notification of their intent to observe the monitoring. This was an attempt to eliminate any disruption that might ensue in the event that a number of employees decided spontaneously to exercise their right to observe the monitoring.

Many commenters objected to the requirement for advance notification. Seymour Epstein of the Aluminum Association stated:

> We cannot take exception to the employees' right to observe monitoring. However, we strongly object to the requirement for posting notice of opportunity to observe the monitoring at least three working days before this is scheduled to occur and listing the time and place where the monitoring will occur. We feel this is unrealistic, will unnecessarily restrict the activities of industrial hygienists in the plant and will place an undue burden on their efforts. (Ex. 14–952, p. 2)

Mr. Harris (Tr. 2613) agreed, and described the conditions that might make advance notification impractical or even impossible: changes in production, breakdowns, shutdowns, failures of measurement equipment, or other such factors might suddenly alter the monitoring schedule. Other commenters suggested that only one day's advance notification should suffice (Ex. 14–169, p. 2; Ex. 59, p. 5; Ex. 14–290, p. 5).

On the basis of the argument presented by Mr. Harris and others, OSHA has decided that advance notification might be difficult for some employers. Therefore the Agency recommends rather than requires advance notice. In addition, the Agency recognizes that such requirements as posting advance notice and allowing the employer to require a response in writing from employees may constitute unnecessary paperwork, and employers may need to retain some flexibility in how best to inform employees of monitoring plans. OSHA does believe that it is helpful for workers or their representatives to know about the monitoring in advance so that they may plan their schedules accordingly.

A number of comments suggested that the observation provisions would be disruptive to the production process and to the monitoring itself.

Mr. Cornell of the Gypsum Association (Tr. 2664) suggested that all workers might exercise their rights to observe, and in that case no one would be available to operate the machinery in question. David Anderson of the Bethlehem Steel Corp. (Ex. 14–347, p. 3) suggested that employees might actually interfere with the monitoring process by stopping work. M. V. Truss of the Vulcan Materials Co. (Ex. 14–58, p. 3) believed that if employees stopped work and watched the monitoring it would be too expensive for the company. For these reasons some industry spokesman suggested that only employee representatives (and not employees) be allowed to observe the monitoring process (Ex. 14–58, p. 3; Ex. 14–290, p. 4).

The Agency understands that in some circumstances a cessation of work might cause the noise levels to change, and it would not be in the interest of either the worker or the employer to take measurements under conditions that did not reflect the employee's true exposure. For reasons such as these, the amendment (as did the proposal) specifies that observation shall be permitted so long as it does not interfere with the monitoring process.

OSHA does not expect that employee observation of monitoring will be disruptive of the production process or the monitoring itself. While the precise method in which this employee right is exercised will vary from workplace to workplace, it is expected that, in most cases, employees will select a single representative to act as an observer. This observer will receive the explanation of the process, observe the calibration of equipment, its placement, and the actual sampling, and report to other employees. The observer may also record the results of the monitoring. It has been OSHA's experience in the context of other health standards that the observation of monitoring by a representative employee successfully implements this provision without undue disruption. In any event, the employee right to observe monitoring must be tempered with "standard of reasonableness," and observation which seriously disrupts production or the sampling itself is not permitted.

Training Program

Section 6(b)(7) of the Occupational Safety and Health Act indicates that standards shall prescribe appropriate forms of warning to insure that employees are apprised of all hazards to which they are exposed. The final standard requires that employers provide workers whose exposures equal or exceed a TWA of 85 dB with a training program that explains the purposes and major components of the hearing conservation program. As part of employee training, the employer also has the responsibility of making certain materials and information, such as the hearing conservation amendment, available to employees.

The proposal required employers to train workers initially in the use of hearing protectors, and to reinstruct employees in the use of hearing

protectors whenever employees incurred a significant threshold shift in hearing. Also the requirement for warning signs and for notification of exposure, which were included in the proposal, are considered elements of worker training. The amendment retains and clarifies these provisions (see discussion under specific subject headings). In addition, the final rule includes a separate training section with more detailed guidance than was found in the proposal. Employees must be trained according to these new requirements at least once a year, so that they will be reminded on a regular basis of the hazardous effects of noise, and the respective roles of management and workers in preventing these effects. Annual audiometric tests should be an opportune time to conduct such training programs.

It should be noted that the entire training program does not have to be accomplished at one session. For example, employers who have safety meetings biweekly may wish to work some elements of the training requirements into general safety meetings. Workers may have been given a brief overview before starting a job, with supplementary information provided later. It is not the intention of this amendment to impose a rigid and formal training program on employers. Rather, the amendment gathers in one place all of the elements deemed necessary for a good training program and allows the employer maximum flexibility in deciding how best to impart the information to the noise-exposed workers.

The new training requirements are in direct response to the many comments in the record emphasizing the importance of training and education to the success of the hearing conservation program (Ex. 75–10, p. 3, Ex. 102, Attach. 4, pp. 4–6, and Attach. 5, p. 3; Ex. 321–1, Attach. 1, p. 3; Ex. 75, p. 11; Ex. 75–2, p. 125; Ex. 306, pp. 2–3 and p. J 2 C; Ex. 307, p. 1; Ex. 2C–16A, p. 6; Ex. 305, p. 7; Ex. 147C, p. 335; Ex. 147A, p. 6; Tr. 3269, 3140; Tr. 3504–3505; Tr. 2528–2529). For example, an article submitted by Dr. M. Thomas Summar (Ex. 147A, p. 4) states that, "Personal counseling with employees and visits to work areas are necessary and important parts of the program. Some of these visits coincide with the yearly monitoring hearing tests . . . ." C. Edward Scott and Dr. Royster (Ex. 102, p. 12) maintain that "continuing education should be used as a means for improving the quality of the program whenever it is found necessary."

Although the amendment does not dictate the content of employers' training programs, certain subject areas must be included. First, workers must be informed of the requirements of the noise standard and the hearing conservation amendment. So that they are aware of the extent of the hazard, workers must be told about the effects of noise on hearing. Workers must be told to report any symptoms of TTS, such as not being able to hear very well after the end of the workshift. This is so that employers can identify TTS and implement prompt protective measures. Workers must also be told about other effects, such as speech and signal masking, which may cause a safety hazard.

So that employees can better understand the nature of their own particular noise exposures, the training program must include a discussion of specific machinery at the job site that causes hazardous exposures, including information on any noise control compliance plan in effect. An integral part of the training program is a complete discussion of hearing protectors, the advantages and disadvantages of various types, and clear instructions on the selection, fitting, use, and care of the protectors. Finally, so that employees are motivated to take the hearing test and to refrain from non-occupational noise exposure before baseline and recheck audiograms, the program must include an explanation of the purpose of audiometric testing, and of the test procedure.

Employers must post a copy of the standard and amendment in a location where employee notices are customarily posted, and they must make a copy of the standard and amendment available to employees exposed to a TWA of 85 dB or above, if they should ask for it. This requirement gives workers an opportunity to be fully informed of specific aspects of the amendment, and should provide workers with access to this information in cases where they might be afraid or reluctant to ask management for a copy. Employers must also provide these employees with any informational materials supplied by OSHA, which are meant to be distributed to affected employees. Lastly, employers must provide copies of their training materials to OSHA if they are requested to do so. This is intended to provide an objective check of compliance with the requirements of this section of the amendment.

Many comments to the record supported the concept of training programs, and emphasized the importance of motivating employees to play an active role in the hearing conservation program. As Dr. Karrh of DuPont pointed out:

> Our experience has shown that maximum effectiveness of hearing conservation results when employees understand the reasons for the program and cooperate and take initiative in its implementation and conduct on a daily basis. This cooperation is accomplished by educating them regarding the potential effects of exposure to high noise levels whether encountered at work or during leisure hours. (Ex. 306, p. 3).

Training programs are also important at the supervisory level. Personnel who conduct the training program must be well versed in all aspects of the company's hearing conservation program, so that they are prepared to answer employees' questions (Ex. 102, Sec. 5, pp. 9, 27–29). Involvement of first-line supervisors would be particularly effective. As stated by Scott and Royster, "the success of the hearing conservation program in each working area will in the end depend upon the willingness of the local supervisor to support the program and enforce its requirements." (Ex. 102, Sec. 5, p. 9). DuPont and several other companies have demonstrated that imagination, discipline, and commitment from the highest levels of management are qualities that will promote successful programs (Ex. 75–5, p. 21; Ex. 75, p. 122; Ex. 307, p. 1; Ex. 102, Sec. 5, pp. 10, 15). Simply informing workers to use hearing protectors so they "won't go deaf" is not enough.

Morrill (Ex. 305, p. 7) stressed the importance of worker education in overcoming workers' objections to wearing hearing protectors. A number of comments indicated that workers are reluctant to appear weak or riduculous as a result of wearing personal protection (Ex. 321–13C, p. 738; Ex. 75–7, p. 20; Ex. 75–5, p. 22; Ex. 75–12, p. 24). According to Dr. Roger Maas (Ex. 75–2, p. 2) "Supervisors must sell employees on the need and value of hearing protection devices. When employees understand what the protective measure if for, it will be accepted because the employee realizes it is for his own good." Labor leadership, such as union health and safety committees, can also play an active, supportive role in answering on-the-job questions, seeing that their members are fitted satisfactorily, and encouraging workers to wear protectors.

Employers are advised to use audiologists, otolaryngologists, or industrial hygienists to aid in the training of employees. They are not required to do so because these personnel may not always be available. However, the instructor should be capable of addressing any questions on

the technical, procedural, or health aspects of hearing conservation. Also, the instructor should be well versed in all aspects of hearing protectors since employees are likely to have many questions on the subject. One person does not have to perform all of the training. Different aspects of the training may be done by a variety of people with knowledge of various aspects of the hearing conservation program.

The employer is free to structure the training program any way he or she pleases as long as it contains the specific topics discussed above. Several commenters (Ex. 102, Attach. 3, p. 5, and Attach. 4, pp. 6, 12; Ex. 2C–16B, p. 17; Ex. 75–2, p. 125; Ex. 75–3, p. 6; Ex. 75–10, p. 3) offered suggestions. They recommended that companies (and also unions) regularly distribute informative literature to employees, provide periodic audiovisual presentations, hang posters and use bulletin board displays, and put articles on noise hazards and hearing protection in the company or union magazine. Audiovisual materials can often be obtained from Federal and State health agencies, insurance companies, trade union and professional associations, hearing protector and audiometric equipment suppliers, educational institutions, individual medical practioners, and audiological consulting firms.

To summarize, good training means clear content, well presented by an informed and sympathetic person, who is willing to spend the time and effort to motivate employees to participate actively in the hearing conservation program. The final element is the behavior, and implicitly the attitude, of management. According to Dr. Thomas, who submitted extensive materials to the record:

> Several companies have gone to considerable expense in developing and implementing a hearing conservation program only to end up with what can properly be called s second rate program. Why? . . . Lack of support by top management . . . Why spend several thousand dollars implementing the program if MR. BIG is going to walk through the plant without wearing his protective equipment. Even if the amount of exposure expected is insignificant the attitude given is what counts. MR. BIG, regardless of his position in the company, must also abide by the rules and by example educate the employees. (Ex. 2C–16, pp. IV–5).

Warning Signs

The proposal required that clearly worded warning signs be posted at the entrances to or on the periphery of areas where employees' exposures exceed the prescribed limits. These signs were to be large enough so as to be easily read by employees working in this area. The warning sign was to indicate that the area ia a high noise area, and it was to specify the protective actions (usually ear protectors) that are necessary.

The final standard requires warning signs in those areas where exposures equal or exceed a TWA of 85 dB. This represents the action level for the intitiation of the hearing conservation programs, and it is consistent with the concept to have warning signs in such environments.

Most entries to the hearing record favored the use of warning signs (Ex. 105, p. 8; Ex. 132, p. 6; Ex. 58, p. 2; Ex. 2C–1, p. 11 and 12; Ex. 2C–125–1, p. 9; Ex. 14–984, p. 6). Some commenters believed that the requirements for notification of exposure and posting of warning signs were redundant (Ex. 14–346, p. 4; Ex. 14–333, p. 5). The Agency believes that the requirement is not redundant with the notification of employee exposure because exposure notification occurs approximately every two years, while the warning sign presents a constant reminder that a hazard exists, and that protective action may be needed.

Certain witnesses, such as Dr. Ward (Ex. 64–6, pp. 1–2), brought up the fact that warning signs are necessarily stationary and describe noise *levels*, whereas OSHA regulates noise *exposures* for workers who move around. OSHA recognizes this problem. For this reason OSHA advises employers to post signs in areas where employees' noise exposures regularly rather than occasionally meet or exceed 85 dB. Also, the Agency is aware that not all workers who are exposed to a TWA above 85 dB are required to wear hearing protectors. Therefore the Agency advises employers to specify mandatory ear protectors on the sign in locations where employees' noise exposures are routinely above 90 dB, and in areas where employee's exposures are between 85 and 90 dB employers may specify that hearing protectors are advised, or may be needed.

Some comments recommended that OSHA put specific wording for signs into the regulation (Ex. 1, p. I–9; Ex. 48, p. 9; Ex. 110, p. 4), or provide examples of clearly worded signs (Ex. 14–152, p. 4). Although the Agency believes that employers should be free to devise their own wording, the following examples are suggested:

In work areas where employee exposure routinely exceed a TWA of 90 dB:

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WARNING

HAZARDOUS NOISE AREA

Hearing Protection

Required
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In work areas where employee exposures routinely exceed a TWA between 85 and 90 dB:

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WARNING

HAZARDOUS NOISE AREA

Hearing Protection

May be Necessary
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OSHA has not prescribed the specific wording for the warning signs. It is desirable to retain as much flexibility as possible so that employers may devise signs that are appropriate to the specific workplace environment.

Recordkeeping

Section 8(c)(1) of the Occupational Safety and Health Act gives OSHA the authority to require employers to maintain records that are: "Necessary or appropriate for the enforcement of this Act, or for developing information regarding the cause and prevention of occupational accidents and illnesses." Section 8(c)(3) requires OSHA to "issue regulations requiring 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."

The hearing conservation amendment requires that records of noise exposure measurements, audiometric testing and audiometer calibration be maintained. These recordkeeping requirements have been approved by the Office of Management and Budget (Approval No. 44–R 1622).

Noise exposure records require the date, location, and results of the measurements, including the number of measurements made when sound level meters are used. Although the latter requirement did not appear in the proposal, this provision provides further clarification of the proposal's requirement that the employer keep an accurate record of all noise exposure measurements. The number of sound level meter measurements is required to be recorded in order to show that the sampling procedures have been sufficient to give a reasonable estimate of the TWA for the range of noise levels encountered. The final rule also requires a description of the equipment used and the date of the most recent laboratory-type calibration. The name and job classification must be recorded for each employee measured, and for any other employees represented by the measured employee. Although not specified in the proposal, an entry for job classification (or job title) has been added so that employers and employees may see the important connection between job location and magnitude of exposure. The requirement to record the social security number has been eliminated as unnecessary paperwork unless the employer desires to keep it. Records of noise exposure monitoring must be kept for at least 2 years. This represents a relaxation of the proposal's requirement, which was to keep noise exposure records for at least 5 years. Since the employee's most recent noise exposure must be recorded on the audiometric test record, OSHA feels that it is unnecessary to keep records of noise exposure monitoring for longer than 2 years, after which they may be replaced by new monitoring records.

Records of audiometric tests must include the employee's name and job classification. They must also include the date of the audiometric test, the examiner's name and qualifications, the make and model of the audiometer, and the date of the last acoustic or exhaustive audiometer calibration. These requirements are essentially the same as those of the proposal, except for the inclusion of job classification and the deletion of social security number for the reasons stated above. The Agency has added a requirement to record the employee's most recent noise exposure (or that of the employee's representative) on the audiogram record. This will aid employers and professional reviewers in making important associations between noise exposure and hearing loss, and will permit monitoring records to be disposed of at an earlier date. Also, the amendment requires that employers indicate on the audiometric test record whether the background noise levels in the audiometer room met the levels specified on Table D–1 or Table D–2 in Appendix D. This information will be very useful to the professional reviewer, who needs to know that the audiometric test was carried out in sufficiently quiet conditions. As required in the proposal, audiometric test records must be retained for the duration of employment plus 5 years.

OSHA recommends that employers record the type of hearing protector selected, its attenuation (usually the NRR), and the procedure used to determine its attenuation, which involves identifying the method selected from Appendix G. This entry, coupled with the exposure measurement, would be useful to employers and professional reviewers in assessing the adequacy of hearing protection. However, OSHA has not made this provision a requirement because employers must provide workers with a variety of ear protectors, and workers may want to use certain protectors on a trail basis. The Agency does not want to restrict the flexibility with which employers offer and employees choose their hearing protection by requiring employers to record the make of protector before the final choice is made.

The requirements for keeping records of audiometer calibration are the same as those specified by the proposal. The record must include information on the type of calibration, whether an acoustic or exhaustive calibration, and the date the calibration was performed. The record must also include the numerical results of the acoustical calibration, which are the results of the measurements taken. These records will provide employers and professional reviewers with evidence of the proper functioning of the audiometer, and any steps that were taken to correct improper functioning. As required in the proposal, they must be kept for a minimum of 5 years.

Although the proposal did not contain this requirement, employees must record measurements of the background sound pressure levels in the audiometric test room and the date of these measurements. The Agency believes that this information must be recorded because it is critical to the requirement that valid audiograms be made. Sound pressure level measurements of audiometric test rooms must be kept at least 5 years.

OSHA has included a new requirement for the transfer of records in case an employer should cease to do business. If a new employer takes over the business the old employer must transfer the records to the new employer. This provision, which is added to safeguard the records, also is found in other OSHA standards.

Discussion in the hearing record centered on the usefulness of keeping records, the impact of recordkeeping on the affected businesses, the retention period, access to records, and recordkeeping procedures.

Some commenters questioned the usefulness of keeping records. M. V. Truss, Director of Engineering at the Vulcan Material Company (Ex. 14–58, p. 2) was joined by others (Ex. 14–86, p. 2; Ex. 14–35, p. 1) in saying that disruptive paper work would seem to outweigh any theoretical benefits. Others maintained that recordkeeping requirements have no bearing on the reduction of noise levels or on hearing loss (Ex. 14–129, p. 3; Ex. 14–190, p. 1; Ex. 14–246, p. 5; Ex. 14–791, pp. 1–2). Carroll Rogers Jr., President of the Feldspar Corporation (Ex. 14–28, p. 1), was among those who believed that the provisions would be too burdensome, especially for small business (Ex. 14–72, p. 1; Ex. 14–117, p. 1; Ex. 14–201, p. 1; Ex. 14–215, p. 4; Ex. 14–266, p. 2; Ex. 14–292, pp. 2–3).

OSHA understands that recordkeeping can be problematic; however, without this requirement the effectiveness of the amendment would be impaired. Professional reviewers need to make sure that the audiometric tests were carried out under proper conditions and that audiograms reflect employees' true hearing levels. Records are educational for employees because they enable employees to assess the continuing status of their hearing. In addition, they provide employers with a way of assessing the success or failure of the hearing conservation program.

Some industry spokesmen suggested that records should not have to be kept for short-term employees. The National Association of Manufacturers (Ex. 14–864, p. 20), and the Beet Sugar Development Foundation and the United States Beet Sugar Association (Ex. 14–867, p. 3, p. 34) suggested that records should only be kept for employees who have worked continuously for more than 180 days, whereas the National Canners Association (Ex. 188–4, p. 6) suggested 120 days. The Can Manufacturers Institute (Ex. 14–862, p. 23) thought that employees should have worked at least 1 year before records should be kept. Although no recordkeeping exemptions have been specified, OSHA believes that short-term employees should not present a significant recordkeeping problem. Audiometric testing of short-term workers is not required unless they remain at work longer than 4 months.

Since employers must monitor new employees within 60 days of exposure to a TWA of 85 dB or greater, they may have to keep noise exposure records of short-term employees. In most cases, as explained earlier, a new employee will assume a position occupied by a former employee, and therefore the former employee's noise exposure will be attributed to the new employee. Making and retaining the same information for the new employee should not be a difficult matter. Also, since the amendment permits employers to monitor representative employees rather than all employees, this procedure should reduce the recordkeeping burden in many cases. Employers may choose to write the exposure level, names, and jobs of the represented employees all on one record. Employers must, however, record the most recent exposure measurement on each individual's audiometric test record.

Following the recommendation of the Advisory Committee (Ex. 2 B, p. 17) the proposal required noise exposure measurements to be maintained for 5 years, audiometric records to be maintained for 5 years. Many comments to the record discussed this issue. Some, such as these of Dr. Ward (Ex. 64–9, p. 5), Robert Richards of the Consumers Power Company (Ex. 14–332, p. 5), and others (Ex. 14–348, p. 3, Ex. 14–329, p. 3), indicated that the proposed record retention periods were too long and too costly. Edwin Hood of the Shipbuilders Council of America (AC 53–1, p. 3) suggested that the employer determine the length of the retention period but that all records be kept for at least 5 years. On the other hand, Frank Fitzsimmons of the International Brotherhood of Teamsters (Ex. 81A, p. 9) advocated a longer retention period for exposure records, stating that exposure records should be kept for the same amount of time as audiometric records so that the relationship between noise exposure and hearing loss can be reviewed. NIOSH recommended a 10-year retention period for records of exposure monitoring, 20 years for audiometric records, and 20 years for audiometric calibration records. NIOSH's recommendations were supported by Raelyn Janssen of the Environmental Defense Fund (AC 125–1, p. 11) and by Dr. J. Ronald Bailey, Assistant Professor of Mechanical Engineering at the North Carolina State University (AC 33, p. 10). Dr. Victor Gladstone, Assistant Professor of Audiology at Towson State College (AC 31, p. 3) concurred with NIOSH, but recommended that if an employee remained in the same employment for a period longer than 20 years, audiometric records should be kept for the duration of employment.

OSHA has considered these recommendations and agrees with Mr. Fitzsimmons that both noise exposure measurements and audiometric test records should be retained at least for the duration of employment to enable employers and professional reviewers to follow the employee's audiometric thresholds in relation to the employee's noise exposure levels. This procedure has been accomplished (and simplified) by the requirement to record the employee's latest noise exposure level on the audiometric test record. OSHA believes that it is not necessary to keep the details of the noise measurements, such as a description of the equipment and the date of calibration, longer than 2 years, at which time they may be replaced by new measurements. However, the Agency does see the value in keeping audiometric test records *and* the employee's exposure levels for the duration of employment plus 5 years in order to ascertain the employee's sensitivity to noise exposure, and to judge the effectiveness of the hearing conservation program.

A minimum of 5 years was selected for the retention of audiometric calibration records and records of the sound pressure levels in audiometric test rooms. These durations are necessary so that employers and professional reviewers may be assured that a series of audiograms was carried out under proper test conditions.

Requirements for access to records are essentially the same as those of the proposal, with the exception that the proposal required employers to furnish copies of audiometric data upon *written* request by employees. The amendment specifies written requests only when employees designate another person to receive the records. The Agency does not believe that written requests are necessary for direct employee access to either noise monitoring or audiometric test records. The amendment requires employers to make records available, upon request, to the Assistant Secretary of Labor and his or her respective authorized representatives, including compliance officers. Copies of records must be made available to affected (noise-exposed) employees and former employees. If an employee or former employee should present a written request, employers must also furnish the records to any person designated by the employee, such as a physician, lawyer, or union representative. Since employees are granted access to their records, OSHA advises them to take copies with them when they leave their jobs.

OSHA's standard entitled "Access to Employee Exposure and Medical Records" (29 CFR 1910.20 (d)(i) and (ii)) requires that employee medical records be preserved and maintained for at least the duration of employment plus 30 years, that exposure records be preserved and maintained for at least 30 years, and that calibration records (which would be covered by section (d) (ii) (A), "background data") be retained for 1 year. However, the standard provides that it may be superseded by other health standards that require longer or shorter retention periods. According to the standard's preamble, the reason for the 30-year or longer retention period was the long latency periods associated with certain occupational diseases. The Agency recognizes, however, that specific substances or agents may merit longer or shorter record retention periods, in which case an individual standard's recordkeeping requirements would supersede those of 29 CFR 1910.20. This provision in the access standard is appropriate since each health standard is based on rulemaking evidence specific to the substance or agent being regulated (45 FR 35270). Since the hearing conservation amendment has undergone the rulemaking procedure on issues that are specific to noise, some provisions in the amendment are different from those in the access standard.

OSHA believes that it is unnecessary to require retention of noise exposure and audiometric test records for periods as long as 30 years. In the event that some companies and consulting firms wish to computerize these records and retain them indefinitely, the Agency would encourage this practice. However, the latency for noise-induced hearing loss is not nearly as long as it is for certain other occupational diseases, such as cancer. Although the onset of noise-induced hearing loss is gradual, its progress is not expected to continue after cessation of exposure. Therefore a long record-retention period would not aid in the diagnosis of a condition, or in the identification of a hazard that is not already recognized.

The standard also requires that employees, their designated representatives, the Assistant Secretary for Occupational Safety and Health shall have access to all records required to be maintained. In general, the employer is obliged to provide access to such records at a reasonable time, place and manner. Specifics regarding the

provision of such access are found at 29 CFR 1910.20 and 29 CFR 1913.10.

It is the Agency's belief that providing employees with access to the records is a necessary component of the hearing conservation program. Such access will serve to educate employees as to the state of their hearing and the effectiveness of the program, and will encourage their conscientious participation in it. The information in the records will be invaluable to the Assistant Secretary in the enforcement of the amendment and will be useful in research into the effects of occupational noise exposure. The Director of NIOSH will also be primarily interested in the records for research purposes.

A number of commenters, such as Moyer B. Edwards of the Alabama By-Products Corporation (Ex. 14–972, p. 6), recommended restricting access to records to the employee's physician or other medical representative (Ex. 145, p. 5). Others (Ex. 233, p. 1; Ex. 14–900, p. 9; Ex. 14–965, p. 6; Ex. 14–890, p. 5) believed that because of the technical nature of the data, lay readers might misinterpret their files. Douglass Bracket of the Southern Furniture Manufacturers Association (Ex. 14–918, p. 17) and others (Ex. 14–345, p. 4) contended that records only should be made available for some justifiable reason. Lockheed-California Company (Ex. 14–312, p. 2) suggested that records should be available for exposure studies only. Some were concerned that employee access to records might result in "misuse of records" in worker compensation cases (Ex. 14–66, p. 2; Ex. 14–107, p. 1; Ex. 14–233, p. 1; Ex. 14–262, p. 3; Ex. 14–333, p. 6), and some suggested that workers might "harass" employers after they see their records (Ex. 14–107, p. 1; Ex. 14–233, p. 1; Ex. 14–262, p. 3; Ex. 14–332, p. 5). OSHA believes that proper training and education of employees should prevent misinterpretations or "misuse" of noise exposure or audiometric data. The Agency agrees with the many witnesses who stated that informed workers are better motivated and able to protect themselves, and to effectively participate in the total hearing conservation program (Ex. 305, p. 7; Ex. 306, p. J2c–11; Ex. 321–1, Section 2, p. 3; Ex. 307, p. 1; Tr. 2907). Access to their own noise exposure and audiometric test results is a necessary step in the development of informed workers.

XII. Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary for Occupational Safety and Health, 200 Constitution Avenue, N.W., Washington D.C. 20210.

Pursuant to sections 6(b) and 8(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1599, 29 U.S.C. 655, 657), Secretary of Labor's Order No. 8–76 (41 FR 25059), and 29 CFR Part 1911, Part 1910 of Title 29, Code of Federal Regulations is hereby amended by deleting paragraph (b)(3) of § 1910.95 and adding to § 1910.95 requirements for a hearing conservation program in new paragraphs (c) through (s) plus Appendices A through I.

The provision of the current occupational noise standard requiring employers who have employees exposed over the permissible exposure level to implement a continuing, effective hearing conservation program (§ 1910.95(b)(3)) will remain in effect until the new paragraphs contained in this document actually go into effect. Should the new paragraphs be stayed, judicially or administratively, or should the new paragraphs not sustain legal challenge under section 6(f) of the Act, paragraph (b)(3) of § 1910.95 will remain in effect.

Any petitions for administrative reconsideration of this amendment or for an administrative stay pending judicial review must be filed with the Assistant Secretary of Labor for Occupational Safety and Health within 45 days of the publication of this amendment in the Federal Register. Any petitions filed after this date will be considered to be untimely filed. This requirement is considered essential to permit the Agency to give full consideration to any petition filed and respond in advance of the effective date of the amendment.

Signed at Washington, D.C. this 8th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

1. Paragraph (b)(3) of § 1910.95 is removed.

2. Section 1910.95 is amended by adding new paragraphs (c) through (s) and Appendix A through I to read as follows:

§ 1910.95 Occupational noise exposure.

* * * * *

(c) *Hearing conservation program.* The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (s) of this section whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with Appendix A and Table G–16a, and without regard to any attenuation provided by the use of personal protective equipment.

(d) *Initial determination.* (1) Each employer shall determine if any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels (dB) measured on the A scale. This determination shall be based on all information, observations, or calculations which indicate that employee noise exposures may be at or above that level, including the following:

(i) Any employee exposure measurements which have been taken;

(ii) Any employee complaints which may be attributable to noise exposure;

(iii) Any difficulties in understanding normal conversation in the workplace when the speaker and the listener face each other at a distance of two feet.

(2) This initial determination shall be repeated at least every two years and within sixty days of a change in production, processes, equipment, controls, or personnel which may result in new noise exposures at or above a time-weighted average of 85 decibels.

(e) *Monitoring.* (1) When any information in the initial determination conducted pursuant to paragraph (d) of this section indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall within 60 days obtain individual or representative exposure measurements for all employees who may be exposed at or above that level.

(2) In cases where a group of employees is engaged in a similar kind of work and has approximately the same noise exposure, the employer may, in lieu of measuring the exposure of each employee, measure only one member of the group. In these cases, the employer shall select for monitoring the employee who is reasonably believed to have the greatest exposure and shall attribute the selected employee's exposure measurement to all employees in the group.

(3) Monitoring of employee noise exposures shall be repeated:

(i) Every two years unless an initial determination conducted pursuant to paragraph (d)(2) of this section or actual exposure measurements indicate that employees are not exposed to a time-weighted average of 85 decibels or greater; and

(ii) Within sixty days of a change in production, processes, equipment, controls, or personnel which may render the attenuation provided by hearing protectors in use inadequate to meet the requirements of paragraph (m) of this section.

(f) *Employee notification.* (1) Within 21 days of monitoring, the employer shall notify, in writing, each employee exposed at or above a time-weighted average of 85 decibels of the results of the monitoring.

(2) Each employee shall be notified of that employee's measured exposure or the representative exposure that is attributed to that employee.

(3) New employees shall be notified of their measured exposure or the exposure attributed to them within sixty days of their first exposure at or above a time-weighted average of 85 decibels.

(g) *Method of measurement.* (1) All employee exposure measurements required by paragraph (e) of this section shall be obtained by the use of noise dosimeters which comply with the provisions of paragraph (g)(1)(i) of this section or sound level meters which comply with the provisions of paragraph (g)(1)(ii) of this section.

(i) *Dosimeters.* Dosimeters shall meet the Class 2A–90/80–5 requirements of the American National Standard Specification for Personal Noise Dosimeters, S1.25–1978, with an operating range of at least 80 dB to 120 dB. Dosimeters shall also meet the performance requirements of Section 7.5 of ANSI S1.25–1978 for a test signal at an average A-weighted sound level of 90 dB having a crest factor of 30 dB.

(ii) *Sound level meters.* Sound level meters shall meet the Type II requirements of the American National Standard Specification for Sound Level Meters, S1.4–1971 (R1976).

(2) Exposure measurements shall accurately reflect employee exposures and shall be conducted in the following manner:

(i) *Dosimeters.* The microphone of the dosimeter shall be placed on the employee's shoulder or head.

(ii) *Sound level meters.* (*a*) Sound level meters shall be set to the A scale, slow response.

(*b*) All continuous, intermittent and impulsive sound levels from 80 dB to 130 dB shall be integrated into the computation of time-weighted average.

(*c*) The employer shall use an appropriate sampling strategy to ensure that accurate results are obtained. The employer may use the sampling procedures given in Appendix B: *Temporal Sampling Procedures for Use with a Sound Level Meter,* which are provided as guidelines for compliance with this provision.

(*d*) The microphone of a sound level meter shall be positioned not less that two inches nor more than two feet from the worker's ear.

(h) *Calibration of monitoring equipment.* Dosimeters and sound level meters used to monitor employee noise exposure shall be calibrated as follows:

(1) Before and after each day's measurements, an acoustical calibrator shall be used to verify the accuracy of the measuring equipment.

(2) Whenever acoustical calibration and manual adjustments of the measuring equipment cannot verify the accuracy of the measuring instrument, laboratory calibration shall be performed to ensure conformance with the requirements of ANSI S1.25–1978 or S1.4–1971, as appropriate.

(i) *Observation of monitoring.* (1) The employer shall provide affected employees or their representatives with an opportunity to observe any measurements of employee noise exposure which are conducted pursuant to paragraph (e) of this section.

(2) Without interfering with the monitoring procedures, the observer shall be entitled to:

(i) Receive an explanation of the measurement procedures;

(ii) Observe all steps related to the noise exposure measurements performed at the place of exposure; and

(iii) Record the results obtained.

(j) *Audiometric testing program.* (1) The employer shall establish and maintain an audiometric testing program as provided in this paragraph by making audiometric testing available to all employees whose exposures equal or exceed an 8-hour time-weighted average of 85 decibels.

(2) The program shall be provided at no cost to employees.

(3) Audiometric tests shall be performed by a licensed or certified audiologist, otolaryngologist, or other qualified physician, or by a person who is certified by the Council of Accreditation in Occupational Hearing Conservation, or by an audiometric technician who has satisfactorily demonstrated competence in administering audiometric examinations, obtaining valid audiograms, and properly using, maintaining and calibrating audiometers. A technician who performs audiometric tests must be responsible to an audiologist, otolaryngologist or qualified physician.

(4) All audiograms obtained pursuant to this section shall meet the requirements of Appendix C: *Audiometric Measuring Instruments.*

(5) *Baseline audiogram.* (i) Within 4 months of an employee's first exposure to noise at or above a time-weighted average of 85 decibels, the employer shall establish for each employee so exposed a valid baseline audiogram against which subsequent audiograms can be compared.

(ii) Testing to establish a baseline audiogram shall be preceded by at least 14 hours without exposure to workplace noise.

(*a*) Hearing protectors shall not be used as a substitute for the requirement that baseline audiograms be preceded by 14 hours without exposure to workplace noise.

(*b*) The employer shall notify employees of the need to avoid high levels of non-occupational noise exposure during this 14-hour period.

(6) *Annual audiogram.* (i) At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above a time-weighted average of 85 decibels.

(ii) Annual audiometric testing may be conducted at any time during the workshift.

(7) *Evaluation of audiogram.* (i) Each employee's annual audiogram shall be compared to that employee's baseline audiogram to determine if the audiogram is valid and if a significant threshold shift, as defined in paragraph (j)(10) of this section, has occurred.

(ii) Such evaluation shall be performed by an audiologist, otolaryngologist, or qualified physician. The employer shall provide to the person performing this evaluation the following information:

(*a*) A copy of the requirements for hearing conservation as set forth in paragraphs (c) through (r) of this section;

(*b*) The baseline audiogram and most recent audiogram of the employee to be evaluated;

(*c*) Measurements of background sound pressure levels in the audiometric test room as required in Appendix D: *Audiometric Test Rooms.*

(*d*) Records of audiometer calibrations required by paragraph (k)(5) of this section.

(iii) The audiologist, otolaryngologist, or qualified physician shall also review the audiograms to determine whether any significant threshold shift is work related or whether there is need for further evaluation.

(iv) If the comparison of the audiograms reveals a significant threshold shift as defined in paragraph (j)(10) of this section, a retest to obtain a new audiogram shall be performed within 60 days to determine if the shift is permanent.

(*a*) Retesting shall be preceded by at least 14 hours without exposure to workplace noise.

(*b*) Hearing protectors shall not be used as a substitute for the requirement that retesting be preceded by at least 14 hours without exposure to workplace noise.

(c) Retesting is not required if the annual audiogram was obtained after 14 hours without exposure to workplace noise. In this case the significant threshold shift revealed by the annual audiogram shall be considered permanent.

(d) If retesting also reveals a significant threshold shift as defined in paragraph (j)(10) of this section, the significant threshold shift shall be considered permanent.

(8) *Follow-up procedures.* If a comparison of the annual audiogram to the baseline audiogram indicates a significant threshold shift as defined in paragraph (j)(10) of this section, the employer shall ensure that the following steps are taken:

(i) Employees not using hearing protectors shall be fitted with hearing protectors, trained in their use and care, and required to use them.

(ii) Employees already using hearing protectors shall be refitted and retrained in the use of hearing protectors and provided with hearing protectors offering greater attenuation if necessary.

(iii) If retesting of an employee reveals that the significant threshold shift is not permanent, the use of hearing protectors by that employee may be discontinued, unless the employee is required to wear hearing protectors pursuant to paragraph (b)(1) of this section.

(iv) If a significant threshold shift has been determined to be permanent on the basis of a retest audiogram or an annual audiogram conducted after 14 hours without exposure to workplace noise, the employer shall:

(a) Inform the employee in writing, within 21 days of the determination, of the existence of a permanent significant threshold shift;

(b) Refer the employee for a clinical audiological evaluation or an otological examination, as appropriate, if additional testing is necessary to determine the cause of the permanent significant threshold shift, or if the employer suspects that a medical pathology of the ear (as defined in Appendix I) is caused or aggravated by the wearing of hearing protectors;

(c) Inform the employee of the need for an otological examination if a medical pathology of the ear which is unrelated to the use of hearing protectors is suspected; and

(d) Record the existence of the permanent significant threshold shift on the OSHA Form 200 when the audiologist, otolaryngologist or qualified physician who reviews the audiogram determines that the shift is work related.

(9) *Revised baseline.* An annual or retest audiogram shall be substituted for the baseline audiogram under the following circumstances:

(i) Where the annual or retest audiogram reveals a permanent significant threshold shift as defined in paragraph (j)(10) of this section; or

(ii) Where the annual or retest audiogram reveals improved hearing thresholds with respect to the baseline at two or more test frequencies.

(10) *Significant threshold shift.* As used in this section, a significant threshold shift is:

(i) A change in hearing threshold relative to the baseline audiogram of 20 dB or greater at any test frequency other than 500 Hz in either ear, if no previous audiograms have thresholds that exceed 25 dB with reference to audiometric zero as specified by American National Standard S3.6–1969; or

(ii) A change in hearing threshold relative to the baseline audiogram of 10 dB or greater at 1000 or 2000 Hz, 15 dB at 3000 or 4000 Hz, or 20 dB at 6000 Hz, in either ear, if any previous audiogram has one or more thresholds that exceed 25 dB with reference to audiometric zero; or

(iii) A change in hearing threshold relative to the baseline audiogram of 10 dB or greater at any test frequency other than 500 Hz in either ear, if any previous audiogram has thresholds exceeding an average of 25 dB with reference to audiometric zero at the frequencies 1000, 2000, and 3000 Hz; or

(iv) A change in hearing threshold relative to the baseline audiogram of 10 dB or greater at any test frequency other than 500 Hz in either ear, if the employee has previously suffered one or more permanent significant threshold shifts.

(v) In determining whether a significant threshold shift has occurred, allowance may be made for the contribution of aging (presbycusis) to the change in hearing level by correcting the annual or retest audiogram according to the procedure described in Appendix F: *Calculation and Application of Age Correction to Audiograms.*

(k) *Audiometric test requirements.* (1) Audiometric tests shall be pure tone, air conduction, hearing threshold examinations, with test frequencies including as a minimum 500, 1000, 2000, 3000, 4000, and 6000 Hz. Tests at each frequency shall be taken separately for each ear.

(2) Audiometric tests shall be conducted with equipment that meets the specifications of, and is maintained and used in accordance with, American National Standard Specification for Audiometers, S3.6–1969.

(3) Pulsed-tone and self-recording audiometers, if used, shall meet the requirements specified in Appendix C: *Audiometric Measuring Instruments.*

(4) Audiometric examinations shall be administered in a room meeting the requirements listed in Appendix D: *Audiometric Test Rooms.*

(5) *Audiometer calibration.* (i) The functional operation of the audiometer shall be checked before each day's use by testing a person with known, stable hearing thresholds, and by listening to the audiometer's output to make sure that the output is free from distorted or unwanted sounds. Deviations of more than 5 dB shall require an acoustic calibration.

(ii) Audiometer calibration shall be checked acoustically at least annually in accordance with Appendix E: *Acoustic Calibration of Audiometers.* Test frequencies below 500 Hz and above 6000 Hz may be omitted from this check. Deviations of more than 10 dB necessitate an exhaustive calibration.

(iii) An exhaustive calibration shall be performed at least every two years in accordance with sections 4.1.2; 4.1.3; 4.1.4.3; 4.4.1; 4.4.2; 4.4.3; and 4.5 of the American National Standard Specification for Audiometers, S3.6–1969. Test frequencies below 500 Hz may be omitted from this calibration.

(l) *Hearing protectors.* (1) Employers shall make hearing protectors available to all employees exposed to a time-weighted average of 85 decibels or greater at no cost to the employees. Hearing protectors shall be replaced as necessary.

(2) Employers shall ensure that hearing protectors are worn by all employees:

(i) Who are exposed to a time-weighted average of 85 decibels or greater and who have experienced a permanent significant threshold shift; or

(ii) Who are required by paragraph (b)(1) of this section to wear personal protective equipment.

(3) Employees shall be given the opportunity to select their hearing protectors from a variety of suitable hearing protectors provided by the employer.

(4) The employer shall provide training in the use and care of all hearing protectors provided to employees.

(5) The employer shall ensure proper initial fitting and supervise the correct use of all hearing protectors.

(m) *Hearing protector attenuation.* (1) The employer shall evaluate hearing protector attenuation for the specific noise environments in which the protector will be used by one of the methods described in Appendix G:

Methods for Estimating the Adequacy of Hearing Protector Attenuation.

(2) Hearing protectors must attenuate employee exposure at least to a time-weighted average of 90 decibels as required by paragraph (b) of this section.

(3) For employees who have experienced a significant threshold shift, hearing protectors must attenuate employee exposures to a time-weighted average of 85 decibels or below.

(4) The adequacy of hearing protector attenuation shall be re-evaluated whenever employee noise exposures increase to the extent that the hearing protectors provided may no longer provide adequate attenuation. The employer shall provide more effective hearing protectors where necessary.

(n) *Training program.* (1) The employer shall institute a training program for all employees who are exposed to noise at or above a TWA of 85 dB, and shall ensure employee participation in such program.

(2) The training program shall be repeated annually for each employee included in the hearing conservation program. Information provided in the training program shall be updated to be consistent with changes in protective equipment and work processes.

(3) The employer shall ensure that each employee is informed of the following:

(i) The contents of the noise standard including the hearing conservation program;

(ii) The effects of noise on hearing;

(iii) Specific machinery at the jobsite that could produce hazardous noise exposures;

(iv) The role of engineering and administrative controls in the reduction of noise exposure;

(v) The contents of any noise control compliance plan in effect;

(vi) The purpose of hearing protectors, the advantages, disadvantages, and attenuation of various types, and instructions on selection, fitting, use, and care; and

(vii) The purpose of audiometric testing, and an explanation of the test procedures.

(o) *Access to information and training materials.* (1) The employer shall make available to affected employees or their representatives copies of this standard and shall also post a copy in the workplace.

(2) The employer shall provide to affected employees any informational materials pertaining to this standard that are supplied to the employer by the Assistant Secretary.

(3) The employer shall provide, upon request, all materials related to the employer's training and education program pertaining to this standard to the Assistant Secretary and the Director.

(p) *Warning signs.* (1) Signs shall be posted at entrances to or on the periphery of all well-defined work areas in which employees may be exposed at or above a TWA of 85 dB.

(2) Warning signs shall clearly indicate that the area is a high noise area and shall indicate that hearing protectors may be required.

(q) *Recordkeeping.* (1) *Exposure measurements.* (i) The employer shall maintain an accurate record of all employee exposure measurements required by paragraph (e) of this section.

(ii) This exposure record shall include:

(*a*) Name and job classification of the employee measured and of all other employees whose exposure the measurement represents;

(*b*) The date, location and result of each measurement taken, and the number of measurements where sound level meters are used;

(*c*) A descripton of the noise measurement equipment used and the date of it last laboratory calibration.

(2) *Audiometric tests.* (i) The employer shall retain all employee audiograms obtained pursuant to paragraph (j) of this section;

(ii) This record shall include:

(*a*) Name and job classification of the employee;

(*b*) Date of the audiogram;

(*c*) The examiner's name and qualifications;

(*d*) Manufacturer and model of the audiometer;

(*e*) Date of the last acoustic or exhaustive calibration of the audiometer;

(*f*) Employee's most recent noise exposure assessment;

(*g*) Statement of whether the sound pressure levels in the test room in which the audiogram was taken meet the levels specified in Table D–1 or Table D–2 of Appendix D: *Audiometric Test Rooms.*

(3) *Audiometric test rooms.* (i) The employer shall maintain accurate records of the measurements of the background sound pressure levels in audiometric test rooms.

(ii) This record shall include:

(*a*) Background sound pressure level measurements at each of the following octave bands: 500, 1000, 2000, 4000, and 8000 Hz; and

(*b*) Date of measurement.

(4) *Calibration of audiometers.* (i) The employer shall maintain accurate records of all acoustical and exhaustive calibrations of audiometers required to be made pursuant to paragraph (k) of this section;

(ii) This record shall include:

(*a*) Type of calibration:

(*b*) Date performed; and

(*c*) Numerical results of the acoustical calibration.

(5) *Record retention.* The employer shall retain records required in this paragraph (q) for at least the following periods:

(i) Noise exposure measurement records shall be retained for 2 years.

(ii) Audiometric test records shall be retained for the duration of the affected employee's employment plus 5 years.

(iii) Records of background sound pressure levels in audiometric test rooms shall be retained for a period of 5 years.

(iv) Records of audiometer calibrations shall be retained for a period of 5 years.

(6) *Access to records.* All records required by this section shall be provided upon request to employees, former employees, representatives designated by the individual employee and the Assistant Secretary. The provisions of 29 CFR 1910.20(a)–(e) and (g)–(i) apply to access to records under this section.

(7) *Transfer of records.* If the employer ceases to do business, the employer shall transfer to the successor employer all records required to be maintained by this section, and the successor employer shall retain them for the remainder of the period prescribed in paragraph (q)(5) of this section.

(r) *Appendices.* (1) Appendices A, C, D, E, G, and I to this section are incorporated as part of this section and the contents of these Appendices are mandatory.

(2) Appendices B, F and H to this section are informational and are not intended to create any additional obligations not otherwise imposed or to detract from any existing obligations.

(s) *Effective dates.* (1) Paragraphs (c)–(r) of this section shall become effective April 15, 1981 unless otherwise noted below.

(2) Initial determinations and subsequent monitoring conducted pursuant to paragraphs (d) and (e) of this section shall be completed by October 15, 1981.

(3) Baseline audiograms required by paragraph (j) of this section shall be completed by April 15, 1982.

(4) In lieu of Table D–1 of Appendix D, background sound pressure levels in audiometric test rooms may conform to Table D–2 of Appendix D until April 15, 1983. After April 15, 1983, background sound pressure levels in audiometric test rooms shall comply with Table D–1 of Appendix D.

(5) Dosimeters used for employee exposure monitoring conducted pursuant to paragraph (e) of this section shall meet the requirements of paragraph (g)(1)(i) of this section by April 15, 1983.

Appendix A: Noise Exposure Computation

This Appendix is Mandatory

I. Computation of Employee Noise Exposure

(1) Noise dose is computed using Table G–16a as follows:

(i) When the sound level, L, is constant over the entire work shift, the noise dose, D, in percent, is given by: $D=100\ C/T$ where C is the total length of the work day, in hours, and T is the reference duration corresponding to the measured sound level, L, as given in Table G–16a or by the formula shown as a footnote to that table.

(ii) When the workshift noise exposure is composed of two or more periods of noise at different levels, the total noise dose over the work day is given by: $D=100\ (C_1/T_1+C_2/T_2+\ \ldots\ +C_nT_n)$, where C_n indicates the total time of exposure at a specific noise level, and T_n indicates the reference duration for that level as given by Table G–16a.

(2) The eight-hour time-weighted average sound level (TWA), in decibels, may be computed from the dose, in percent, by means of the formula: $TWA=16.61\ \log_{10}\ (D/100)+90$. For an eight-hour workshift with the noise level constant over the entire shift, the TWA is equal to the measured sound level.

(3) A table relating dose and TWA is given in Section II.

Table G–16a

A-weighted sound level, L (decibel)	Reference duration, T (hour)
80	32
81	27.9
82	24.3
83	21.1
84	18.4
85	16
86	13.9
87	12.1
88	10.6
89	9.2
90	8
91	7.0
92	6.2
93	5.3
94	4.6
95	4
96	3.5
97	3.0
98	2.6
99	2.3
100	2
101	1.7
102	1.5
103	1.4
104	1.3
105	1
106	0.87
107	0.76
108	0.66
109	0.57
110	0.5
111	0.44
112	0.38
113	0.33
114	0.29
115	0.25
116	0.22
117	0.19
118	0.16
119	0.14
120	0.125
121	0.11
122	0.095
123	0.082
124	0.072
125	0.063
126	0.054
127	0.047
128	0.041
129	0.036
130	0.031

In the above table the reference duration, T, is computed by

$$T=\frac{8}{2^{(L-90)/5}}$$

where L is the measured A-weighted sound level.

II. Conversion Between "Dose" and "8-Hour Time-Weighted Average" Sound Level

Compliance with paragraphs (c)–(r) of this regulation is determined by the amount of exposure to noise in the workplace. The amount of such exposure is usually measured with an audiodosimeter which gives a readout in terms of "dose." In order to better understand the requirements of the amendment, dosimeter readings can be converted to an "8-hour time-weighted average (TWA) sound level".

In order to convert the reading of a dosimeter into TWA, see Table A–1, below. This table applies to dosimeters that are set by the manufacturer to calculate dose or percent exposure according to the relationships in Table G–16a. So, for example, a dose of 91 percent over an eight hour day results in a TWA of 89.3 dB, and, a dose of 50 percent corresponds to a TWA of 85 dB.

If the dose as read on the dosimeter is less than or greater than the values found in Table A–1, the TWA may be calculated by using the formula: $TWA=16.61\ \log_{10}\ (D/100)+90$ where TWA=8-hour time-weighted average sound level and D=accumulated dose in percent exposure.

Table A–1.—*Conversion From "Percent Noise Exposure" or "Dose" to "8-Hour Time-Weighted Average Sound Level" (TWA)*

Dose or percent noise exposure	TWA
10	73.4
15	76.3
20	78.4
25	80.0
30	81.3
35	82.4
40	83.4
45	84.2
50	85.0
55	85.7
60	86.3
65	86.9
70	87.4
75	87.9
80	88.4
81	88.5
82	88.6
83	88.7
84	88.7
85	88.8
86	88.9
87	89.0
88	89.1
89	89.2
90	89.2
91	89.3
92	89.4
93	89.5
94	89.6
95	89.6
96	89.7
97	89.8
98	89.9
99	89.9
100	90.0
101	90.1
102	90.1
103	90.2
104	90.3
105	90.4
106	90.4
107	90.5
108	90.6
109	90.6
110	90.7
111	90.8
112	90.8
113	90.9
114	90.9
115	91.1
116	91.1
117	91.1
118	91.2
119	91.3
120	91.3
125	91.6
130	91.9
135	92.2
140	92.4
145	92.7
150	92.9
155	93.2
160	93.4
165	93.6
170	93.8
175	94.0
180	94.2
185	94.4
190	94.6
195	94.8
200	95.0
210	95.4
220	95.7
230	96.0
240	96.3
250	96.6
260	96.9
270	97.2
280	97.4
290	97.7
300	97.9
310	98.2
320	98.4
330	98.6
340	98.8
350	99.0

Table A-1.—*Conversion From "Percent Noise Exposure" or "Dose" to "8-Hour Time-Weighted Average Sound Level" (TWA)*—Continued

Dose or percent noise exposure	TWA
360	99.2
370	99.4
380	99.6
390	99.8
400	100.0
410	100.2
420	100.4
430	100.5
440	100.7
450	100.8
460	101.0
470	101.2
480	101.3
490	101.5
500	101.6
510	101.8
520	101.9
530	102.0
540	102.2
550	102.3
560	102.4
570	102.6
580	102.7
590	102.8
600	102.9
610	103.0
620	103.2
630	103.3
640	103.4
650	103.5
660	103.6
670	103.7
680	103.8
690	103.9
700	104.0
710	104.1
720	104.2
730	104.3
740	104.4
750	104.5
760	104.6
770	104.7
780	104.8
790	104.9
800	105.0
810	105.1
820	105.2
830	105.3
840	105.4
850	105.4
860	105.5
870	105.6
880	105.7
890	105.8
900	105.8
910	105.9
920	106.0
930	106.1
940	106.2
950	106.2
960	106.3
970	106.4
980	106.5
990	106.5
999	106.6

Appendix B: Temporal Sampling Procedures for Use With a Sound Level Meter

This Appendix Is Non-Mandatory

Two basic types of equipment permitted are to measure noise exposure for the purposes of paragraphs (c) through (r) of 29 CFR 1910.95: the noise dosimeter and the sound level meter. The sampling procedure for using a sound level meter described below is intended to yield accuracy comparable to that obtained by using a dosimeter meeting the requirements of paragraph (g)(1)(i) of 29 CFR 1910.95. This accuracy will only be possible when the sampled sound levels are truly representative of the total exposure. 1. Based on the nature of the workplace operations to which the employee is exposed, identify each time period for which the noise exposure is to be determined.

This identification is done by dividing the entire workday into a number of time segments, each having workplace operations where the noise environment is relatively uniform. The noise may vary with time in each time segment but except for periodic variations in sound level associated with the cyclic nature of specific machinery, there is no reason to expect consistently different sound levels in one part of this time segment as opposed to another part.

For example, in a machine shop a worker may spend the early part of the day preparing his particular machine for production and the remainder of the day actually running it. The sound level at the worker's location might exceed 80 dB during the setting up process because of nearby machines already in operation. When his own machine is running, the sound level to which he is exposed could be much greater. During each period the sound levels vary in a characteristic manner. Each of these two time periods (see Figure B–1) would be an identified time segment during which measurements should be made.

As another example, consider a factory where intermittent noise due to operation of a particular machine is superimposed on a fairly steady background noise, so that the sound level varies with time as shown in Figure B–2. The total time that the machine is on can be considered to be one time segment and the total time that the machine is off would be another time segment. The procedure described in Section 2, below, can be used in conjunction with such intermittent noise provided that the times spent in each operating cycle are sufficiently long that the duration of each on-cycle or off-cycle can be easily measured.

As a third example, consider a situation where impulsive sounds due, for example, to mechanical impacts are superimposed on continuous noise as indicated in Figure B–3. The total time that the impulses are well in excess of the general ambient noise can be considered as one time segment and the remainder of the time as another time segment. The procedure described in Section 3, below, can be used in conjunction with impulsive noises or very short bursts of noise.

2. For each time segment for which the noise is essentially continuous, determine the average sound level in the following manner:

(a) Carry out any necessary calibration to ensure proper and accurate operation of the sound level meter.

(b) Set the controls of the sound level meter for A-weighted SLOW response.

(c) Adjust the controls of the sound level meter so that the higest sound level readings that occur during the time segment will be readable on the meter scale.

(d) With the microphone located in the desired position, read the sound level at intervals and place a checkmark in the appropriate box on the data sheet (Figure B–4). The sound levels should be read to the nearest decibel. The readings may be made at any time interval of 5 seconds or longer. The readings should be instantaneous, i.e., the person taking the data should glance at the indicator of the sound level meter and read it "on the fly" rather than look for maximum or minimum levels or wait for fairly steady levels. If the noise-producing operation is cyclic, care should be taken to avoid reading sound levels at consistent times relative to the cycles in sound level; this may require taking observations at random, rather than at regular time intervals.

(e) If the time interval is not sufficiently long to take 25 readings at intervals of 5 seconds or longer, readings should be taken at 5-second intervals throughout the entire time period and steps (f), (g), and (h) may be omitted.

(f) If, after 25 sound level readings have been taken, the total range of sound levels does not exceed 3 dB, the highest reading obtained may be taken as the effective sound level, and steps (g), (h), and (i) may be omitted.

(g) If, after 25 readings have been taken, the total range of sound levels exceeds 3 dB, the total number of readings that are required is estimated as follows:

(1) On the data sheet (Figure B–4), count down four checkmarks from the top. Draw a horizontal arrow (as shown in the example on Figure B–6) from the ordinate scale marked "A-weighted sound level" to the center of the row in which the fourth checkmark appears.

(2) Count up four checkmarks from the bottom and draw an arrow in line with the center of the row in which the fourth checkmark appears.

(3) Take the difference, in decibels, between the two sound levels (rows) so identified. This is the "spread of levels" to be used below. If the spread of levels from the fourth lowest to the fourth highest exceeds 12 decibels, the identified time segment should be

divided into two or more smaller time segments such that the spread of levels in *each* time segment will not exceed 12 decibels. If this is not possible, the use of a sound level meter to determine the noise exposure is probably not advisable and a noise dosimeter should be used. (However, see Section 3, below, for circumstances under which transient or impulsive noises may be ignored).

(4) Locate the estimated duration of the time segment on the ordinate scale to the far left on the data sheet. Draw a straight line from this point to the point where the upper arrow (step (1) above) intersects the scale labeled "A-weighted sound level." Draw a second straight line from the point labeled 8 hr on the time segment scale through the intersection of the first line with the "pivot line" located midway between the two scales, extend it to the sound level scale and then draw a horizontal arrow to the right to find the "adjusted upper level."

(5) The total number of sound level readings required is given by the table at the bottom of the worksheet. The columns in this table correspond to different values of the spread of levels (from the fourth lowest to the fourth highest). The three rows correspond, respectively, to the adjusted upper level being less than 85 decibels, between 85 and 90 decibels, and greater than 90 decibels.

(h) If the "adjusted upper level" is less than 80 decibels, the contribution due to the particular time segment may be ignored and no further measurements or calculations for that time segment are required.

(i) If the required number of sound level meter readings is equal to 25, no further sound levels need be read. If the required number is greater than 25, take additional measurements, in accordance with (d), above, until the total number of readings, including the 25 original readings, exceeds the required number. (The checkmarks can be added onto the original data sheet).

(j) Compute the effective sound level using the worksheet (Figure B–5) as follows:

(1) Enter the number of counts per sound level (frequency of occurrence) in Column B. Add them to get Sum B.

(2) Multiply the counts in Column B by the number in Column C and enter the results in Column D.

(3) Add all values in Column D to determine Sum D.

(4) Divide Sum D by Sum B.

(5) Locate the value in Column C that is approximately equal to Sum D/Sum B. The corresponding value in Column A is equal to the effective sound level.

Note.—It may be desirable to use a (pre-programmed) calculator to carry out these steps rather than to use the worksheet. This is quite acceptable so long as the calculation procedure is checked to ensure correctness.

(k) Proceed to carry out steps (a) through (g) as necessary for any other identified time segments.

3. When impulsive noise or short bursts of continuous noise result in large (e.g., 10 decibels or more) increases of short duration in the sound level, care must be taken to determine properly the effective duration of the higher noise level. When such discrete events occur, with a resultant time variation of sound levels such as that shown in Figure B–3, the following procedure may be followed:

(a) Carry out steps (a), (b), and (c) of Section 2, above.

(b) With the microphone located in the desired position, read the *maximum* sound level indicated on the sound level meter during occurrence of one of the discrete events of interest and place a checkmark in the appropriate box on a data sheet (Figure B–4). The maximum sound levels should be read to the nearest decibel.

(c) Repeat step 3(b) for 25 readings of the maximum sound level.

(d) Compute the maximum effective sound level for these 25 readings using the worksheet (Figure B–5) and the procedures described in Section 2(j), above.

(e) Calculate the sound level that is 6 decibels less than the maximum effective sound level determined in step 3(d); this is designated as the "6-decibel down level."

(f) Determine the effective duration of a transient event as follows: For a minimum of 10 events, use a stop watch or other timing device to measure the time that the sound level is greater than the "6-decibel down level" that was determined in step 3(e). This can be done by noting the 6-decibel down level on the sound level meter and then, for at least 10 events, starting the stop watch when the sound level increases to the 6-decibel down level, allowing the stop watch to run while the sound level is above the 6-decibel down level, and stopping the watch when the sound level falls below the 6-decibel down level. The effective duration of a single event is the arithmetic average of at least 10 durations thereby obtained, rounded up to the next larger integer second.

(g) The duration of the time segment for all similar single events is simply the number of such events multiplied by the effective duration of a single event.

(h) Follow the procedures described in Section 2(g) to determine the total required number of sound level meter readings, using the duration of the time segment as determined in step 3(g) to enter the left-hand scale of the data sheet (Figure B–4).

(i) If the "adjusted upper level" is less than 80 decibels, the contribution due to the particular time segment may be ignored and no further measurements or calculations for that time segment are required.

(j) If the required number of sound level meter readings is equal to 25, no further readings of the maximum sound level need be taken. If the required number of readings is greater than 25, take additional measurements, in accordance with 3(b), above, until the total number of readings, including the 25 original readings, exceeds the required number.

(k) Compute the effective sound level, using the worksheet (Figure B–5) and the procedure described in Section 2(j), above.

4. The average sound levels thus determined, and the durations for each time segment, should be entered into Table G–16a to compute the total noise dose, and subsequently the 8-hour time-weighted average sound level according to the procedures required by 29 CFR 1910.95(c).

Example for Continuous Noise

(a) Twenty-five sound levels are measured and entered on a data sheet with the results shown in Figure B–6.

(b) Counting down four checkmarks from the top, the number corresponding to the row in which the fourth checkmark appears is 97 decibels. An arrow is placed in line with that row and a dot is drawn where the tail of the arrow intersects the scale labeled "A-weighted sound level."

(c) The duration of the time segment is estimated as 5 hours; a corresponding dot is placed on the (left-hand) time scale on the data sheet.

(d) A straight line is drawn connecting the dot at 5 hours on the time scale and the dot at 97 dB on the sound level scale. A dot is placed where this line intersects the "pivot line" that is parallel to and midway between the two scales.

(e) A straight line (shown dashed in Figure B–6) is drawn from the mark at 8 hours on the time scale through the dot on the pivot line and extended to intersect the sound level meter scale. An arrow (also shown dashed) is drawn from this intersection point to the right—the "adjusted upper level" is found to lie between 93 and 94 decibels.

(f) Counting up four checkmarks from the botton of the worksheet, the number corresponding to the row in which the fourth checkmark appears is 92 dB.

(g) The difference between this lower level and the (unadjusted) upper level is 5 decibels; from the table at the bottom of the worksheet, it is found that at least 75 sound level readings are required.

(h) Fifty additional sound levels are read and entered onto the data sheet with the results show in Figure B–7; the number of checkmarks in each row is summed and entered in the right hand column.

(i) The sums from the data sheet are transferred to a worksheet and the required calculations are carried out as shown in Figure B–8; the resultant average sound level for the selected time period is found to be 95 dB.

Example for Impulsive Noise

(a) Twenty-five maximum sound levels are measured and entered on a data sheet with the results shown in Figure B–9.

(b) The sums from this data sheet are transferred to a worksheet as shown in Figure B–10 and the required calculations are carried out. The resultant maximum effective sound level for these impulsive events is found to be 103 dB.

(c) The "6-decibel down level" is thus 97 decibels. Using a stop watch, the time that the sound level exceeds 97 decibels is measured for 10 events; the average effective duration is found to be 3.4 seconds, which is rounded up to 4 seconds.

(d) It is estimated that there are approximately 50 such events during a typical workshift. Thus the duration of the time segment is estimated to be 200 seconds (or 3.3 minutes).

(e) A dot is placed on the time axis on the worksheet at 3.3 minutes and a dot is placed on the sound level axis at 103 decibels. A straight line is drawn between these two dots and a dot is placed where that line intersects the pivot line. A second line (shown dashed in Figure B–9) is drawn from the mark at 8 hours on the time axis through the mark on the pivot line. It is seen that this line would intersect the sound level scale at a location well below 80 decibels. Thus the noise exposure due to the 50 impulse sounds can be ignored and no further measurements or calculations are required. (Note: If the adjusted level had exceeded 80 decibels, the remaining procedure for the impulsive noises would have been the same as for the continuous noise example given above.)

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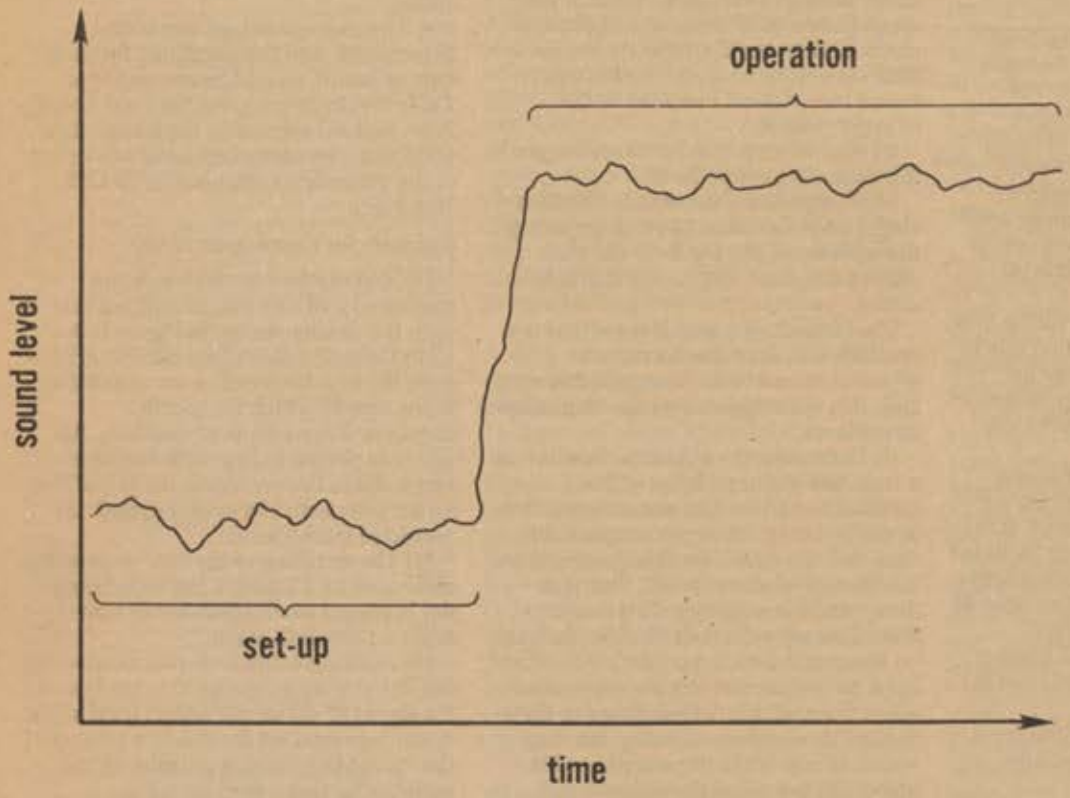


Figure B-1. Example of two discrete time segments.

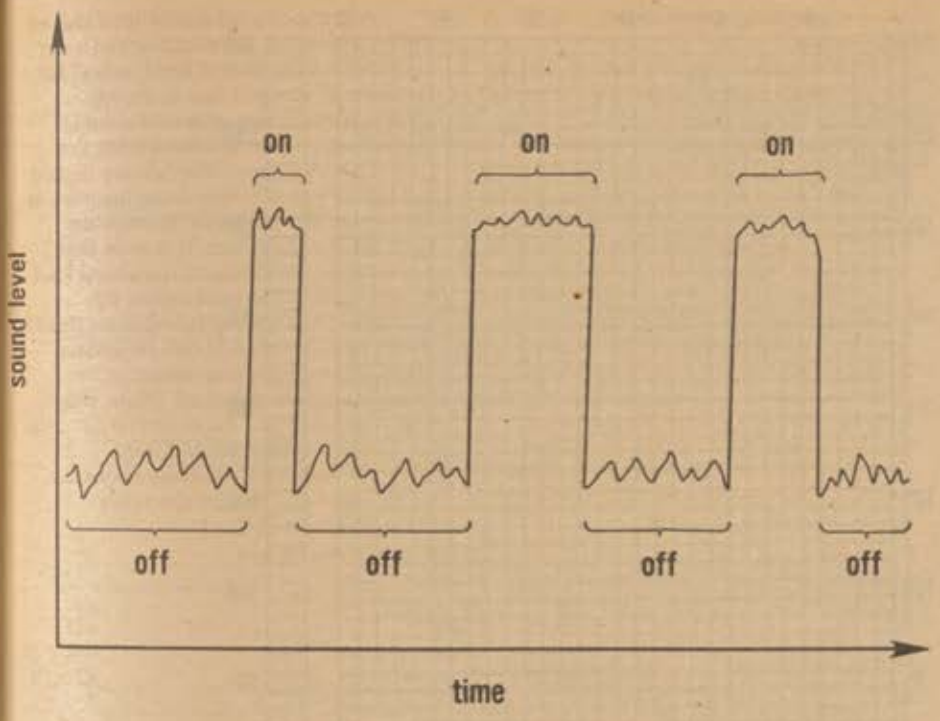


Figure B-2. Example of intermittent noise time segments.

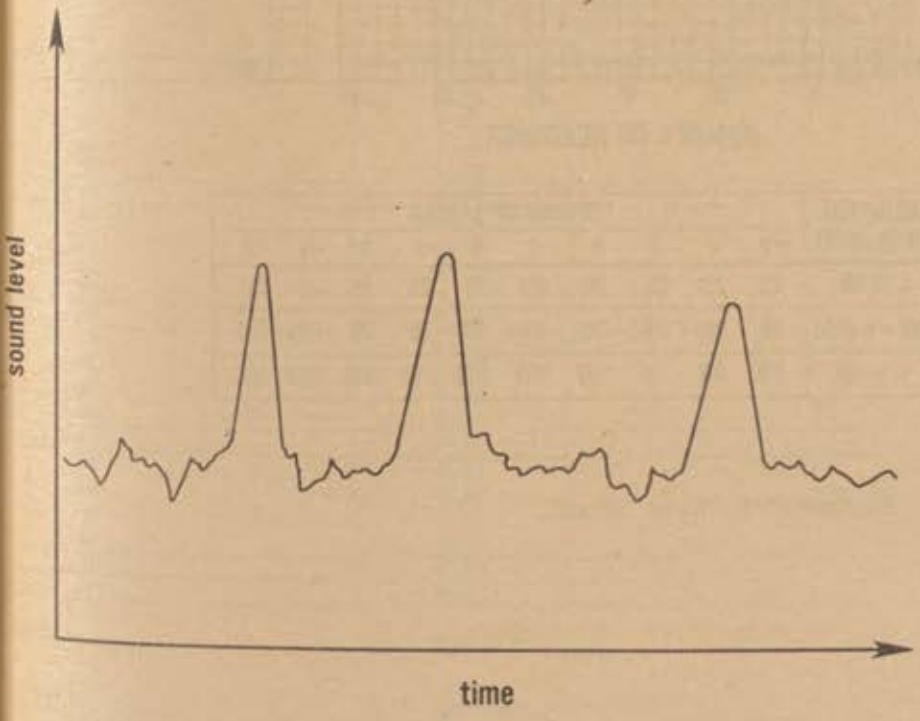
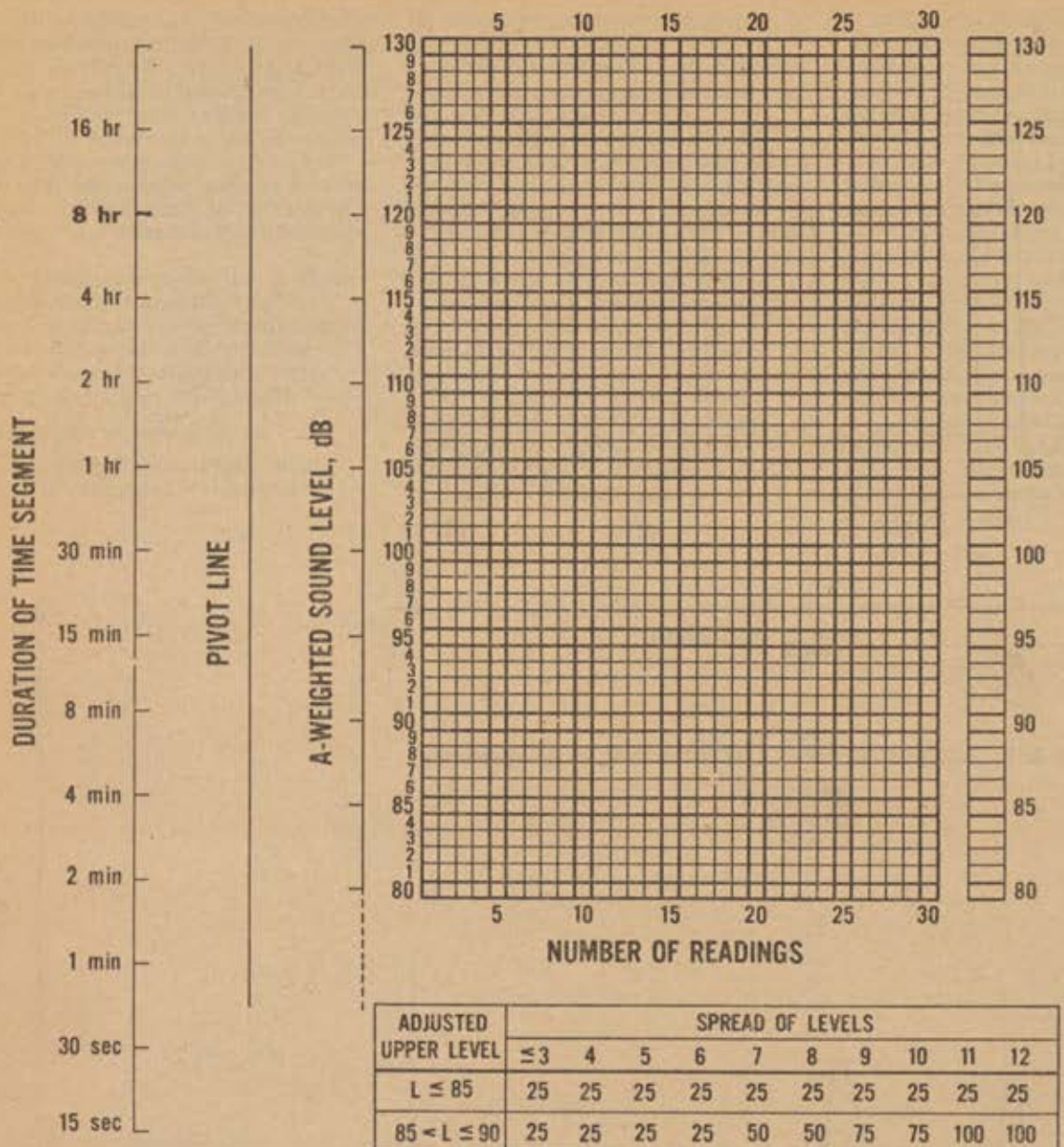


Figure B-3. Example of impulses superimposed on continuous noise.



ADJUSTED UPPER LEVEL	SPREAD OF LEVELS									
	≤3	4	5	6	7	8	9	10	11	12
L ≤ 85	25	25	25	25	25	25	25	25	25	25
85 < L ≤ 90	25	25	25	25	50	50	75	75	100	100
L > 90	25	50	75	100	150	200	250	300	350	400

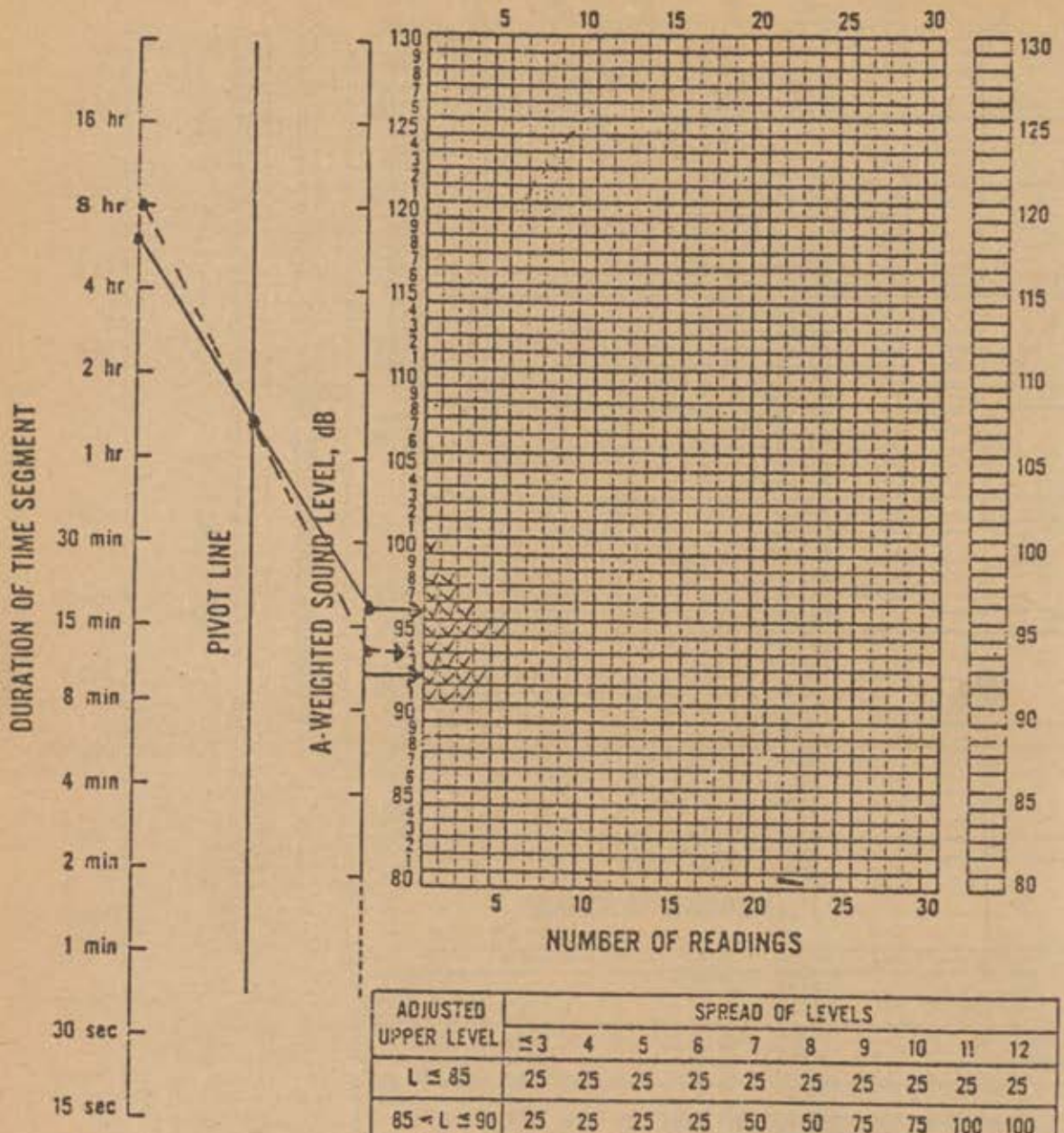
Figure B-4. Data Sheet.

A SOUND LEVEL dB	B COUNT		C RELATIVE WEIGHTING		D RELATIVE TOTAL WEIGHTING
130 or above		×	256.00	=	
129		×	222.86	=	
128		×	194.01	=	
127		×	168.91	=	
126		×	147.03	=	
125		×	128.00	=	
124		×	111.43	=	
123		×	97.01	=	
122		×	84.45	=	
121		×	73.52	=	
120		×	64.00	=	
119		×	55.72	=	
118		×	48.50	=	
117		×	42.22	=	
116		×	36.76	=	
115		×	32.00	=	
114		×	27.86	=	
113		×	24.25	=	
112		×	21.11	=	
111		×	18.38	=	
110		×	16.00	=	
109		×	13.93	=	
108		×	12.13	=	
107		×	10.56	=	
106		×	9.19	=	
105		×	8.00	=	
104		×	6.96	=	
103		×	6.06	=	
102		×	5.28	=	
101		×	4.59	=	
100		×	4.00	=	
99		×	3.48	=	
98		×	3.03	=	
97		×	2.64	=	
96		×	2.30	=	
95		×	2.00	=	
94		×	1.74	=	
93		×	1.52	=	
92		×	1.32	=	
91		×	1.15	=	
90		×	1.00	=	
89		×	0.87	=	
88		×	0.76	=	
87		×	0.66	=	
86		×	0.57	=	
85		×	0.50	=	
84		×	0.44	=	
83		×	0.38	=	
82		×	0.33	=	
81		×	0.29	=	
80		×	0.25	=	
below 80		×	0.00	=	0.00

Sum B = _____ Sum D = _____

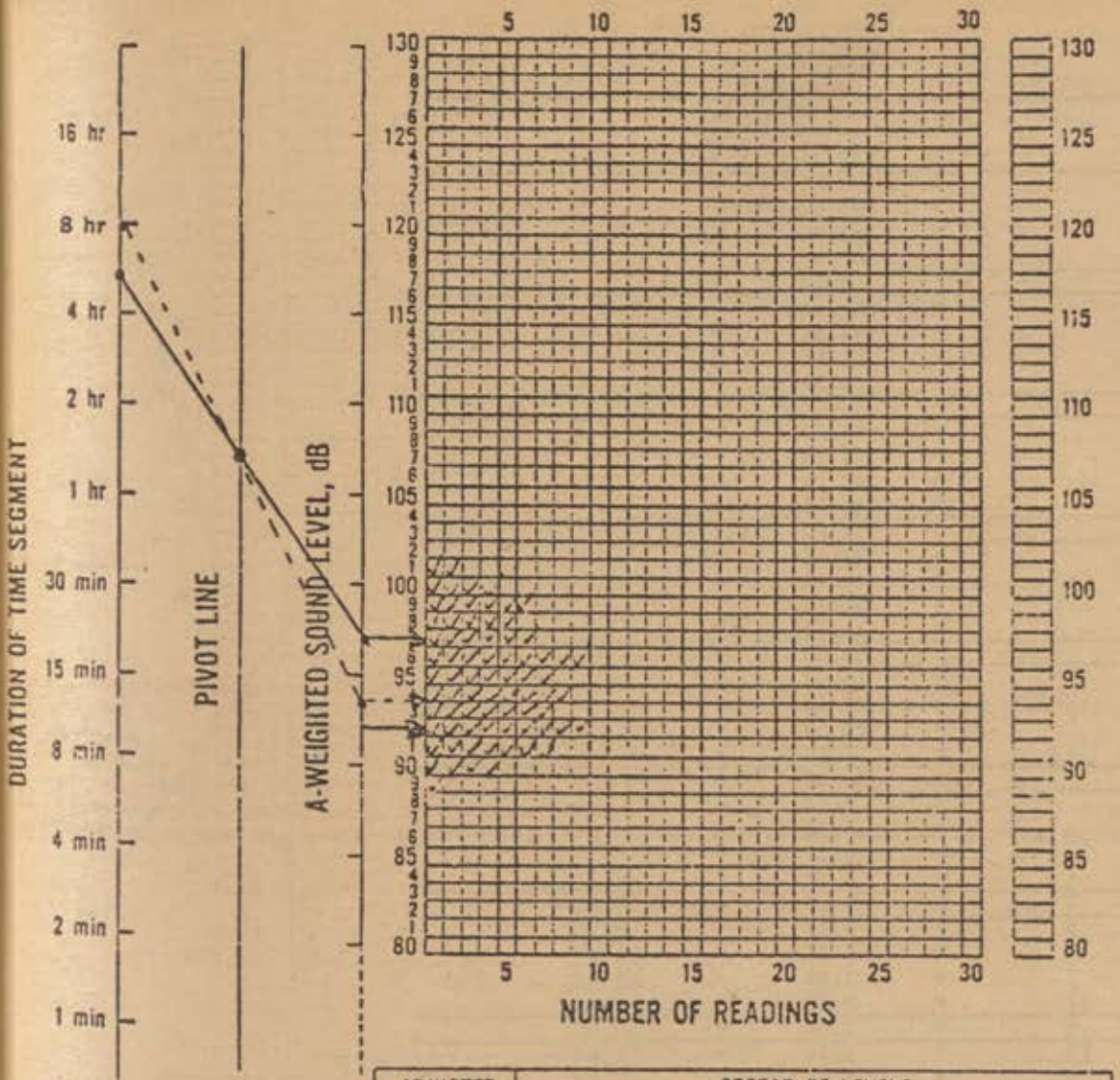
$\frac{\text{Sum D}}{\text{Sum B}}$ = _____ Average Sound Level = _____

Figure B-5. Worksheet for computing average sound level.



ADJUSTED UPPER LEVEL	SPREAD OF LEVELS									
	≤3	4	5	6	7	8	9	10	11	12
L ≤ 85	25	25	25	25	25	25	25	25	25	25
85 < L ≤ 90	25	25	25	25	50	50	75	75	100	100
L > 90	25	50	75	100	150	200	250	300	350	400

Figure B-6. Sample data sheet.



ADJUSTED UPPER LEVEL	SPREAD OF LEVELS									
	≤3	4	5	6	7	8	9	10	11	12
L ≤ 85	25	25	25	25	25	25	25	25	25	25
85 < L ≤ 90	25	25	25	25	50	50	75	75	100	100
L > 90	25	50	75	100	150	200	250	300	350	400

Figure B-7. Sample data sheet.

SOUND LEVEL dB	COUNT		RELATIVE WEIGHTING		RELATIVE TOTAL WEIGHTING
130 or above		×	256.00	=	
129		×	222.86	=	
128		×	194.01	=	
127		×	168.91	=	
126		×	147.03	=	
125		×	128.00	=	
124		×	111.43	=	
123		×	97.01	=	
122		×	84.48	=	
121		×	73.52	=	
120		×	64.00	=	
119		×	55.72	=	
118		×	48.50	=	
117		×	42.22	=	
116		×	36.76	=	
115		×	32.00	=	
114		×	27.86	=	
113		×	24.25	=	
112		×	21.11	=	
111		×	18.38	=	
110		×	16.00	=	
109		×	13.93	=	
108		×	12.13	=	
107		×	10.56	=	
106		×	9.19	=	
105		×	8.00	=	
104		×	6.96	=	
103		×	6.06	=	
102		×	5.28	=	
101	1	×	4.59	=	4.59
100	2	×	4.00	=	8.00
99	4	×	3.48	=	13.92
98	5	×	3.03	=	15.15
97	7	×	2.64	=	18.48
96	11	×	2.30	=	25.30
95	9	×	2.00	=	18.00
94	12	×	1.74	=	20.89
93	7	×	1.52	=	10.64
92	7	×	1.32	=	9.24
91	6	×	1.15	=	6.90
90	4	×	1.00	=	4.00
89		×	0.87	=	
88		×	0.76	=	
87		×	0.66	=	
86		×	0.57	=	
85		×	0.50	=	
84		×	0.44	=	
83		×	0.38	=	
82		×	0.33	=	
81		×	0.29	=	
80		×	0.25	=	
Below 80		×	0.00	=	0.00

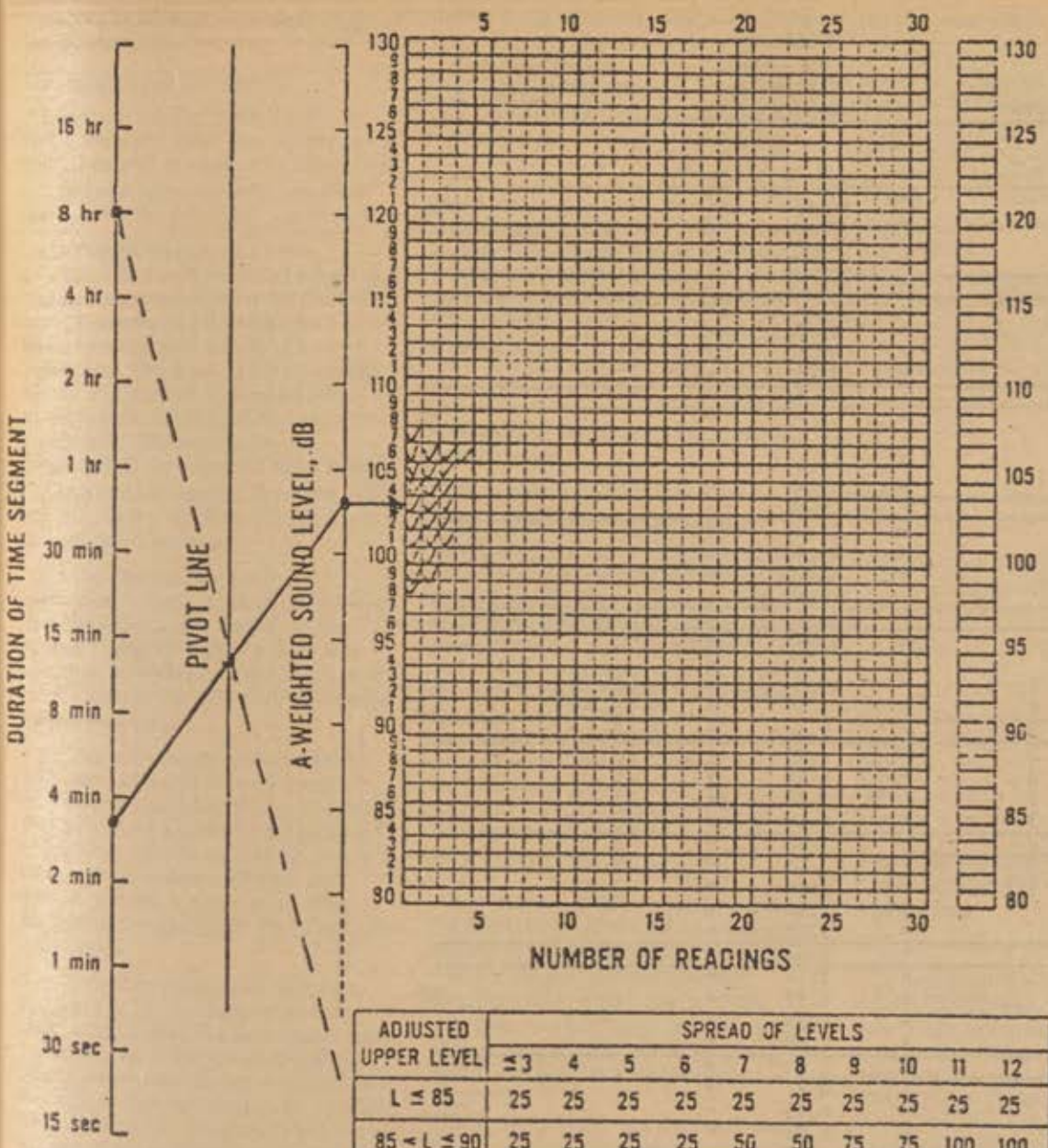
Sum B = 75

Sum D = 155.00

$\frac{\text{Sum D}}{\text{Sum B}}$ = 2.07

Average Sound Level = 95+ dB

Figure B-8. Sample worksheet for computing average sound level.



ADJUSTED UPPER LEVEL	SPREAD OF LEVELS									
	≤3	4	5	6	7	8	9	10	11	12
L ≤ 85	25	25	25	25	25	25	25	25	25	25
85 < L ≤ 90	25	25	25	25	50	50	75	75	100	100
L > 90	25	50	75	100	150	200	250	300	350	400

Figure B-9. Sample data sheet.

A SOUND LEVEL dB	B COUNT		C RELATIVE WEIGHTING		D RELATIVE TOTAL WEIGHTING
130 or above		×	256.00	=	
129		×	222.86	=	
128		×	194.01	=	
127		×	168.91	=	
126		×	147.03	=	
125		×	128.00	=	
124		×	111.43	=	
123		×	97.01	=	
122		×	84.45	=	
121		×	73.52	=	
120		×	64.00	=	
119		×	55.72	=	
118		×	48.50	=	
117		×	42.22	=	
116		×	36.76	=	
115		×	32.00	=	
114		×	27.86	=	
113		×	24.25	=	
112		×	21.11	=	
111		×	18.38	=	
110		×	16.00	=	
109		×	13.93	=	
108		×	12.13	=	
107	1	×	10.56	=	10.56
106	4	×	9.19	=	36.76
105	3	×	8.00	=	24.00
104	3	×	6.96	=	20.88
103	3	×	6.06	=	18.18
102	3	×	5.28	=	15.84
101	3	×	4.59	=	13.77
100	2	×	4.00	=	8.00
99	2	×	3.48	=	6.96
98	1	×	3.03	=	3.03
97		×	2.64	=	
96		×	2.30	=	
95		×	2.00	=	
94		×	1.74	=	
93		×	1.52	=	
92		×	1.32	=	
91		×	1.15	=	
90		×	1.00	=	
89		×	0.87	=	
88		×	0.76	=	
87		×	0.66	=	
86		×	0.57	=	
85		×	0.50	=	
84		×	0.44	=	
83		×	0.38	=	
82		×	0.33	=	
81		×	0.29	=	
80		×	0.25	=	
below 80		×	0.00	=	0.00

Sum B = 25

Sum D = 157.98

$\frac{\text{Sum D}}{\text{Sum B}}$ = 6.32

Average Sound Level = 103^{+} dB

Figure B-10. Sample worksheet for computing average sound level.

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Appendix C: Audiometric Measuring Instruments

This Appendix is Mandatory

1. In the event that pulsed-tone audiometers are used, they shall have a tone on-time of at least 200 milliseconds.

2. Self-recording audiometers shall comply with the following requirements:

(A) The chart upon which the audiogram is traced shall have lines at positions corresponding to all multiples of 10 dB hearing level within the intensity range spanned by the audiometer. The lines shall be equally spaced and shall be separated by at least 1/4 inch. Additional increments are optional. The audiogram pen tracings shall not exceed 2 dB in width.

(B) It shall be possible to set the stylus manually at the 10-dB increment lines for calibration purposes.

(C) The slewing rate for the audiometer attenuator shall not be more than 6 dB/sec except that an initial slewing rate greater than 6 dB/sec is permitted at the beginning of each new test frequency, but only until the second subject response.

(D) The audiometer shall remain at each required test frequency for 30 seconds (±3 seconds). The audiogram shall be clearly marked at each change of frequency and the actual frequency change of the audiometer shall not deviate from the frequency boundaries marked on the audiogram by more than ±3 seconds.

(E) It must be possible at each test frequency to place a horizontal line segment parallel to the time axis on the audiogram, such that the audiometric tracing crosses the line segment at least six times at that test frequency. At each test frequency the threshold shall be the average of the midpoints of the tracing excursions.

Appendix D: Audiometric Test Rooms

This Appendix is Mandatory

After April 15, 1983, rooms used for audiometric testing shall not have background sound pressure levels exceeding those in Table D–1 when measured by equipment conforming at least to the Type 2 requirements of American National Standard Specification for Sound Level Meters, S1.4–1971 (R1976), and to the Class II requirements of American National Standard Specification for Octave, Half-Octave, and Third-Octave Band Filter Sets, S1.11–1971 (R1976). Table D–2 may be used until April 15, 1983.

Table D–1.—*Maximum Allowable Octave-Band Sound Pressure Levels for Audiometric Test Rooms*

Octave-band center frequency (Hz)	500	1000	2000	4000	8000
Sound pressure level (dB)	27	30	35	42	41

Table D–2.—*Maximum Allowable Octave-Band Sound Pressure Levels for Audiometric Test Rooms (May be used in lieu of Table D–1 until Apr. 15, 1983)*

Octave-band center frequency (Hz)	500	1000	2000	4000	8000
Sound pressure level (dB)	40	40	47	57	62

Appendix E: Acoustic Calibration of Audiometers

This Appendix is Mandatory

Audiometer calibration shall be checked acoustically, at least annually, according to the procedures described in this Appendix. The equipment necessary to perform these measurements is a sound level meter, octave-band filter set, and a National Bureau of Standards 9A coupler. In making these measurements, the accuracy of the calibrating equipment shall be sufficient to determine that the audiometer is within the tolerances permitted by American National Standard Specification for Audiometers, S3.6–1969.

(1) *Sound Pressure Output Check*

A. Place the earphone coupler over the microphone of the sound level meter and place the earphone on the coupler.

B. Set the audiometer's hearing threshold level (HTL) dial to 70 dB.

C. Measure the sound pressure level of the tones at each test frequency from 500 Hz through 6000 Hz for each earphone.

D. At each frequency the readout on the sound level meter should correspond to the levels in Table E–1 or Table E–2, as appropriate, for the type of earphone, in the column entitled "sound level meter reading."

(2) *Linearity Check*

A. With the earphone in place, set the frequency to 1000 Hz and the HTL dial on the audiometer to 70 dB.

B. Measure the sound levels in the coupler at each 10-dB decrement from 70 dB to 10 dB, noting the sound level meter reading at each setting.

C. For each 10-dB decrement on the audiometer the sound level meter should indicate a corresponding 10 dB decrease.

D. This measurement may be made electrically with a voltmeter connected to the earphone terminals.

(3) *Tolerances*

When any of the measured sound levels deviate from the levels in Table E–1 or Table E–2 by ± 3 dB at any test frequency between 500 and 3000 Hz, 4 dB at 4000 Hz, or 5 dB at 6000 Hz, an exhaustive calibration is advised. An exhaustive calibration is required if the deviations are greater than 10 dB at any test frequency.

Table E–1.—*Reference Threshold Levels for Telephonics—TDH–39 Earphones*

Frequency, Hz	Reference threshold level for TDH–39 earphones, dB	Sound level meter reading, dB
500	11.5	81.5
1000	7	77
2000	9	79
3000	10	80
4000	9.5	79.5
6000	15.5	85.5

Table E–2.—*Reference Threshold Levels for Telephonics—TDH–49 Earphones*

Frequency, Hz	Reference threshold level for TDH–39 earphones, dB	Sound level meter reading, dB
500	13.5	83.5
1000	7.5	77.5
2000	11	81.0
3000	9.5	79.5
4000	10.5	80.5
6000	13.5	83.5

Appendix F: Calculations and Application of Age Corrections to Audiograms

This Appendix is Non-Mandatory

In determining whether a significant threshold shift has occurred, allowance may be made for the contribution of aging to the change in hearing level by adjusting the most recent audiogram. If the employer chooses to adjust the audiogram, the employer shall follow the procedure described below. This procedure and the age correction tables were developed by the National Institute for Occupational Safety and Health in the criteria document entitled "Criteria for a Recommended Standard . . . Occupational Exposure to Noise," (HSM)–11001).

For each audiometric test frequency:

(i) Determine from Table F–1 or F–2 the age correction values for the employee by:

(A) finding the age at which the most recent audiogram was taken and recording the corresponding values of age corrections at 1000 Hz through 6000 Hz;

(B) finding the age at which the baseline audiogram was taken and recording the corresponding values of

age corrections at 1000 Hz through 6000 Hz.

(ii) Subtract the values found in step (i)(A) from the value found in step (i)(B).

(iii) The differences calculated in step (ii) represented that portion of the change in hearing that may be due to aging.

Example: Employee is a 32-year-old male. The audiometric history for his right ear is shown in decibels below.

Employee's age	Audiometric test frequency (Hz)				
	1000	2000	3000	4000	6000
26	10	5	5	10	5
*27	0	0	0	5	5
28	0	0	0	10	5
29	5	0	5	15	5
30	0	5	10	20	10
31	5	10	20	15	15
*32	5	10	10	25	20

The audiogram at age 27 is considered the baseline since it shows the best hearing threshold levels. Asterisks have been used to identify the baseline and most recent audiogram. A threshold shift of 20 dB exists at 4000 Hz between the audiograms taken at ages 27 and 32. (The threshold shift is computed by subtracting the hearing threshold at age 27, which was 5, from the hearing threshold at age 32, which is 25). A retest audiogram has confirmed this shift. The contribution of aging to this change in hearing may be estimated in the following manner:

Go to Table F–1 and find the age correction values (in dB) for 4000 Hz at age 27 and age 32.

	Frequency (Hz)				
	1000	2000	3000	4000	6000
Age 32	6	5	7	10	14
Age 27	5	4	6	7	11
Difference	1	1	1	3	3

The difference represents the amount of hearing loss that may be attributed to aging in the time period between the baseline audiogram and the most recent audiogram. In this example, the difference at 4000 Hz is 3 dB. This value is subtracted from the hearing level at 4000 Hz, which in the most recent audiogram is 25, yielding 22 after adjustment. Then the hearing threshold in the baseline audiogram at 4000 Hz (5) is subtracted from the adjusted annual audiogram hearing threshold at 4000 Hz (22). Thus the age-corrected threshold shift would be 17 dB (as opposed to a threshold shift of 20 dB without age correction).

Table F–1.—*Age Correction Values in Decibels for Males*

Years	Audiometric Test Frequencies (Hz)				
	1000	2000	3000	4000	6000
20 or younger	5	3	4	5	8
21	5	3	4	5	8
22	5	3	4	5	8
23	5	3	4	6	9
24	5	3	5	6	9
25	5	3	5	7	10
26	5	4	5	7	10
27	5	4	6	7	11
28	6	4	6	8	11
29	6	4	6	8	12
30	6	4	6	9	12
31	6	4	7	9	13
32	6	5	7	10	14
33	6	5	7	10	14
34	6	5	8	11	15
35	7	5	8	11	15
36	7	5	9	12	16
37	7	6	9	12	17
38	7	6	9	13	17
39	7	6	10	14	18
40	7	6	10	14	19
41	7	6	10	14	20
42	8	7	11	16	20
43	8	7	12	16	21
44	8	7	12	17	22
45	8	7	13	18	23
46	8	8	13	19	24
47	8	8	14	19	24
48	9	8	14	20	25
49	9	9	15	21	26
50	9	9	16	22	27
51	9	9	16	23	28
52	9	10	17	24	29
53	9	10	18	25	30
54	10	10	18	26	31
55	10	11	19	27	32
56	10	11	20	28	34
57	10	11	21	29	35
58	10	12	22	31	36
59	11	12	22	32	37
60 or older	11	13	23	33	38

Table F–2.—*Age Correction Values in Decibels for Females*

Years	Audiometric test frequencies (Hz)				
	1000	2000	3000	4000	6000
20 or younger	7	4	3	3	6
21	7	4	4	3	6
22	7	4	4	4	6
23	7	5	4	4	7
24	7	5	4	4	7
25	8	5	4	4	7
26	8	5	5	4	8
27	8	5	5	5	8
28	8	5	5	5	8
29	8	5	5	5	9
30	8	6	5	5	9
31	8	6	6	5	9
32	9	6	6	6	10
33	9	6	6	6	10
34	9	6	6	6	10
35	9	6	7	7	11
36	9	7	7	7	11
37	9	7	7	7	12
38	10	7	7	7	12
39	10	7	8	8	12
40	10	7	8	8	13
41	10	8	8	8	13
42	10	8	9	9	13
43	11	8	9	9	14
44	11	8	9	9	14
45	11	8	10	10	15
46	11	9	10	10	15
47	11	9	10	11	16
48	12	9	11	11	16
49	12	9	11	11	16
50	12	10	11	12	17
51	12	10	12	12	17
52	12	10	12	13	18
53	13	10	13	13	19
54	13	11	13	14	19
55	13	11	14	14	19
56	13	11	14	15	20
57	13	11	15	15	20
58	14	12	15	16	21

Table F–2.—*Age Correction Values in Decibels for Females*—Continued

Years	Audiometric test frequencies (Hz)				
	1000	2000	3000	4000	6000
59	14	12	16	16	21
60 or older	14	12	16	17	22

Appendix G: Methods for Estimating the Adequacy of Hearing Protector Attenuation

This Appendix is Mandatory

For employees who have experienced a significant threshold shift, hearing protector attenuation must be sufficient to reduce employee exposure to a TWA of 85 dB. Employers must select one of the following methods by which to estimate the adequacy of hearing protector attenuation.

The most convenient method is the Noise Reduction Rating (NRR) developed by the Environmental Protection Agency (EPA). According to EPA regulation, the NRR must be shown on the hearing protector package. The NRR is then related to an individual worker's noise environment in order to assess the adequacy of the attenuation of a given hearing protector. This Appendix describes four methods of using the NRR to determine whether a particular hearing protector provides adequate protection within a given exposure environment. Selection among the four procedures is dependent upon the employer's noise measuring instruments.

Instead of using the NRR, employers may evaluate the adequacy of hearing protector attenuation by using one of the three methods developed by the National Institute for Occupational Safety and Health (NIOSH), which are described in the "List of Personal Hearing Protectors and Attenuation Data," HEW Publication No. 76–120, 1975, pages 21–37. These methods are known as NIOSH methods #1, #2 and #3. The NRR described below is a simplification of NIOSH method #2. The most complex method is NIOSH method #1, which is probably the most accurate method since it uses the largest amount of spectral information from the individual employee's noise environment. As in the case of the NRR method described below, if one of the NIOSH methods is used, the selected method must be applied to an individual's noise environment to assess the adequacy of the attenuation. Employers should be careful to take a sufficient number of measurements in order to achieve a representative sample for each time segment.

Note.—The employer must remember that calculated attenuation values reflect realistic values only to the extent that the protectors are properly fitted and worn.

When using the NRR to assess hearing protector adequacy, one of the following methods must be used:

(i) When using a dosimeter that is capable of C-weighted measurements:

(A) Obtain the employee's C-weighted dose for the entire workshift, and convert to TWA (see Appendix A, II).

(B) Subtract the NRR from the C-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(ii) When using a dosimeter that is not capable of C-weighted measurements, the following method may be used:

(A) Convert the A-weighted dose to TWA (see Appendix A).

(B) Subtract 7 dB from the NRR.

(C) Subtract the remainder from the A-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(iii) When using a sound level meter set to the A-weighting network:

(A) Obtain the employee's A-weighted TWA in accordance with a procedure such as the one recommended in Appendix B.

(B) Subtract 7 dB from the NRR, and subtract the remainder from the A-weighted TWA to obtain the estimated A-weighted TWA under the ear protector.

(iv) When using a sound level meter set on the C-weighting network:

(A) Obtain a representative sample of the C-weighted sound levels in the employee's environment for each identified time segment.[1]

(B) If there is more than one identified time segment, compute the 8-hour time-weighted average of the C-weighted sound levels using Figure B–5 and Table G–16a or an equivalent method.

(C) Subtract the NRR from the C-weighted average sound level to obtain the estimated A-weighted TWA under the ear protector.

Appendix H: Availability of Referenced Documents

Paragraphs (c) through (s) of 29 CFR 1910.95 and the accompanying appendices contain provisions which incorporate publications by reference. Generally, the publications provide criteria for instruments to be used in monitoring and audiometric testing. These criteria are intended to be mandatory when so indicated in the applicable paragraphs of Section 1910.95 and appendices.

It should be noted that OSHA does not require that employers purchase a copy of the referenced publications. Employers, however, may desire to obtain a copy of the referenced publications for their own information.

The designation of the paragraph of the standard in which the referenced publications appear, the titles of the publications, and the availability of the publications are as follows:

Paragraph designation	Referenced publication	Available from—
§ 1910.95(g)(1)(i)	"Specification for Personal Noise Dosimeters," ANSI S1.25–1978, (ASA 25–1978).	Back Numbers Department, Dept. STD, American Institute of Physics 333 E. 45th St., New York, NY 10017; American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.
§ 1910.95(g)(1)(ii)	"Specification for Sound Level Meters," S1.4–1971 (R 1976).	American National Standards Institute, Inc., 1430 Broadway, New York, NY 10018.
§ 1910.95(k)(2), appendix E	"Specifications for Audiometers," S3.6–1969.	American National Standards Institute, Inc., 1430 Broadway, New York, NY 10018.
Appendix D	"Specification for Octve, Half-Octave and Third-Octave Band Filter Sets," S1.11–1971 (R1976).	Back Numbers Department, Dept. STD, American Institute of Physics 333 E. 45th St., New York, NY 10017; American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.
Appendix G	"List of Personal Hearing Protectors and Attenuation Data," HEW Pub. No. 76–120, 1975.	Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20404.

The referenced publications (or a microfiche of the publications) are available for review at many universities and public libraries throughout the country. These publications may also be examined at the OSHA Technical Data Center, Room N2439, United States Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210, (202) 523–9700 or at any OSHA Regional Office (see telephone directories under United States Government—Labor Department).

Appendix I: Definitions

These definitions apply to the following terms as used in paragraphs (c) through (r) of 29 CFR 1910.95.

Audiogram—A chart, graph, or table resulting from an audiometric test showing an individual's hearing threshold levels as a function of frequency.

Audiologist—A professional, specializing in the study and habilitation of hearing, who is certified by the American Speech, Hearing, and Language Association or licensed by a state board of examiners.

Baseline audiogram—The audiogram against which future audiograms are compared.

Crest factor—Absolute value of the ratio of the peak value and the root-mean-square value measured over a specified time interval where both values are measured in reference to the arithmetic mean value of the wave.

Criterion sound level—A sound level of 90 decibels.

Decibel (dB)—Unit of measurement of sound level.

Hertz (Hz)—Unit of measurement of frequency, numerically equal to cycles per second.

Medical pathology—A disorder or disease. For purposes of this regulation, a condition or disease affecting the ear, which should be treated by a physician specialist.

Noise dose—The ratio, expressed as a percentage, of (1) the time integral, over a stated time or event, of the 0.6 power of the measured SLOW exponential time-averaged, squared A-weighted sound pressure and (2) the product of the criterion duration (8 hours) and the 0.6 power of the squared sound pressure corresponding to the criterion sound level (90 dB).

Noise dosimeter—An instrument that integrates a function of sound pressure over a period of time in such a manner that it directly indicates a noise dose.

Otolaryngologist—A physician specializing in diagnosis and treatment of disorders of the ear, nose and throat.

Representative exposure—Measurements of an employee's noise dose or 8-hour time-weighted average sound level that the employers deems to be representative of the exposures of other employees in the workplace.

Sound level—Ten times the common logarithm of the ratio of the square of the measured A-weighted sound pressure to the square of the standard reference pressure of 20 micropascals. Unit: decibels (dB). For use with this regulation, SLOW time response, in accordance with ANSI S1.4–1971 (R1976), is required.

Sound level meter—An instrument for the measurement of sound level.

Time-weighted average sound level—That sound level, which if constant over an 8-hour exposure, would result in the same noise dose as is measured.

(Sec. 4, 6, 8, 84 Stat. 1592, 1593, 1599, (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 8–76 (41 FR 25059); 29 CFR Part 1911)

[FR Doc. 81–1283 Filed 1–13–81; 12:00 pm]

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[1] Time segments should be identified according to a procedure such as the one recommended in Appendix B, but the same number of measurements may not be necessary to achieve a representative sample.

federal register

Friday
January 16, 1981

Part IV

Department of Labor

Occupational Safety and Health Administration

Marine Terminals; Notice of Proposed Rulemaking

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910 and 1918a

[Docket No. S-506]

Marine Terminals; Proposed Rulemaking

AGENCY: Occupational Safety and Health Administration Department of Labor.

ACTION: Proposed standard.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is proposing to add a new part, 29 CFR Part 1918a, safety and health regulations for marine terminals.

The proposed standards covers cargo handling and related activites at marine terminals and addresses the safety and health hazards associated with the shoreside portion of the marine cargo-handling industry. Marine cargo-handling operations that take place aboard vessels will continue to be regulated under 29 CFR Part 1918, the safety and health regulations for longshoring.

This proposed rule is a vertical standard, i.e., one which applies to this industry exclusively and is designed specifically to address the hazards associated with marine cargo-handling ashore. However, certain sections and subparts of Part 1910, the general industry standards, would continue to apply to marine terminals and have been incorporated by reference in the vertical standard. The new Part 1918a would apply exclusively to marine terminals, except for those provisions of Part 1910 referenced in the new Part.

This proposal contains requirements for marine terminal operations, cargo handling gear and equipment, personal protective equipment, operations such as welding and spray painting, and specialized terminals such as container terminals and menhaden facilities. The water transportation services industry, which is largely comprised of the marine cargo-handling industry, has an occupational injury incidence more than twice the average rate of industries in the private sector, and a severity rate seven times as great. The principal hazards addressed by this proposal are injuries and accidents associated with hoisting gear, hazardous atmospheres, materials handling, powered industrial vehicles, ship's gear, vehicle and pedestrian traffic, and other marine cargo-handling operations.

DATES: Written comments and any requests for a hearing must be postmarked on or before May 15, 1981.

ADDRESS: Written comments and requests for a hearing should be submitted to the Docket Officer, Docket No. S-506, Occupational Safety and Health Administration, Room S 6212, U.S. Department of Labor, Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: Mr. Basil Needham, acting director, Office of Maritime Safety Standards, Occupational safety and Health administration, U.S. Department of Labor, 200 Constitution Avenue, NW., room N3471, Washington, D.C. 20210, Telephone: (202) 523-7234.

SUPPLEMENTARY INFORMATION:

I. History.

Due to the alarming number and serious nature of the accidents and injuries in the marine cargo-handling industry, Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (44 Stat. 1424; 33 U.S.C. 901 et seq.) in 1958 to provide maritime employees with a safe work environment. The amendments (P.L. 85-742, 72 Stat. 835) significantly strengthened Section 41 of the LHWCA (44 Stat. 1444; 33 U.S.C. 941) by requiring employers covered by the Act to "furnish, maintain and use" equipment and to establish safe working conditions in accordance with regulations promulgated by the secretary of Labor. Two years later, the Labor Standards Bureau (LSB) of the Department of Labor (DOL) issued the first set of safety and health regulations for longshoring activites as 29 CFR Part 9 (25 FR 1565). These standards were amended on several occasions between 1960 and 1971. Since 1971, there have been no substantive changes in these provisions. However, these regulations only covered longshorign activities taking place aboard vessels.

Passage of the Occupational Safety and Health Act (the Act) (84 Stat. 1580; 29 U.S.C. 650 et seq.) by Congress in 1970 enabled the Federal government to become directly involved with commercial shoreside cargo-handling operations in marine terminals. Section 6(a) of the act (84 Stat. 1593; 29 U.S.C. 655) authorized the Secretary of Labor to adopt established Federal standards issued under other statutes, including LHWCA, as occupational safety and health standards under the Act. Accordingly, the Secretary adopted the existing longshoring regulations as OSHA regulations and recodified these rules as 29 CFR Part 1918 (39 FR 22074, June 19, 1974). Since the Act comprehensively covered all private employments, the longshoring standards also applied to shoreside cargo handling operations. (See 29 CFR 1910.16.)

In addition, in accordance with established policy codified at 29 CFR 1910.5(c)(2), OSHA has applied its general industry regulations to shoreside activities not covered by its older longshoring rules. Citations have also been frequently issued under Section 5(a)(1) (the General Duty Clause) of the Act (84 Stat. 1593, 29 U.S.C. 654) (Ex. 22), since some serious hazards are not addressed either by requirements in Part 1910 or Part 1918.

The attempt to apply and to enforce provisions from different standards to shoreside activities has encouraged a fragmentary approach to compliance activity, has produced much misunderstanding and dissension, and has not provided adequate employee protection. As a result, several groups have requested that OSHA "make the industry whole" by consolidating all the regulations applicable to the marine terminal portion of the cargo-handling industry into a comprehensive set of regulations parallel to those for the shipboard portion of the operation. OSHA believes that a marine terminal standard tailored specifically to the hazards and circumstances of this industry, written in simplified and more understandable language, is clearly needed.

II. Background of the Proposal.

In the early 1960's, OSHA's predecessor agency, the Bureau of Labor Standards, played an important role in developing an American National Standards Institute (ANSI) marine terminal standard (ANSI MH9) to assist the industry in its voluntary efforts at accident prevention. When completed, however, this consensus standard left many gaps in safety coverage, and it was somewhat out of date by 1971. A new ANSI MH9 committee was established after the advent of OSHA, and in 1972 this group developed a revised ANSI marine terminal standard, Safety Requirements for Marine Terminal Operations, ANSI MH9.1. OSHA had intended to adopt this new ANSI revision under Section 6(a) of the Act; however, the Agency did not do so because the standard was considered incomplete and because the legal authority to adopt such national consensus standards expired in April 1973. OSHA then began to develop its own marine terminal standard, using ANSI MH9.1, State standards, other available data, and staff experience and research as starting points.

Subsequently, the Assistant Secretary of Labor for OSHA appointed an ad hoc Standards Advisory Committee (SAC) to review the Agency's draft marine terminal document and to make appropriate recommendations. (A list of committee members and their affiliations appears in the front of the volume of committee recommendations, which has been entered in the record (Ex. 2)). The first meetings of the SAC took place in June 1974, and its period of service terminated in March 1975. Staff work then resumed, with review and consideration of the transcripts of committee meetings and recommendations, and further revision in response to the committee's comments.

All available material and data have since been given careful review, in particular the issues raised by the SAC and accident and injury data related to marine terminal operations. OSHA has also continued to monitor industry trends, such as the increasing use of intermodal containers, and coverage for hazards associated with these relatively recent industry developments has been incorporated into the proposal.

Any specific final recommendations made by the SAC on provisions of the draft marine terminal proposal are discussed in the Summary and Explanation section of this preamble, in connection with the relevant provisions of the proposal; references to Advisory Committee discussions that were inconclusive and did not result in a specific recommendation have not been included in this preamble. However, transcripts of the Committee's deliberations and a copy of their recommendations are in the rulemaking record (Ex. 2–12).

This proposed standard was written to enhance the safety of dock workers, to address the specific hazards associated with the marine terminal industry, and to encourage voluntary compliance by employers and employees. To achieve these goals, the proposal has been written in straightforward, performance-based language, which has allowed OSHA to reduce the volume of these proposed regulations to ⅙ that of the existing rules that currently apply to marine terminals. In addition, in an effort to keep the employer's compliance costs to the lowest level consonant with employee safety, the proposed standard makes extensive use of the "grandfather clause" or phase-in concept. This practice will reduce to a minimum the amount of equipment that must either be replaced or retrofitted to comply with the standard's provisions. Another method of reducing costs and avoiding regulatory rigidity is the proposal's use of a range rather than a specific figure, for design or construction specifications. For example, rather than specifying that guardrails must be 36 inches high, the proposal permits railing height to fall within a range which experience and ergonomic research have determined to be appropriate and safe. Finally, OSHA has worked closely with the U.S. Coast Guard throughout the development of this proposal, to ensure that the proposed requirements complement and do not conflict with that agency's regulatory efforts in the marine terminal environment. Section 4(b)(1) of the Act (84 Stat. 1592, 29 U.S.C. 653) preempts OSHA jurisdiction in areas in "which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Thus, in marine terminals, OSHA's jurisdiction does not apply to those working conditions as to which the Coast Guard has exercised its statutory authority to promulgate standards affecting occupational safety and health.

The shortened forms listed below are used throughout this preamble to refer to the following sources: Standards Advisory Committee—SAC; American National Standards Institute, Safety Requirements for Marine Terminals—ANSI MH9.1; OSHA's safety and health regulations for longshoring—Part 1918; OSHA's general industry standards—Part 1910; and exhibits in the rulemaking record—Ex. .

III. Marine Terminal Hazards

The work environment at a marine terminal exposes maritime employees to a greater risk of injury than is true for workers in most other industries. In terms of number of injuries per worker and of lost workdays per worker, cargo-handling operations in American ports represent some of the most dangerous activities in American industry. A simple comparison of injury incidence and accident severity rate between the marine terminal industry and the industrial average for the private sector will illustrate the hazardous nature of the work performed along the waterways of this country.

Examination of accident data compiled by the U.S. Bureau of Labor Statistics (BLS) up to 1978 reveals that the injury incidence for marine cargo-handling operations is more than twice that of the national average. More specifically, BLS found an average injury incidence for the private industrial sector of 9.2 injuries per 100 full-time workers, while the rate for water transportation services (SIC 446, made up in large part by the marine cargo-handling industry) was 21.5 per 100 employees (Ex. 18).

Even more disturbing are the comparative BLS figures on accident severity. The severity rate, computed on the basis of lost workdays per worker, was seven times greater for maritime employees than the national average. Though only 62.1 workdays were lost on the average to occupational injury (per 100 full-time workers), those industries supplying water transportation services suffered losses of 454 lost workdays per 100 workers (Ex. 18). Even when compared to the accident severity rate of a high hazard industry such as construction, the accident figures for cargo handling operations are still significant and unsettling. The lost workday incidence rate for construction was only 108.1 days per 100 workers, leaving the maritime industry with an accident severity rate four times greater than that of construction (Ex. 18).

The particular hazards encountered at marine terminals are as varied as the cargoes that move through terminal gates. Technological advances in waterborne trade such as the development of container ships, roll on-roll off (Ro-Ro) vessels and "lighter aboard ship" (LASH) barges have eliminated many hazards, but created new ones. In an effort to pinpoint the major types of maritime accidents, OSHA contacted Cooper and Company of Stanford, Connecticut to study this problem. The company surveyed approximately 7,000 injury reports (Employer's First Notice of Injury or Illness) for 1974, and issued a report in 1975 which listed, by percentage, the 20 leading types of accidents associated with longshoring activities (Ex. 52):

	Percentage
Slip/Trip on Dock Deck	15.7
Stress/Strain, Lifting/Carrying	6.4
Caught Between Load/Object	6.1
Hit by Lashing Gear	5.6
Hit by Load/Draft	5.4
Foreign Body in Eye	4.7
Hit by Falling Cargo	4.6
Hurt Handling Drums	4.4
Cut on Cargo	4.1
Hit by Dunnage	4.1
Foot Through Dunnage/Cargo	3.3
Hit by Industrial Truck	3.3
Sensitivity to Cargo/Fumes	3.1
Slipped on Ladder	2.9
Step on Nails	2.6
Cut on Hook	2.5
Hit by Falling Object	2.5
Hit by Sling/Bridle	2.2
Hit by Rolling Pipe/Steel	2.2
Hurt Avoiding Accident	1.7

Additionally, the Agency sought to determine the types of accidents that generated the greatest cost, in terms of dollars expended for medical and

compensation purposes. To make this determination, OSHA relied on a study performed by the Liberty Mutual Insurance Company. This study, published in the February 1978 edition of American Seaport Magazine, reported that Liberty Mutual reviewed 297 "high cost" accidents occurring in the marine cargo-handling industry. The insurance company found that more than 69 percent of the total costs and 66 percent of the total number of cases surveyed fell within two broad classes of accidents, "falls" and "struck by falling objects." To more firmly underline this point, Liberty Mutual (Ex. 60) reproduced this accident data in the following tabular form:

Stevedoring Operations—A Review of 297 High Cost Accidents

(Figures in parentheses equal percentage)

	Number of accidents	Cost of accidents
Falls	115 (39)	$1,985,800 (37.6)
Struck by falling objects	80 (27)	1,665,200 (31.6)
All others	102 (34)	1,629,400 (30.8)
Total number	297	
Total cost		5,258,400

From the above: 66 percent of the total number and 69.2 percent of the total cost were from "Falls" and "Struck by falling objects."

Falls

Types of falls	No. of cases	Total cost[1]	Average cost[1]
Fell to working surface	40	$405,000	$10,800
Fell between cargo	22	436,500	19,900
Fell from ship's ladders/portable ladders	16	438,400	27,400
Fell to lower level	16	241,900	14,700
Fell from piled cargo, piled dunnage, piled hatch boards, etc.	14	342,000	24,400
Fell from forklift trucks and other similar equipment	7	121,800	17,300

[1]Medical and compensation costs.

Struck by Falling Objects

Type of object	No. of cases	Total cost[1]	Average cost[1]
Cargo (from drafts, stacked cargo, or while manually handling)	55	$1,282,302	$23,314
Hatch gear	10		
Empty pallets	4		
Parts from gear failure	3	382,898	15,316
Dunnage	3		
Other	5		

[1]Medical and compensation costs.

Agency review of some of its recent accident data confirmed Liberty Mutual's finding regarding the existence of "falls" and "struck by objects" as major accident categories in the maritime environment. Accident figures for longshoring activities in the Port of New York (Ex. 29) during the first six months of 1980 revealed that out of a total of 1,256 reported accidents, 289 were attributed to "slips, trips and falls," and 119 consisted of instances where employees were struck by falling cargo. Moreover, another 247 accidents occurred as a result of employees being struck by or against drafts, or by other objects being handled. Another major source of injury was operation of mobile equipment (168 accidents). Additionally foot injuries (122) represented almost 10 percent of the total number of injuries for this six-month period (Ex. 29). An OSHA survey of the West Coast accident experience for marine cargo handling operations during this same period found that out of a total of 2,643 reported accidents, falls accounted for 684 injuries and "struck by or against" accidents numbered 711. Injuries associated with the operation of mobile equipment totaled 204, while foot injuries (348) formed 13.2 percent of the total West Coast accident figure (Ex. 30).

Another way the Agency chose to focus on the major sources of maritime accidents for rulemaking purposes was to examine the fatal maritime accidents reported to OSHA during the period July 1972–April 1980. A brief summary of ten of the more than 180 fatal accidents reviewed is provided below, along with a reference to the relevant provision in the proposal (Ex. 80–90).

New York, New York—December 1973

An employee inspecting a container gantry crane was thrown from his position atop a trolleying drum house, when the entire trolley apparatus traveled past the out reach stops of the crane. The employee struck the container spreader in his fall, and though quickly pulled from the water, never regained consciousness (See § 1918a.45(g)(6)).

Everett, Massachusetts—August 1974

A worker engaged in a welding operation adjacent to a set of large rollers was drawn into an eight inch space between the rollers and was crushed. No provision had been made to lock out the electric power that activiated this equipment. The power was accidentally turned on, resulting in this employee's death (See § 1918a.151(b)(7)).

Tampa, Florida—May 1975

An employee suffocated in tons of citrus pellets, when he attempted to clear the flow of a jam within a silo without benefit of a safety harness and lifeline. The jam suddenly cleared and the worker was swept under twenty feet of the bulk cargo. On the sport rescuers were helpless and watched him disappear under the cargo (See § 1918a.49(i)(3)).

Miami, Florida—September, 1975

A terminal worker accidentally fell into an opening atop a hopper car filled with corn grain. the opening was unguarded, facilitating easy entry, and the employee died, asphyxiated by the cargo (See § 1918a.49(c)).

Port Newark, New Jersey—March, 1976

The driver of a large fork lift (stacker) struck a yard tractor at a cross aisle where visibility was obstructed by container stows. The driver of the yard tractor was operating on the wrong side of a two-lane thoroughfare (See § 1918a.44(d)) and neither driver was required to sound a warning or stop at the cross aisle, despite poor visibility (See § 1918a.43(b)(8) and § 1918a.44(e)). The driver of the yard tractor was thrown from his vehicle and killed.

Baltimore, Maryland—March, 1976

Two employees were killed and another seriously injured when two large rail mounted container gantry cranes were pushed down their tracks by strong winds. Wind warnings were issued prior to the accident. There were intermittent gusts of 40 and 50 mph throughout the four hour period prior to the accident. Audible wind warning alarms had been made inoperable. No policy existed at the port for discontinuing operations at a specific wind velocity. The cranes were swept off the end of the apron and into the adjacent waters (See § 1918a.45(g)).

San Juan, Puerto Rico—October, 1976

A checker was crushed to death when a yard tractor driver accidentally hit the tractor's accelerator pedal. The checker was noting marks at the rear of a mounted container that was in a truck line. The yard tractor that struck him was waiting immediately behind the container (See § 1918a.71(i)).

San Juan, Puerto Rico—March, 1977

While containers were being unloaded from a vessel by a crane the crane's cargo fall broke and a loaded container fell striking three longshoremen below. The crane had exceeded its operable rating and the container was overloaded (See § 1918a.45(b)(2) and § 1918a.71(f)).

St. Louis, Missouri—February, 1980

A terminal worker was killed when he fell 6 feet from an unguarded platform above a hopper. The employee was controlling the flow of fertilizer through

the hopper when he lost his balance and fell over the open edge (See § 1918a.49(b)).

Port Elizabeth, New Jersey—June, 1980

Three rail mounted container gantry cranes were swept down their tracks by high winds. weather alerts and high wind warnings were issued as early as four hours before the incident. Upon investigation, the Agency learned that much of the equipment needed to secure the cranes had fallen into disrepair and was not serviceable (See § 1918a.45(g)).

As noted above, these accidents form only a fraction of the accident data surveyed and represent only a small protion of the hazards that this proposal addresses. However, it is possible that OSHA may not have surveyed all the relevent classes of accidents that occur at marine terminals, and therefore may not have provided protection in the proposal from all major hazards present at a terminal. OSHA is therefore solicitous of any accident information relevant to the hazards found at a terminal especially if it relates to one of the provisions in the proposed standard.

The available data on accidents and injuries in marine terminals indicate that terminal employees are exposed to a significant risk of injury in the workplace. OSHA therefore believes that a marine terminal standard is reasonably necessary for the protection of these employees from a wide range of workplace hazards.

(A) Vertical vs. Horizontal Standards

This proposed marine terminal standard is drafted in a format that will allow it to stand by itself, i.e., to be a "vertical" standard (one that applies to this industry exclusively and in lieu of any other OSHA standard); in a few areas of coverage specified in the proposal's scope section, OSHA's general industry standards are incorporated by reference. In general, vertical standards encourage voluntary compliance because they are directed to the particular problems of the industry, and because they only contain provisions that are appropriate to the industry in question. On the other hand, since many industries covered by OSHA do in fact use the same or similar equipment and processes, and therefore have employees who are exposed to the same hazards, it is usually a more efficient use of the Agency's resources to develop "horizontal" standards (those applying to more than one industry). It is also more efficient to train field personnel in general safety programs tailored to the horizontal general industry standards than to train field staff in individual programs designed for specific industries.

The Standards Advisory Committee discussed the merits of vertical versus horizontal standards at some length. The committee recommended that some provisions of OSHA's general industry standards continue to apply in marine terminals, but the group also recommended that a vertical standard be written to apply to those aspects "that are unique to Marine Terminal Facilities" (Ex. 2:ia). However, OSHA has subsequently received several letters (Ex. 58), many from former members of the SAC, urging the Agency to adopt a predominantly vertical marine terminal standard and testifying to the difficulty and confusion associated with trying to comply with two sets of standards (Parts 1910 and 1918).

In many respects, marine cargo handling is a single operation, despite the fact that it has both ashore and afloat segments. Both segments of the marine cargo-handling industry employ longshoremen, both use many of the same types of equipment, and both require many of the same operational procedures. The line between cargo handling aboard a vessel and such work ashore has traditionally and for regulatory purposes been drawn "at the foot of the gangway." In practice, however, loading or discharging cargo from a vessel is one continuous operation which cannot logically be divided into two distinct functions. For example, regardless of whether fork lifts are used in the hold of a ship or inside a terminal, whether ship's gear or house fall gear is used to hoist cargo, or whether vessel cranes or shore cranes perform the lift, the tasks to be done, the hazards to be addressed, the workers involved, and the type of equipment to be used are essentially the same. The fact that cargo handlers involved in both shipside and shoreside aspects of the operation use the same distinctive terms, such as dunnage, burtoning gear, recoopering, stowage, and apron, attests to the common tradition and the unitary nature of the marine cargo-handling industry.

Despite this commonality, however, there are substantial differences between the work environments of longshoremen on board ship and those working ashore. For example, shipboard conditions vary greatly among particular ships, and the restricted spaces and close clearances typical of work aboard ship exacerbate many of the hazards commonly associated with cargo-handling. The equipment and machinery used to handle cargo aboard ship also differ somewhat from those used ashore. For example, vessel cranes and hoisting gear ususally have lower rated capacities than their shore-based counterparts. In addition, there are significantly fewer powered industrial trucks aboard ships than in terminals. Further, certain equipment frequently used in cargo-handling at marine terminals, such as railcars, conveyors, chutes, and hoppers, is not found aboard vessels. These differences in shipboard and shoreside work environments are substantial enough to warrant careful consideration of the hazards unique to each aspect of the industry and have led OSHA to propose this marine terminal standard as a document distinct from, but complementary to, the Agency's longshoring standard. Ultimately, appropriate changes in part 1918 will be proposed to make it consistent with the marine terminal standard.

The entire marine cargo-handling environment, both shipside and shoreside, is also unique in several respects, especially in comparison to other industries. For example, longshoremen must continually work in the harsh environment of the waterfront, which requires exposure both to work-related hazards, such as falling cargo, and to environmental hazards, such as drowning and working around machinery in high winds. Additionally, dock workers perform some of the same high-hazard tasks, and confront many of the same heavy-industry hazards, as those typically associated with the construction industry. Examples of such hazards include falls, crushing and caught-in injuries, and traffic accidents, which are common in container terminals. Cargo handling and construction work are also both seasonal and weather-dependent, and both industries have a high proportion of part-time and transient employees. Longshoremen are also likely to be exposed more frequently and often for longer periods to certain hazardous work situations, such as work in restricted spaces and hazardous atmospheres, than would be the case for many workers in general industry. The excessive occupational injury and illness incidence for the marine cargo-handling industry, more than twice the national private sector average, testifies to the hazardous nature of longshoring (Ex.18: 62, 69). The Hazard section of the preamble above, describes in greater detail the accidents and injuries to which longshoremen are subject.

After careful consideration of the advantages and disadvantages of vertical and horizontal standards,

OSHA had decided to propose a vertical standard for this high-hazard and large-workforce industry. The Agency believes that only this type of regulation will eliminate redundant and conflicting coverage, reduce the confusion caused by the existing dual coverage, be tailored specifically to the unique problems of marine terminals, and address adequately the hazards peculiar to this industry. OSHA also has a vertical standard for the consrtuction industry (29 CFR part 1926), another particularly hazardous industry with a large workforce (the average occupational injury and illness incidence per 100 full-time construction workers is nearly twice the average for workers in the private sector as a whole).

Proposed Part 1918a references those provisions of Part 1910 that would continue to apply to shoreside cargo handling, but is otherwise self-contained in its coverage of marine terminals.

OSHA particularly welcomes comments both as to the merits and the limitations of a vertical standard for marine terminals. In addition, OSHA would appreciate information about the appropriateness of developing detailed coverage under the vertical marine terminal standard for certain operations and types of equipment, such as abrasive blasting and scaffolds, which under this proposal would continue to be covered under the general industry standards.

(B) Performance vs. Specification Standards

Another issue raised during the development of this proposal concerned performances versus specification standards. A performance-based standard identifies a hazard and the level of control required to protect against the hazard, without specifying the precise means of achieving such control, while a specification standard stipulates design and construction crietria to be met to achieve a particular safety objective. For example, a specification standard often requires specific sizes, materials, or types of equipment, and thus allows little or no variation or innovation. OSHA has received many comments in the past about standards that have forced employers to move, retrofit, or replace existing equipment in order to comply with an inflexible specification requirement. This lack of flexibility fails to take the adequacy of many existing facilities into account and discourages design and use innovations. Although enforceability is enhanced by specification standards, they may be unduly restrictive; on the other hand, a performance standard may be too broad to be meaningful. The present general industry standards (29 CFR Part 1910) are primarily specification standards, while the longshoring standards (29 CFR Part 1918) take a predominantly performance approach.

In keeping with OSHA's commitment to clarity, brevity, flexibility, and practicality, and to encourage employers to comply voluntarily, this marine terminal proposal has adopted the performance approach except in those cases in which employee safety would be enhanced by more specific requirements. OSHA has followed this approach in other recent standards (see Fire Protection final rule, 45 FR 60656, September 12, 1980). The Agency is interested in receiving substantive comments from persons who feel that certain of the proposed provisions would benefit either from a greater degree of specification or from a more goal-oriented approach.

(1) *Review of general industry standards for marine terminal applicability.*

The shift in emphasis from specification to performance-based standards, coupled with the Agency's earlier decision to establish a vertical standard for this industry, made it necessary to review the requirements of Part 1910 for applicability to marine terminals. After an extensive examination of the pertinent provisions of Part 1910, OSHA decided that it would not be appropriate to include a large number of these provisions in the marine terminal proposal. The guidelines used to determine which general industry rules to exclude are explained below.

Among the types of provisions in Part 1910 that OSHA chose not to propose for marine terminal application where those directed primarily at the manufacturer (design or construction specifications), and other rules of Part 1910 addressed to industrial or environmental conditions not present at marine terminals. Also, regulatory actions taken in the past by the United States Coast Guard as to certain working conditions in the area of waterfront safety preempt the Agency from exercising its authority as to these working conditions under § 4(b)(1) of the Act.

Pursuant to its statutory mandate under the Port and Waterways Safety Act (33 U.S.C. § 1221 et seq.) to provide rules for the promotion of waterfront safety, the Coast Guard promulgated a series of regulations that set out in detail the practices to be observed by employers to protect against the hazards of fire (see 33 CFR Part 126). Since the Coast Guard has already taken regulatory action as to these working conditions affecting safety and health in which it possesses primary statutory authority, OSHA cannot also regulate in the area. Section 4(b)(1) of the Occupational Safety and Health Act (29 U.S.C. 653(b)(1)) provides that nothing in the Act "shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Accordingly, OSHA's general industry fire protection regulations at Subpart L of Part 1910 could not be incorporated into this proposal.

It should be noted that the Coast Guard issued an advance notice of proposed rulemaking (43 FR 15108) on April 10, 1978, which outlined plans to significantly expand and update the Coast Guard's coverage of fire protection on the waterfront. When the Coast Guard has proposed and then promulgated these fire protection rules, they will apply in marine terminals and will further enhance employee safety.

Many provisions of Part 1910 could not be adopted in this proposal, for practical reasons. Provisions from the general industry standards that deal with equipment or processes not used at marine terminals are not included. For example, § 1910.213 requires that employers provide guarding on a large variety of woodworking machinery. However, many of the machines covered by this section, such as jointers, tenoning machines and veneer cutters, are not found at marine terminals, and therefore do not need to be addressed by this proposal. Consequently, OSHA saw no need to include paragraphs (j) through (q) of § 1910.213 in the proposed standard. In addition, certain provisions on spray painting in the general industry standard, such as the rules covering use of electrostatic hand spraying equipment (§ 1910.107(i)) and the use of drying, curing or fusion units (§ 1910.107(j)), were not made part of this proposal because these types of spray painting equipment are not found at marine terminals. Further, three parts of paragraph (f)(2) of § 1910.184 were left out of the proposal, since the slings and grommets covered are to small to be used in cargo handling operations at marine terminals.

Certain other specification provisions of the general industry standards were not adopted in the proposal because technological innovation has made them obsolete. For example, § 1910.184(h)(3)(ii), which sets the

requisite number of tucks for eye splices made in synthetic rope, has not been adopted because the production of new types of synthetic rope has made these requirements outdated. The provisions of this general industry rule can only be applied safely to those few types of synthetic rope specifically addressed by this rule, because the properties of the new varieties of synthetic rope on the market differ from those of the types of rope covered in § 1910.184(h)(3)(ii). Due to such technological advances in the manufacture of synthetic rope, OSHA believes that the rope manufacturer's recommendations provide a greater measure of safety than the general industry requirement, and the marine terminal proposal therefore mandates the use of these recommendations. Additionally, the Agency has decided not to include the tables from § 1910.184 listing the rated lifting capacities of wire and fiber rope (see Tables N–184–3, to N–184–10; N–184–16 to N–184–19). Again, these tables only contain ratings for certain types of wire and fiber rope. They do not cover new types of wire and fiber rope developed since the standard was promulgated.

The number of outdated provisions of Part 1910 that are not being proposed for marine terminals is small in comparison to the number of provisions not included in the proposal because they are design or contruction specifications. In their place, OSHA has proposed performance standards aimed at providing equivalent safety but simultaneously providing the employer with greater flexibility in choosing means of compliance. Several examples of the use of performance standards in place of design or specification requirements are included in the proposal's section on machine guarding, § 1918a.151. For instance, the proposal does not include the general industry design description of hoods and spreaders for hand-fed ripsaws (§ 1910.213(c)(1) and (2)). Instead, though the proposal specifically requires hoods and spreaders, it also contains a general performance rule requiring the employer to ensure that these saws are guarded to keep employees clear of any danger zone (§ 1918a.151(b)(1); (c)(1) and (2)).

Similarly, the marine terminal proposal does not incorporate the lengthy general industry requirements governing the use of certain types of powered industrial trucks in hazardous atmospheres. Instead the proposed standard provides that work in a hazardous atmosphere be performed only by powered industrial trucks approved by a nationally recognized testing laboratory for use in that atmosphere (compare § 1910.178(b) with § 1918a.43(d)). The rigid general industry specification covering construction of ladder cages has been replaced by a proposed provision that simply states that cages be of rigid construction to prevent an employee from falling through or dislodging the cage (compare § 1910.27(d)(1)(i) with § 1918a.119(e)(5)(i). Another example of substituting performance rules for specification standards concerns strength requirements for guardrails. Section 1910.23 contains specific measurements that wood, pipe and structural steel stair railings must meet to comply with the standard, while the proposal simply states that a stair railing must be capable of withstanding a force of at least 200 pounds applied in any direction (compare § 1910.23(e)(3)(i) through (iii) with § 1918a.112(e)(1)).

The preceding examples of general industry provisions that are not included in this proposed standard do not comprise an exhaustive list of the provisions that have not been incorporated in this proposal for marine terminals. However, OSHA believes this discussion and these examples will illustrate the principles which were followed in reviewing Part 1910 provisions for applicability in the marine terminal environment.

In general, the format and substance of this proposal reflect OSHA's efforts to eliminate needless regulations and to simplify and update others. To achieve these goals with regard to this proposed standard, OSHA has adopted a performance approach to drafting new rules and to revising existing ones. Staff review of Part 1910 convinced the Agency that many general industry provisions could be left out of the marine terminal proposal without reducing the level of protection now provided to longshoremen by these rules. Furthermore, OSHA believes that some of the lengthy, detailed and complex specification-based general industry regulations can be greatly simplified by substituting performance language for existing provisions. By not including some Part 1910 provisions and by modifying others, the Agency has sought both to streamline and to strengthen the safety requirements proposed for marine terminals. Where provisions from the general industry standards have been judged appropriate and applicable to the marine terminal environment they have been adapted to meet the marine terminal industry's specific safety and health requirements.

Certain sections of this proposed standard, such as those pertaining to cranes, have also been based principally on provisions in 29 CFR Part 1918 (longshoring), while other requirements, such as those for welding, have been based primarily on related provisions of 29 CFR Part 1915 (Ship Repairing), Part 1916 (Shipbuilding), and Part 1917 (Shipbreaking); these standards, and certain provisions of the ANSI MH9.1 consensus standard, were used as the basis for certain provisions of the proposal because they were more specifically directed at the hazards of this industry than were the relevant requirements of the general industry standards.

Intersted parties are requested to submit any information related to the coverage of this proposed marine terminal standard. For example, are specific hazards adequately addressed in the proposal? Are dock workers exposed to safety and health hazards which this proposal does not cover? Have extraneous provisions been included in the proposal? Are there any areas of general industry coverage that have not been included in the proposal that should be? OSHA would particularly appreciate information on these issues.

Although many proposed requirements are based on provisions of the longshoring standard (Part 1918), they may vary somewhat in content or language from the parallel longshoring requirements because the longshoring rules have not been updated or substantively revised since 1971. However, OSHA intends to revise these rules in the near future. After the marine terminal standard (Part 1918a) is promulgated as a final rule and revisions to the longshoring standard (Part 1918) have been proposed and promulgated, employers and employees will be able to turn to these parallel standards to find compatible provisions applicable to the ashore and afloat segments of the marine cargo-handling industry.

V. Summary and Explanation of the Proposal

Section 1918a.1 Scope and applicability. Proposed § 1918a.1 outlines the scope and applicability of the marine terminal proposal, Part 1918a. The proposed standard would apply to container, menhaden, roll-on—roll-off, LPG, LNG, general cargo, and liquid and dry bulk terminals, including those at ocean ports and facilities located on the inland waterways. It would also apply to areas devoted entirely to the storage and handling of bulk liquids, such as petroleum, wine, coconut oil, castor oil, or paraffin, or associated packaged liquid products or gases such as drums of lubricating oil or compressed gas cylinders. The proposal

contains no additional provisions directed solely at operations in grain elevator terminals, although such terminals would be covered by an applicable provisions, such as those for electrical equipment and power trucks, of this marine terminal standard after it has been proposed and promulgated. OSHA is currently developing a proposed general industry safety and health regulation for grain-handling facilities. Applicable provisions of the general industry grain-handling standard are expected to be proposed for inclusion in these marine terminal regulations in the future.

The proposed standard would not apply to construction activities at marine terminals, which are regulated under the Agency's construction safety and health regulations (29 CFR Part 1926).

In addition, pursuant to § 4(b)(1) of the Act (84 Stat. 1952, 29 U.S.C. 653), the proposed standard would not apply to working conditions of employees in marine terminals with respect to which the United States Coast Guard or the Office of Pipeline Safety Regulation of the Materials Transportation Bureau, Department of Transportation exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. The Office of Pipeline Safety has responsibility for regulating safety and health matters relating to interstate pipelines, while the Coast Guard has traditionally had the responsibility in marine terminals for maintaining port security (including fire protection and such operations as welding and hot work) under 33 CFR Part 126; for the handling and storage of hazardous materials as defined in 49 CFR Part 172; and the handling of explosives and dangerous commodities, under 46 CFR Part 146. Among facilities designated in the Coast Guard regulations (33 CFR Part 126) are the 15 liquid petroleum gas (LPG) and liquid natural gas (LNG) terminals presently in operation in the United States.

Certain subparts and provisions of OSHA'a general industry standards (29 CFR Part 1910) would remain in effect in a marine terminal facility after the final marine terminal standard is published as a vertical standard. OSHA's electrical safety and health regulations for general industry (Subpart S) would continue in effect in marine terminals after promulgation of a final marine terminal standard, as would the Agency's noise standard (§ 1910.95). Where referenced in the marine terminal code, the toxic and hazardous substances rules for general industry, Subpart Z, also would apply. Similarly, any commercial divers performing minor inspection, salvage, or repair tasks at marine terminals, such as voyage repairs or piling inspections, would continue to be covered under OSHA's safety and health regulations for commercial diving operations (Subpart T).

In addition, as proposed paragraph (a)(2)(v) states, the scaffold section of the general industry standards (§ 1910.28) would continue to apply in marine terminals. A recent statistical estimate suggests that as many as 32,000 work-related falls from scaffolds occur each year in the United States (Ex. 59: Table 1). Although it is not possible to separate these data into marine terminal as opposed to general industry and construction cases, some of these injuries undoubtedly occurred in marine terminals. Although scaffolds are not used frequently in terminals, they are occasionally needed to perform minor repair tasks or chores such as window washing. At present, OSHA is developing construction and general industry rules for scaffolds, in connection with the Agency's planned overall revision of the walking and working surface standards in Subpart D of Part 1910 and Subparts L and M of Part 1926. The Agency intends to evaluate data and comments on scaffolds received in the course of that rulemaking, and information obtained in response to this marine terminal proposal, to determine appropriate requirements for scaffolds used in marine terminals. Provisions determined to be suitable to protect employees working on scaffolds in marine terminals would then be proposed for inclusion in the marine terminal standard.

OSHA particularly welcomes comment on the suitability of the current general industry scaffold standards (§ 1910.28), which are presently being applied, for the marine terminal environment. For example, are all of the types of scaffolds covered in Part 1910 used in terminals? What tasks are commonly performed on a scaffold in a terminal? Do terminal employees perform these jobs, or does the terminal owner usually contract such work out? What are the heights at which scaffolds are positioned? What types of fall protection do workers in a terminal use when on a scaffold? In addition, OSHA is interested in receiving any case reports or injury statistics related to marine terminal accidents involving the use of scaffolds.

Proposed paragraph (a)(2)(vi) proposes that abrasive blasting operations conducted in marine terminals also continue to be covered by the relevant requirements of the general industry standards (§ 1910.94(a)). As with scaffolds, OSHA is interested in receiving comment on the appropriateness of this coverage to the marine terminal situation. The Agency is aware that most terminals do not perform abrasive blasting; however, this process is performed in some terminals to prepare surfaces for spray painting or other treatment. Employees exposed to abrasive blasting inhale respirable particles of the sand or material used as the abrasive and the material being blasted, and are at risk of developing silicosis or other pneumoconiotic diseases as a result of this exposure. For example, if a mineral grit, such as "Black Beauty," a by-product of copper smelting, is used as the abrasive agent, chromium and beryllium dust and fumes are released, exposing workers in the vicinity to the toxic fumes of these metals. OSHA has issued a field directive requiring atmospheric monitoring when Black Beauty is used as the abrasive agent (Ex. 62).

OSHA is presently revising the general industry abrasive blasting standards, and comment received in the course of that rulemaking, in addition to information obtained in response to this marine terminal proposal, will be evaluated for suitability of application to marine terminals. Provisions determined to be appropriate to abrasive blasting operations in this environment would then be proposed for inclusion in the final marine terminal standard. OSHA invites comment on the adequacy and appropriateness of the current general industry abrasive blasting rules (§ 1910.94(a)) for marine terminals. The Agency would also welcome data on the number of marine terminal abrasive blasting operations, the size of the affected workforce, the abrasives used, and the composition of the materials most commonly blasted. In addition, any information on abrasive blasting-related occupational illness and disease among marine terminal wokers would help OSHA to develop this section of the final rule.

Section 1918a.2 Definitions. Section 1918a.2 includes definitions of terms used in more than one section of the standard; terms used only once are defined where they appear in the text. As defined, the term marine terminals would not include manufacturing and production operations which have their own docking facilities and are located within the marine terminal area. Examples of such operations are sugar refining plants, cement plants and

smelters. These facilities are principally concerned with manufacturing rather than cargo handling, and would therefore continue to be regulated under the general industry rather than the marine terminal standards.

In keeping with OSHA's shift to performance language to encourage voluntary compliance and to permit greater flexibility, the proposal applies the "danger zone" concept to the guarding of conveyors (see § 1918a.48) and machines (see § 1918a.151). As defined in the proposal, a danger zone is any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.

OSHA has adopted the danger zone approach in preference to including individual provisions requiring guarding for each type of hazard, e.g., nip points, shear lines, gears, sprockets, and transfer mechanisms. The difficulty with attempting to specify every hazardous part or area is that some hazards may be overlooked in the standard, leaving a gap in employee protection. An advantage of using the danger zone concept is that it permits employers to use their judgment about which machine parts or areas at or near a machine do in fact expose employees to workplace hazards. For example, although an unguarded nip point near an employee's work station presents a significant caught-in hazard, a nip point located 10 feet above the working surface presents no such hazard. Similarly, the unguarded edge of a belt conveyor at which, for example, assembly workers are stationed would constitute a danger zone, while an edge on an unattended overland conveyor would not present a hazard to employees.

OSHA welcomes comments on this proposed danger zone concept. For example, does it cover all the hazards associated with moving machine parts and conveyors? Are there individual hazards that should be addressed separately in the proposal?

Subpart B—Marine Terminal Operations

Section 1918a.11 Housekeeping. Subpart B deals with characteristic operations associated with marine terminals, such as cargo handling, line handling, and work in hazardous atmospheres.

Section 1918a.11(a) contains general housekeeping provisions that are based essentially on requirements in § 1918.91 and on sections 3.1.12 and 3.1.13 of ANSI MH9.1 and which accord with SAC recommendations (Ex. 2: 13i) on this topic. The provisions in this section are designed to prevent tripping and falling accidents, injuries caused by sharp objects such as nails, and struck-by accidents caused by falling objects. Paragraph (b) is similar to § 1918.43(a)(1) and is included because some vessels still use hatch beams and covers, and this equipment is occasionally placed ashore in the terminal. Proposed paragraph (c) is a housekeeping precaution that is designed to ensure that employees have unobstructed access to vehicles, buildings, and vessels at all times.

Section 1918a.12 Slippery conditions. Section 1918a.12 contains a performance requirement stipulating that employers eliminate walking-and-working surface hazards at work stations and walkways, both inside and outside the terminal's structures. Examples of these hazards are slippery floors caused by spilled liquids or by oil leaking from equipment, and icy surfaces on piers or aprons. Means of eliminating these hazards might include applying sawdust or other absorbent material to the slippery area, cleaning up spills entirely, or applying sand or salt. ANSI MH9.1 (section 3.1.16) is more detailed in its coverage of this topic than the proposed requirement, which uses a more performance-based approach. The proposed provision's language reflects the fact that weather conditions, for example, may make it impossible for an employer to keep all terminal walking and working surfaces completely slip-free at all times. This would be particularly difficult to accomplish in outdoor areas exposed to the marine environment. However, since recent estimates (Ex. 59: Table 1) indicate that falls on the same level account for approximately 9% of all occupational injuries, the importance of efforts to eliminate slip and fall hazards cannot be overemphasized.

Section 1918a.13 Slinging. Slinging cargo is addressed in proposed § 1918a.13, and the provisions are based essentially on equivalent regulations in Part 1918 and section 8.3.1 of the MH9.1. Paragraph (a) is based on §§ 1918.82(a) and 1918.81(a), and requires that drafts (loads of cargo) be built or hoisted in a way that will prevent the cargo from falling during hoisting; particular ways of achieving this goal are not specified. The proposed provision also stipulates that drafts be safely slung before hoisting, and that any loose protruding pieces be removed to prevent employee injury. Examples of means that might be used to comply are restraining logs in bunks and banding or tying the topmost tier of the draft. Methods of hoisting that reduce the risk of the draft slipping during the lift are, for example, lifting the draft squarely in the middle of the draft, and taking care not to "jerk" the winch mechanism. This provision is not intended to apply to the preliminary hoisting of cargo, such as the small amount of lifting involved in "breaking out" (hoisting cargo a few inches to allow slings or other gear to be passed under the load).

Proposed paragraph (b), based on § 1918.81(e), allows baled cargo to be lifted by straps only if the straps are strong enough to support the weight of the bale and only if a minimum of two hooks, each placed in a separate strap, is used to provide an additional safety factor should a band or strap break or a hook disengage during hoisting.

In paragraph (c), OSHA is proposing a newly developed provision restricting the means of hoisting bundles of certain types of cargo. For example, some types of cargo, such as pig iron, dunnage, or copper ingots, should not be hoisted by straps that are not intended for hoisting use; unless the bands, straps, or ties are designed for hoisting and are strong enough to support the load, a means such as slings must be used to contain these loads during hoisting.

Proposed paragraph (d) is also a newly developed provision, and it deals with the hazards associated with hoisting unitized loads, which have come into widespread use in the last decade. Finished lumber, bales of wood pulp, and paper products bound together are among the drafts most commonly unitized. The handling gear for hoisting these often bulky and heavy loads is usually specifically designed for the load in question. However, in the absence of any regulatory requirement, OSHA and its predecessor agency (and several agencies of foreign governments) have occasionally determined that the particular means of unitization and handling are safe by witnessing an on-site trial deliberately conducted under adverse working conditions. In such cases, approval has been granted on an individual basis. The provisions proposed in paragraph (e) simply place these procedures on a firmer regulatory basis. The testing process must be certified by an agency accredited under Part 1919, to ensure impartiality. The provisions in paragraph (e) do not require that each load or unit from a shipment be tested, but they are intended to apply to particular types of unitized loads and to a particular means of handling them. The suitability and

safety of each type of load and each means of hoisting would only need to be established and documented once.

Proposed paragraph (f) stipulates that unitized loads with seriously damaged banding or strapping be handled by whatever special and additional means, such as slings, may be necessary to ensure the safety of employees below.

Paragraph (g) proposes that case hooks only be used to hoist cases specifically intended to be used with these hooks. This rule is not intended to prohibit "breaking out" of cargo, i.e., lifting it a few inches to pass slings or other gear beneath the load, but is intended to guard against accidents that may occur if types of packaging unsuited to handling with case hooks are hoisted by this means. Cases intended for handling with hooks have stencilled marks indicating where the hooks are to go, and these cases are intended to be used for one lift only. A similar provision is found in § 1918.81(d).

Proposed paragraph (h) is based on § 1918.81(f) and requires that ropes (tag lines) be used to guide loads requiring manual guidance, to prevent the load from injuring employees. This provision would only apply to special types of lifts, for example hoisting a 30-foot-long crate that must be maneuvered with ropes to keep it from striking against a structure and breaking. The provision also stipulates that any guide ropes used be long enough to aid in directing the load.

Paragraph (i) is a cross-reference to a proposed provision covering the handling of intermodal containers.

Section 1918a.14 Stacking of cargo and pallets. Proposed § 1918a.14 stipulates that cargo and pallets stacked in tiers be placed so they will not slide or collapse; MH9.1 contains a similar requirement (section 4.2.9.5); the equivalent provision for shipboard application appears at § 1918.83(a) but is restricted to cargo because pallets stacked high enough to be a hazard are rarely found on board ship. The proposed provision essentially agrees with the recommendation of the SAC (Ex. 2: 83i); it is not intended to imply that cargo or pallets need to be stacked so securely that they will be able to withstand a major impact, such as being hit by a vehicle.

Section 1918a.15 Coopering. The proposed section on repair of damaged or leaking cargo packaging (coopering) (§ 1918a.15) provides that packaging repair activities be performed in a manner that is not hazardous to coopering employees, but it does not restrict this work to particular locations because it is not always possible to move damaged cargo to a special repair site. Examples of cargo and cargo packaging which would be difficult or impossible to move to a special repair area are sacks of coffee beans and barrels of nails. The proposed requirement does not prohibit coopering in place as long as the employees doing the repair work are not exposed to vehicle traffic, overhead loads, or other hazards.

Section 1918a.16 Line handling. Section 1918a.16 covers line handling, a topic also addressed by ANSI MH9.1 (section 3.14). The proposed provisions ensure a safe walkway for linemen required to handle heavy mooring lines along the water edge of the terminal area, and in cases where the walkway between the vessel's berth and a terminal structure (stringpiece or apron) is too narrow, the proposal requires a grab rail or grab line for linemen to grasp. Another provision directed at the same hazard, falling into the water and drowning, appears at proposed § 1918a.95(c).

Section 1918a.17 Railroad facilities. Railroad facilities and operations at marine terminals are addressed in § 1918a.17; no other OSHA standard specifically covers these facilities, although section 3.12.3 of MH9.1 does. Proposed paragraph (a) prohibits employees working in a railcar that has a defective and unsafe floor; if the floor is rusted out or otherwise unsafe, a steel plate or other means of supplemental flooring would have to be supplied before work continues.

Proposed paragraph (b) is intended to avoid the injuries that might occur if employees walk between or climb through railcars on the way to or from their work stations; section 3.12.4 of ANSI MH9.1 addresses the same hazard. This provision does not apply to walking between standing railcars that are more than 10 feet apart on the same track, because OSHA believes this distance is sufficient to ensure that no employee will be caught between two cars if one of the cars moves. OSHA would welcome accident data or other information concerning the adequacy of this distance for employee protection.

Paragraph (c) ensures that no employees are accidentally left in a railcar at the close of works; a similar provision appears at section 3.12.5 of ANSI MH9.1. For example, an employee cleaning a tank car may accidentally be locked up in the car overnight, with the tank secured, and be killed by toxic fumes or lack of oxygen.

Accidental railcar movement is addressed in proposed paragraph (d), and the provision agrees essentially with section 3.12.6 of ANSI MH9.1. Inadvertent movement of a car could injure employees working in or around the car; an example of means of preventing railcar movement is chocks.

The Advisory Committee recommended (Ex. 2: 51i) a "blue flag" requirement (a warning flag placed to notify railcar operators that men are working between two cars). OSHA has adopted this recommendation, although the color of the warning flag is not specified, in proposed paragraph (e) because workers in, on, or under a railcar are exposed to serious injury if an engine or car hits the car in which they are working. OSHA welcomes data about the hazards of working in this situation and information about other alternate means, such as derails, which might be used to provide equivalent protection against this hazard.

The next proposed provision, paragraph (f), requires material protruding from railcars to be removed or repositioned before cars are moved, to prevent projections from hitting employees walking or working near the cars.

In paragraph (g), OSHA addresses the potential for injury associated with the uncontrolled and unanticipated movement of unpowered railcars (a practice colloquially known as "humping" railcars) in areas where employees are walking, driving, or working. The proposed provision is not intended to apply to railcars being moved by locomotives, car pullers, winches or by other controlled and suitable means or to prohibit car-dumping operations in a bulk terminal. The requirement would apply, however, when a shift engine is used to push a railcar and then stops, sending the car rolling down the track. The SAC committee made two recommendations on this matter (Ex. 2: 52i): That only "positive means" be used to move unpowered cars, and that railcars without engines not be moved unless "provisions are made to safely control the movement. . . ." The proposed requirement incorporates these suggestions and would provide the employee protection envisaged by these recommendations.

Freight car doors, addressed by proposed paragraphs (h), (i) and (j), may cause accidents. For example, damaged car doors may fall on workers trying to open them or a worker opening a car door may be crushed by a stream of cargo that has shifted against the door during transit. In addition, if the forks of a fork lift truck are used to pry open a car door, the wheels of the truck may become wedged between the railcar and the platform, or the door of the car may fall on the truck driver. Section 3.13 of ANSI MH9.1 prohibits using power

trucks to open or close jammed railcar doors, but OSHA believes that industrial trucks fitted with specially designed door-opening attachments can perform this operation safely. The proposal does stipulate, however, that power trucks that do not have such attachments may not be used to open jammed doors; in such cases, car door openers are required to be fitted to the doors of the car. Proposed paragraph (i) also requires drivers to stand clear while freight car doors are being opened, to avoid being hit by falling cargo. OSHA has issued an interpretation for general industry on the use of acceptable attachments for opening freight car doors (Ex. 25).

Proposed paragraph (k) requires that employees leave flat cars and gondolas when loads are being moved overhead; employees are needed in the railcars to do such things as hook up drafts and land and stow cargo, but having them leave the cars during actual overhead hoisting should prevent many serious crushing and falling injuries. Another provision of the proposal (§ 1918a.71(g)(2)) also prohibits standing or walking under suspended containers. Proposed paragraph (k) also requires the end gates on the railcar to be secured so that an employee leaning against a gate will not fall off the railcar.

In paragraph (l), OSHA is proposing a new provision that requires the operator of the railcar dump mechanism used in handling high-volume bulk cargo (such as coal) to have an unobstructed view of the cars being dumped, to avoid dumping cars that have employees in them or dumping material on employees working near the cars.

Proposed paragraph (m) requires hand switches that are recessed to be enclosed with a cover or other device to provide a level working surface for vehicles and employees engaged in cargo handling on the apron. Section 3.12 of MH9.1 recommends identical coverage.

Warning signs to protect employees from being hit by a railcar are addressed in proposed paragraphs (n) and (o). The first provision requires signs to give employes warning of potential railcar movement at such places as blind corners, doorways opening directly onto the tracks, or at any other place where an employee might accidentally step in front of a moving railcar because it is not possible to see the tracks adequately. ANSI MH9.1 addresses this potential hazard in a similar way in section 3.12.1.

Proposed paragraph (o) requires warning signs to alert employees of insufficient clearance (less than 2 feet) between a railcar and another object, structure or the water; this requirement would prevent an employee from being crushed or from falling into the water.

Section 1918a.18 Log handling. Section 1918a.18 covers log handling cargo operations; it is based on the Washington state standard (WAC 296–56–520, (Ex. 3:45)) and was developed with the assistance of the staff of the Washington Division of Safety, Department of Labor and Industries. Much of the cargo handled in Pacific Northwest ports consists of outbound logs, although other ports also handle cargo of this type. The SAC recommended adoption of the provisions in this section (Ex. 2:143i, 144i).

Paragraph (a) proposes that log containers (bunks) have rounded corners and parts to prevent damage to slings, which could, in turn, cause a load to fall. Proposed paragraph (b) requires that logs be prevented from rolling off the sides of vehicles and striking nearby employees; binders or lashings might be used for this purpose.

The next proposed provision, (c), stipulates that at least two slings (or other gear intended for the purpose) be used to handle logs to prevent them from sliding or slipping from the sling during hoisting. Proposed paragraph (d) prohibits stacking of more than one tier of logs, to prevent the hazard caused by spreading and rolling logs that have been improperly stacked. The same hazard is addressed by proposed paragraph (e), which requires that logs be adequately supported to prevent spreading during hoisting.

Section 1918a.19 Movement of barges and railcars. Section 1918a.19, which covers the movement of barges and railcars in marine terminal areas, is similar in intent to the requirements appearing at § 1918.84(c) and at section 3.12.8 of ANSI MH9.1. The proposed provision prohibits using runners and rigging from vessel cargo booms, cranes, derricks, or other unsuitable equipment to move barges or railcars, and parallels the protection against this hazard provided in the longshoring standard. The proposal, however, extends the prohibition to shore cranes and other shore-based equipment. The proposed requirement is intended to prevent the widespread practice of moving barges and cars by hooking them to the ship's cargo gear or to vessel or shore-based cranes, a practice which can lead to the crane capsizing because large and improper stresses are imposed on the boom at angles for which the equipment was not designed, or which may structurally damage the crane or derrick, causing subsequent failure.

Section 1918a.20 Interference with communications. Cargo handling is a complex operation requiring close cooperation and effective communication among supervisory personnel, operators, and other workers. Section 1918a.20 requires that high noise levels, such as those that might be caused by scaling the sides of vessels, not be permitted to interfere with the communication essential to safe cargo handling; this paragraph is based on a similar provision from § 1918.95(a).

Section 1918a.21 Open fires. A prohibition against any open fire in a marine terminal (§ 1918a.21) has been incorporated into the proposal on the recommendation of the SAC (Ex. 2:15i); some committee members felt that any open fire, including a fire in a drum and used to warm employees' hands, represented a significant safety hazard in the marine terminal environment. OSHA invites specific comment on fire hazards in terminals, to aid the Agency in preparing the final rule on this topic. For example, would restricting open fires to designated areas provide adequate employee protection against unwanted fires?

Section 1918a.22 Hazardous cargo. Section 1918a.22 deals with the subject of hazardous cargo, and is based on OSHA's general industry coverage of atmospheric contaminants, and the Coast Guard (Department of Transportation) Hazardous Materials Tables. As defined in proposed § 1918a.2(p), any substance covered in Subpart Z of OSHA's general industry rules or included in the Hazardous Materials Table or Hazardous Materials Regulations of the Coast Guard, Department of Transportation (49 CFR Part 172) would be considered hazardous cargo. In addition, any substance not specifically described by name in the table or regulations of 49 CFR Part 172 noted above, but which would be categorized as hazardous in 49 CFR Part 172, e.g., a combustible liquid or an explosive material, would also be considered hazardous cargo. This category of hazardous materials has been included in the proposal to ensure that hazardous chemicals and substances that were developed or determined to be hazardous after publication of the lists in Subpart Z and 49 CFR Part 172 will be handled in a manner that will protect employees from harmful exposure. The proliferation of new chemicals and combinations makes the inclusion of this additional safeguard essential.

It is important to note, however, that although any substance included in the proposed definition of "hazardous" has

the potential to cause harm, specific circumstances vary, depending on the toxicity of the substance involved, the duration of the exposure, and the susceptibility of the individual exposed. In the case of hazardous cargo moving in trade, these circumstances occur rarely and only by accident, because cargo of this type is contained in sealed and intact packaging, which prevents employee exposure entirely. It is only when such packaging leaks or breaks that hazardous exposures can occur. The precautions for handling hazardous cargo included in the proposal are intended to prevent such occurrences if at all possible and to protect employees from harmful effects when they do occasionally occur. Examples of such potentially hazardous cargo are chlorine, hydrochloric acid, asbestos and many other chemicals.

Proposed paragraph (a) requires the employer to determine the nature of the hazardous cargo to be handled and then to inform employees both of any potential hazards and special precautions required to handle the cargo and the proper methods for cleaning up any leaks or spills.

Proposed paragraph (b) requires that hazardous cargo be handled by methods that will prevent damage to the container, to minimize the risk of employee exposure. Examples of appropriate precautions might be nets or lashings.

Paragraph (c) proposes precautions to be taken to reduce exposure to hazardous substances that have leaked or spilled from containers. For example, if leaks or spills occur, employers are required to clear the danger area of personnel other than those engaged in the cleanup operations, to provide appropriate protective and cleanup equipment, and to instruct employees in the proper method of cleaning and disposing of the hazardous substance. The provisions in proposed § 1918a.22 are similar to provisions 8.2.1, 8.2.2., and 8.2.3 of ANSI MH9.1, and to material recommended by the SAC (Ex. 2:140i–141i).

Section 1918a.23 Hazardous atmospheres and substances. Proposed § 1918a.23, Hazardous atmospheres and substances, is designed to provide protection from atmospheric hazards which are not specifically addressed in other proposed sections. The Advisory Committee recommended (Ex. 2: 56i) that this section of the draft standard not be included in the proposal. Instead, the SAC recommended including a single section covering all hazardous atmospheres in confined spaces. This recommendation was not adopted because OSHA believes that atmospheric hazards should be addressed wherever they occur in the terminal environment, regardless of the type of space in which they occur. Accordingly, this proposed section is intended to apply to vehicles, tanks, rooms and other spaces, to contaminants such as the vast array of hazardous chemicals carried as marine cargo, and to oxygen-deficient atmospheres occurring in any marine terminal situation. The substances, types of terminals, and operations specifically excluded in paragraph (a) are addressed individually in other sections of the proposal.

In the final standard, OSHA is considering incorporating the requirements from proposed §§ 1918a.23, 1918a.24, and 1918a.25 into a single section covering all types of hazardous atmospheres found in marine terminals. This consolidation would eliminate many redundant provisions, and would appear to offer equivalent employee protection. OSHA welcomes comments on the advantages and disadvantages of covering hazardous atmospheres in a single, rather than in separate, sections.

Paragraph (b) is generally based on § 1918.86 of the maritime regulations, although it has been adapted to apply to shoreside conditions. It requires that any necessary testing to determine whether a hazardous atmosphere exists be conducted by a properly equipped person designated by the employer, and that records of test results be kept for a minimum of 30 days, in accordance with a SAC recommendation (Ex. 2: 56ii).

The proposed provision appearing at (c) stipulates that in situations where mechanical ventilation is required to maintain an adequate and safe atmosphere, atmospheric tests be conducted as often necessary to ensure that the atmosphere is below permissible levels for the chemical involved.

Paragraph (d) addresses entry into hazardous atmospheres. The proposed requirements specify that only a designated and properly equipped and instructed person be allowed to enter a hazardous atmosphere, which might be necessary in a rescue attempt or to clean up after a spill. This section of the proposal also requires that prepared and equipped standby observers monitor the activity of any employees in spaces containing hazardous atmospheres, and that no ignition sources be permitted in such spaces. The importanct of training both workers and standbys involved in entry and work in hazardous atmospheres cannot be overstated. Accidents in these situations are often fatal and multiple, involving both workers and rescuers (Ex. 24).

The requirements in proposed paragraph (d)(4) recognize that atmospheres containing oxygen levels of less than 19.5% are inadequater for performing hard work; humans breathing oxygen-deficient atmospheres are unable to perform strenuous exercise or even to sustain a moderate level of exertion. Cleaning a tank car in a terminal is an example of work in an atmosphere that might be oxygen-deficient. The proposed 19.5% level is consistent with Coast Guard requirements (Ex. 65). OSHA's existing maritime regulations (29 CFR Parts 1915, 1916, 1917, and 1918) allow a minimum of 16.5% oxygen, but these provisions are presently under review and will be changed in the near future.

Although proposed paragraph (e) addresses a subject, asbestos, already covered by Subpart Z of the general industry regulations (29 CFR Part 1910), the Advisory Committee recommended (Ex. 2: 132i) inclusion of a provision dealing with the proper method of cleaning asbestos spills, a suggestion with which OSHA concurs. In practice, asbestos-containing cargo is almost never moved in trade in anything but heavily protected, sealed and intact packaging. However, the proposed requirements would provide employee protection in the event of asbestos spills.

Section 1918a.24 Carbon monoxide. Section 1918a.24 addresses carbon monoxide, a common hazard which is also dealt with in § 1918.93(a) of the longshoring regulations and in ANSI MH9.1 (section 3.18). Proposed paragraph (a) specifieds maximum carbon monoxide levels of 50 ppm as a time-weighted average, with a 75 ppm ceiling level. These levels agree with those of the Coast Guard (46 CFR Section 35.70–20(d)), and OSHA general industry standards (Supart Z of Part 1910), but OSHA's existing longshoring regulations (§ 1918.93(a)) allow a 100 ppm ceiling; the Agency plans to propose reduction of this figure to 75 ppm when Part 1918 is revised in the near future.

Proposed paragraph (b) contains a performance requirement and is intended to provide worker protection while allowing employers to test at intervals determined by the particular situation. For example, most transit sheds and other similar structures in marine terminals have high ceilings and numerous openings, so that maintaining a safe atmosphere generally poses no difficulty. However, since many vehicles may operate in these spaces simultaneously and not all spaces have

good ventilation, the employer should be prepared to monitor such work areas. Refrigerated and similar confined spaces that have very limited natural ventilation would require almost constant testing and additional ventilation to protect employees adequately. Enclosed highway vehicles or railcars in which an operating internal combustion engine is working might also develop a sufficient carbon monoxide level to be hazardous to an employee working in the car. OSHA is particularly interested in receiving comments giving other examples of marine terminal work situations in which hazardous carbon monoxide levels occur.

Proposed paragraph (c) requires that only designated persons using NIOSH-certified carbon monoxide measuring instruments make these tests, to ensure accurate testing and interpretation of the results. The tests required in this section should be made in the specific area where employees are working, to avoid misleading results such as may occur when samples are drawn from sources distant from the employee exposure area. The last paragraph in this section specifies that records of all tests required in this section be maintained for 30 days.

Section 1918a.25 Fumigants, pesticides, insecticides, and hazardous preservatives. Section 1918a.25, Fumigants, pesticides, insecticides, and hazardous preservatives, is directed to the atmospheric contamination associated with the use of these substances. Cargo that is frequently fumigated includes grain, tobacco, cotton, and other agricultural products; exposure to fumigating agents may cause severe illness or even death, depending on the toxicity of the agent, the level of exposure, and the susceptibility of the individual exposed.

Proposed paragraph (a) states that employers must ensure that only equipped and designated employees enter a space if cargo has been stored, handled, or treated in the space with one of these substances.

Proposed paragraph (b) specifies that tests to determine concentrations of chemicals be appropriate for the specific hazard or hazards involved, be conducted by persons designated by the employer, and be performed as often as necessary to protect employees. The recordkeeping provision that applies to this section appears at proposed paragraph (c) and requires that records of tests be kept for a minimum of 30 days. Provision (d) stipulates that only designated persons be permitted to apply chemicals to cargo; the Environmental Protection Agency (EPA) and several state agencies presently require that persons applying fumigants have EPA or state approval, which would be deemed to meet this requirement.

Paragraph (e) makes clear that only designated persons who have been instructed about the hazard and the applicable precautions and who know how to use the appropriate protective and emergency equipment are permitted to enter a space containing a hazardous atmosphere; further, persons entering must be protected both by respiratory and emergency equipment meeting the requirements of Subpart E of this part, and equipped and prepared standby observers must monitor employee activity within the space.

In paragraph (f), OSHA proposes that danger signs identifying hazards and precautions and providing emergency treatment instructions be posted in any area in which a pesticide, fumigant or hazardous preservative has created a hazardous atmosphere. This proposed provision is in keeping with modern safety and health practices and OSHA's efforts to increase the level of employee awareness of specific workplace hazards.

Section 1918a.26 First aid and lifesaving facilities. Proposed § 1918a.26 treats the subject of first aid and lifesaving facilities and is based primarily on § 1918.96 of the longshoring regulations and section 8.10 of ANSI MH9.1. The SAC recommended that employers be required to "keep related records of occupational diseases" (Ex.2:156ai), a recommendation not adopted because OSHA's existing medical recordkeeping requirements (29 CFR Part 1904) are more specific and more comprehensive than those recommended by the Committee.

Paragraph (a) stipulates that employees be instructed to report all work-related injuries to their employers; this proposed provision is designed to improve on-site treatment of occupational injuries and accidents, and simultaneously to reduce worker morbidity and lost workdays in this high-hazard work environment. Accurate employee reporting also aids in increasing the responsiveness of accident prevention programs to particular workplace hazards.

In proposed paragraph (b), OSHA defines the employer's responsibilities to provide first aid; the requirement is based on § 1918.96(a) of the longshoring regulations and is more extensive than the parallel general industry provisions (§ 1910.151). The proposal states that the employer must keep a first aid kit at the site where work is being performed, and must additionally ensure that a person holding a current first aid certificate is at the terminal. No particular first aid course or approving agency is designated, so long as the certificate is issued by a responsible organization which requires successful completion of a course as evidence of qualification. An example of an acceptable organization is the American Red Cross. Employees qualified at levels above that of first aid, for example as paramedics, would be deemed to satisfy this requirement without a first aid certificate.

First aid kits must be weatherproof if they will be exposed to the weather, and each sterile item must be sealed individually. Individual items and, in some cases, sizes are specified; burn dressing is not required, as it is in the longshoring standard, because medical opinion now advises against its use. This proposed list of items, intended as a minimal requirement, would in many cases be augmented by items appropriate to the particular environment or type of work involved. Except for the deletion from the list of burn dressing and the addition of first aid dressing, the proposed list is identical to the one in § 1918.96(b) and section 8.10.2 of ANSI MH9.1.

Paragraph (d), which covers stretchers, parallels a similar requirement for shipboard use (§ 1918.96(d)), but does not specify the number or type of stretchers required, as section 8.10.3 of ANSI MH9.1 does. OSHA believes that a "readily accessible" stretcher (available within five minutes) and blanket will provide adequate employee protection. The requirement that the stretcher be permanently equipped with bridles for hoisting, which are essential when hoisting employees from a vessel, has been retained for the marine terminal environment because employees may occasionally have to be hoisted, for example over the side of a gondola car or from a crane.

The next paragraph, (e), proposes that a phone or equivalent means, i.e., radio, be available for emergency use; adoption of this language was recommended by the SAC (Ex.2:157i), and is intended to allow greater flexibility, without compromising safety, than is provided by a similar rule appearing at section 8.10.4 of the ANSI MH9.1 standard, which allows only a telephone. The expression "readily available" means within a three-to-five minute period.

Liferings and ladders to prevent employees from drowning are addressed in paragraph (f), which requires that both items of safety equipment be available within 200 feet of each waterside work area. A ladder is

necessary to allow an employee who has fallen into the water to climb back up to the dock or to be rescued. The proposed requirement recognizes that cargo is not worked along many sections of frontage and there is no threat to worker safety in these areas. All active frontage work areas would be equipped, under the proposed provision, with ladders and rings within 200 feet of any such area. Section 1918.96(e) of the longshoring regulations contains similar coverage. Ninety feet of lifeline must be attached to each U.S. Coast Guard approved lifering, a requirement based on an equivalent provision in § 1918.96(e) and on the Coast Guard rules. In addition, any employee working on a bridge or structure leading from the terminal to a distant vessel berthing installation is required to wear a work vest to prevent drowning in case he falls into the water. These berthing installations are isolated from the main terminal area, sometimes by as much as one mile, and immediate rescue might therefore not be possible.

Section 1918a.27 Personnel. Section 1918a. 27 addresses personnel qualifications. Proposed paragraph (a) is directed to the hazards associated with power-operated hoisting equipment, conveyors, or vehicles, including industrial trucks, and requires that all employees, except supervised trainees, be familiar with signs, signals, and operating instructions before operating such equipment or giving signals to the operators of hoisting machinery. This rule is based on § 1918.97(a) and is similar to paragraph 8.9 of ANSI MH9.1. The SAC recommended (Ex. 2:155i) adding "and recognized as competent by the employer" after "trained and experienced employees," a recommendation which OSHA has not adopted because it is the training and experience which are essential to safe operation; any training recognized by a responsible group or organization would therefore be deemed to meet this requirement.

In paragraph (a)(2), OSHA proposes requiring all machinery operators assigned after the final standard's effective date to pass a practical on-the-job operating examination and to be instructed by the employer in standard operating procedures. This provision is designed to upgrade the training and experience levels of equipment operators without requiring licensing or formal training. OSHA supports and encourages joint labor-management training efforts, which have often sponsored such courses in the past. The specific content of the practical examination and the topics of the training course are left to the employer's discretion.

Proposed paragraph (a)(3) is very similar to § 1918.97(b), and provides that employees with medical conditions that could be incapacitating not operate powered machinery. It is intended to protect both the employee with the medical disability and other employees working with that employee. The draft version of this requirement reviewed by the SAC allowed employees with disabilities to operate power-operated equipment, provided they were annually certified by a physician as fit for such employment; the Advisory Committee recommended deletion of this waiver requirement (Ex.2:156i), a recommendation that has subsequently been adopted in the proposal. The type of medical condition addressed by this proposed provision is one which could be suddenly incapacitating, such as serious heart disease, seizure disorder, or insulin-dependent diabetes. OSHA believes that employees with a history of such a serious medical condition should not operate powered equipment.

Paragraph (b) is a newly developed provision similar in intent to a requirement that has appeared in a labor-management contract for this industry (Ex. 27: 4). The proposed rule, which requires that supervisors be trained in accident prevention, would only apply to supervisors of more than five employees. It is designed to increase awareness of hazards and methods of accident prevention at the supervisory level, and thus indirectly at all levels of the work force. The requirement allows a phase-in period, to permit supervisors time to acquire such training. However, after the delayed effective date specified in this paragraph (two years from the final standard's effective date), newly assigned supervisors would be required to take such a course within three months of assignment. The training required would include, in addition to instructions in matters specifically pertaining to the operation to be supervised, instruction in those topics specified in proposed paragraph (b)(2). An earlier SAC version of this requirement stipulated that supervisors have "documentary evidence of satisfactory completion of a 30-hour training course in accident prevention"; the majority recommendation of the committee (Ex. 2: 156i) was that the 30-hour specification be deleted. OSHA believes that accident prevention training is the key to reducing workplace accidents, but agrees with the Committee's judgment that the precise length of the training course does not need to be specified. Since this provision is not based on a similar requirement in any existing maritime regulation, OSHA particularly seeks comments and any relevant information on this matter. The Agency would also welcome suggestions for topics that should be included in the training course.

Subpart C—Cargo Handling Gear and Equipment

Section 1918a.41 House falls. This subpart of the standard is devoted to the gear, machinery, and equipment used to handle cargo. The first proposed section, § 1918a.41, concerns house falls used with ship's gear in union purchase cargo-handling (using cargo runners from the ship and the terminal's hoisting equipment together), a subject not addressed in the present longshoring regulations (although section 4.1 of the ANSI MH9.1 does cover house falls). House fall gear includes spans and supporting members, winches, blocks, and standing and running rigging attached to a terminal facility and used in conjunction with the vessel's gear to load or unload cargo. This provision has been included because, although the use of conventional ship's gear and house falls has declined drastically in recent years, these rigging arrangements are still used at some locations (especially at inland terminals) and are often poorly maintained. Proposed paragraph (a) requires that span beams be secured to prevent them from falling. The next provision, (b), states that safe means of access to the house fall block must be provided for employees working with such rigging arrangements. The specific means is not specified, but fixed ladder and personnel guarding provisions specified in other sections of this document (§§ 1918a.112 and 1918a.120) would also apply here, if these means of providing access are chosen.

In paragraph (c), OSHA requires a visual inspection of loose gear used in house falls before each day's use. House fall gear is often located in difficult to reach places, and maintenance is therefore easy to overlook. The provision also prohibits the use of defective loose gear.

Section 1918a.42 Miscellaneous auxiliary gear. Section 1918a.42, Miscellaneous auxiliary gear, deals with several types of cargo-handling equipment, such as ropes, shackles, slings, and pallets. Each type of equipment is addressed separately. Proposed paragraph (a) covers loose gear, such as slings, chains, bridles, blocks, and hooks; provision (a)(1) requires that loose gear be inspected before use, not be used if defective, and be stored or placed to avoid being

damaged. Paragraph (a)(2) requires that loose gear be inspected visually during use to detect defects in the gear. Defective gear may not be used, and hooks, shackles, and similar gear must be discarded if distorted, because it is not possible to repair damage of this type without permanently damaging the gear itself. The proposed provisions in paragraph (a) derive from § 1918.61(a) and § 1918.66(c), but have been modified for shoreside application; they are also consistent with industry practice and with rules 302 and 331 of the 1979 revision of the Pacific Coast Marine Safety Code (Ex. 20: 13, 17). They are designed to ensure that defects in the gear, which could, for example, cause the load to be dropped, are detected and appropriately dealt with.

Paragraph (b) proposes the adoption of a new approach to the rating of wire rope and wire rope slings; the existing longshoring regulations (§ 1918.63) and other OSHA regulations (for example, § 1910.184(f)(1), Slings) provide tables listing wire rope ratings, which are to be used in preference to the manufacturer's rating for the rope in question. The present proposal does not include these rating tables, because rope manufacturers provide ratings for their products; ropes of the same size, material and construction but made by different manufacturers or in different countries may have different ratings, and the tables in the existing regulations do not cover many of the ropes presently in use in marine terminals. The proposal requires that the employer ascertain and have available the manufacturer's ratings for all wire rope and wire rope slings obtained after the date noted in the proposed standard. This provision also requires that manufacturer's ratings not be exceeded and that a safety factor of at least five be maintained for the common sizes of running wire used in falls, purchases, or light load slings; this is in accordance with a similar provision in § 1918.63(a).

Proposed paragraph (b) goes on to specify situations in which wire rope safety factors of five do not have to be maintained: in specialized equipment such as cranes that are designed to be used with lesser safety factors; in standing rigging applications such as guys on a house fall mast; and in heavy lifts and other purposes where rope with a safety factor of five would be impractical but for which the employer can demonstrate equivalent safety. These exceptions are necessary in these applications, for example in mobile cranes, where the Society of Automotive Engineers Standard SAE J959 has established a safety factor of three for standing wire and three and one-half for running wire, or in heavy lift applications where a safety factor of five cannot be achieved and the method of handling (slowly and without shock loads) ensures safety. Large-capacity cranes are not designed to carry wire rope with a safety factor of five, because the rope would be too large and too heavy for the crane to lift. In standing wire uses, such as guys, a lesser safety factor is also adequate.

Proposed provision (b)(2) prohibits any wire rope or sling from being used with any of the defects listed, and is a revision of § 1918.63(e)(4) of the longshoring regulations. The proposed requirements are essentially consistent with similar provisions of § 1910.184(f)(5), and some, ((b)(2)(i), (ii), and (iii)), are identical to those of the general industry standards. Proposed items (b)(2) (v) and (vi) are new provisions necessary to ensure safe use of wire rope; any strand or wire slippage in end attachments is a clear indication of rope wear, and more than one broken wire within an inch or so of an end attachment indicates impending fatigue failure.

Proposed paragraph (b)(3) is modified somewhat from a similar provision in § 1918.63(b). It stipulates that ends of splices, if covered, be covered so that the covering can be removed to determine the condition of the splices, and that methods used to blunt ends not damage the wire itself.

The proposed paragraph dealing with wire rope clips, (b)(4), is based on a provision in the longshoring regulations, § 1918.63(c), except that the proposal requires that the manufacturer's use recommendations be followed, and that Table C–1 be used for "U" bolt clips only in the absence of the manufacturer's recommendations. As noted above, this method is preferable to relying on manufacturers' ratings and recommendations in this instance because a single table cannot address all the types of clips now available for use in marine terminals, and because manufacturers provide use recommendations with their products. However, Table C–1 has been brought up to date and expanded to include clip requirements for ropes of one-half inch (or less) in diameter, which are now in common use. Requirements for spacing of clips for ropes smaller than one-half inch have not been included since those for one-half inch rope are suitable for lesser sizes as well.

Proposed provision (b)(5) prohibits securing wire rope by means of knots, and has been adapted from a similar requirement in the longshoring regulations, § 1918.63(d). Knots cannot be used to secure wire rope because this means of securing may reduce the rope's strength capability by as much as 50%. The proper working of a wire rope "machine" depends on the inner core and the outer lays working in unison, which cannot occur when the rope is bent.

Proposed paragraphs (b)(6), (7), and (8) apply to wire rope eyes and eye splices, and are essentially based on provisions 1918.63(e)(3), 1918.63(e)(1), and 1918.63(e)(2) of the longshoring regulations, respectively. Proposed paragraph (b)(6) prohibits the use of wire rope clips or knots to form eyes in bridles, slings, bull wires, or single parts used for hoisting, but is not meant to apply to standing rigging applications, such as guys, or to eyes used with lashings for cargo or dead ends of multipart purchases, where clips may be used. The proposed requirements for tucks in eye splices in paragraph (b)(7) are traditional, and similar rules appear in seamanship texts and other standard sources (Ex. 66: 570). Proposed paragraph (b)(8) also reflects standard industry practice, and is identical to the section on the same topic in the existing longshoring regulations.

Proposed paragraph (c) covers natural fiber rope, and follows the proposal's approach of relying on manufacturers' ratings, rather than tables, for rated capacities of rope. Though no requirement on splices similar to proposed provision (c)(2) is included in the existing longshoring regulations, the proposal reflects current industry practice and is identical to the requirement in § 1910.184(h)(3)(i).

Synthetic rope is addressed in proposed paragraph (d); reliance on manufacturers' ratings is particularly important with this type of rope because it is made of a variety of combinations of synthetic materials, each with different capabilities, ratings, and use recommendations. There are several publications dealing with synthetic ropes (Ex. 37, 38) and the various characteristics of each type. For example, nylon has the largest amount of stretch and is therefore inappropriate for hoisting, and some materials cannot be used around a drum because they will melt when stressed in this manner. No specific requirements are given for splices because such matters are covered by the manufacturer's recommendations. The general industry standard does not cover synthetic rope except that used in slings (§ 1910.184(h)).

Proposed paragraph (d)(2) is similar to § 1918.62(b). The formula and directions for substituting synthetic rope for manila rope less than three inches in circumference were devised by the rope

industry for the Bureau of Labor Standards, the American Bureau of Shipping, and the U.S. Coast Guard (Ex. 23: 5; Ex. 5: 18; Ex. 36: 5–9). This provision also appears in section 4.2.5 of ANSI MH9.1, and is the standard for the American Bureau of Shipping and the U.S. Coast Guard.

Proposed paragraph (e) defines the conditions requiring synthetic and natural fiber rope to be removed from service because continued use would be hazardous; this provision derives from and is compatible with § 1910.184(h)95), and also reflects current industry practice.

The proposed requirement for thimbles (paragraph (f)), which protect rope from excessive wear when it is attached to a ring or similar device, is newly developed and does not appear in Parts 1910 or 1918. It stipulates that properly fitting thimbles must be used when a rope is permanently secured to an attachment. Rope used in a temporary configuration, for example in a pendant, would not be required to be protected by a thimble.

The proposed provision addressed to synthetic web slings (paragraph (g)) was drafted after consideration of the applicability of § 1910.184(i) to the marine terminal setting; the increasing use of synthetic web slings makes requirements such as these necessary for safety. Paragraph (g)(1) is broader than the equivalent provision in the general industry standards (§ 1910.184(i)) because preslung cargo arriving in U.S. ports in international trade is occasionally bound by synthetic web slings which, though adequate, are not always marked with the manufacturer's rated capacities. Allowing sling ratings to be ascertained from the manufacturer would permit shippers or carriers to obtain ratings and thus to continue to use unmarked slings. Provision (g)(2) lists conditions under which synthetic web slings must be retired from service, and is identical to § 1910.184(i)(9), except for the additional disqualifying defect, "damage to fitting," that has been included in the proposed list. A damaged fitting may damage the sling to which it is attached or it may itself fail.

Proposed paragraph (g)(3) prohibits repair and reuse of synthetic web slings, because there is no method of repairing these devices without damaging them structurally.

In paragraph (g)(4), OSHA proposes that these slings only be used in accordance with manufacturer's use recommendations, which specify under which conditions slings of this type may be used. For example, nylon slings may not be used around acids, phenolics, or fumes, and web slings with aluminum fittings may not be used near caustic liquids.

Fittings are required by proposed paragraph (g)(5) to be smooth to prevent tearing of the sling, and they must also have rated capacities equal to that of the sling so the fittings will not fail under load.

Chains and chain slings used in hoisting applications are addressed in proposed paragraph (h), and the requirements essentially parallel those of the existing longshoring regulations (§ 1918.64). These provisions also require employers to depend on manufacturer's ratings rather than complex tables for rated capacities and use recommendations, and further state that these ratings must be available at the terminal.

Proposed paragraph (h)(2) prohibits using proof coil steel chain (common or hardware chain), or other chain not intended for hoisting, for slinging or hoisting purposes. Chain of this type is not strong enough for this use and would fail under load.

Paragraph (h)(3) states the inspection requirements for chains used in hoisting, and is based on similar provisions in the existing longshoring regulations (§ 1918.64 (b), (c), and (d)), which will be made identical to the proposed provisions when the longshoring rules are revised. Proposed paragraphs (i) and (ii) require visual inspection, by designated employees, of sling chains and their end fastenings before each day's use, and during use as necessary, to ensure that they have no operational defects.

A more thorough quarterly inspection of chains is required in proposed paragraph (h)(3)(iii). The month of the thorough inspection must be indicated by appropriate means, such as painting a link; using a tag to indicate that the chain has been inspected is usually unsatisfactory, because the tag often tears off during a lift. Proposed paragraph (h)(3)(iv) requires that any chain showing the maximum allowable wear at any point of the link, as specified in Table C–2, be withdrawn from service. In addition, paragraph (v) states that any sling showing an increase of more than five percent in a measured section or having a bent, twisted or damaged link or a raised scarf or defective weld must be removed from service. Damage of these types significantly reduces the strength of the chain.

Proposed paragraph (h)(4) concerns repairing chains and returning them to service, and is similar to the coverage of the same topic in the longshoring regulations (§ 1918.64(e)), except for the addition of requirements that proof tests not conducted by the manufacturer be certified by an agency accredited under Part 1919 of this chapter, and that test results be available at the terminal. Requiring certification will ensure that chains are inspected and tested at regular intervals.

Proposed provision (h)(5) goes beyond the equivalent provision of the longshoring regulations (§ 1918.64(f)) because it requires wrought iron chains in constand use to be annealed or normalized at least every six months, whether or not the manufacturer so recommends; the present rules only require annealing if the manufacturer has recommended it. Both normalizing and annealing involve heating, which restores the metal to its original strength. The proposed rule also requires that certificates attesting to this treatment be available at the terminal. Wrought iron chains for hoisting have not been manufactured for many years, but some chains made of this material are still in use, particularly on the inland waterways. The final proposed requirement of this paragraph prohibits annealing of alloy chains, which do not require such treatment and might be seriously damaged by the process.

The first two proposed provisions of paragraph (h)(6) are identical in effect to those of § 1918.64(g); they prohibit hoisting with chains that are kinked, knotted, bolted, or wired, because these actions stress the chain excessively and may thus damage it. The final proposed requirement in paragraph (h)(6) is intended to prevent the use of makeshift links or fasteners in cargo hoisting; this topic is not currently addressed in the longshoring regulations, but will be covered when Part 1918 is revised in the future. Makeshift gear arrangements may not withstand the weight of the loads hoisted in cargo handling operations.

Proposed paragraph (h)(7) requires hooks, rings, links, and attachments on sling chains to have rated capacities at least equal to those of the chains to which they are attached; this provision would prevent loading a sling with a heavier load than the sling attachments could bear. This requirement is very similar to a provision appearing at § 1910.184(e)(2).

Proposed paragraph (h)(8) stipulates that it must be possible to identify the size, grade, and rated capacity of chain slings from marks or other identification on the sling; this information needs to be readily available to ensure that slings are only used as the manufacturer intended. The provision is similar to that in § 1910.184(e)(1), but this topic is not

presently addressed in the longshoring regulations.

Shackles are dealt with in paragraph (i), and the first proposed provision adopts the approach favored in the proposal for other hoisting gear, that of relying on the manufacturer's ratings in preference to using a table (in this case, Table C-3) to determine the safe working loads for shackles of various sizes. This table should only be used in situations in which it is not possible to determine the manufacturer's ratings for the shackles in use. The table is intended for mild steel shackles. Most shackles in use today are made of steel alloy that are of higher quality than mild steel, and steel alloy shackles should be used with the appropriate ratings for such alloys. The equivalent longshoring regulation (§ 1918.65) relies primarily on a table to determine minimum safe working loads. Proposed paragraph (i)(2) stipulates that screw pin shackles used aloft (except in cargo hook assemblies) have moused or otherwise secured pins so that the pin cannot come loose. Shackles used in cargo hook assemblies that are not used aloft are accessible during handling, so their pins can be tightened easily and do not have to be additionally secured.

The next proposed paragraph, (j)(1), applies to hooks (excluding hand hooks), and again requires conformance with the manufacturer's rated capacities. In addition, hooks obtained after the date specified in this proposal would have to be tested as part of the certification process outlined in § 1918a.51(c)(6). Proposed paragraph (j)(2) requires hooks that are bent or sprung to be discarded; these deformations are evidence of permanent damage that cannot be repaired. The next two proposed provisions, (j)(3) and (j)(4), require case hook teeth to be in good condition to facilitate grasping and clamp-type plate hook jaws to be sound (for the same reason). Paragraphs (j)(2) through (j)(4) are based on the longshoring regulations (see § 1918.66(b), (c), (d), (e)). A proposed provision requiring loads to be applied to the throat of the hook has also been included in the proposal because loading the point overstresses and bends the hook.

Some provisions of paragraph (k), which addresses pallets, are similar to provisions in ANSI MH9.1 (section 4.2.9) and the longshoring regulations (§ 1918.67). The principle hazard of hoisting a load on a damaged pallet is that the pallet may give way while the load is suspended, causing cargo to fall on employees below. The first proposed provision, (k)(1), requires that pallets be made and maintained to carry loads safely; all fastenings on reusable pallets must therefore be of a type, such as bolts and nuts, drive screws, or helically threaded nails, that will hold securely. Proposed paragraph (k)(2) is a newly developed requirement stipulating that damaged pallets be removed from active work areas, marked as damaged, and stored away from the work site; this rule is intended to ensure that damaged pallets are not accidentally used to hoist cargo.

Proposed paragraph (k)(3) is based on § 1918.67(b), but has been expanded in recognition of the fact that wing-type pallets may occasionally have to be hoisted by means other than bar bridles; so long as these means are suitable for the load, pallet, and other pertinent conditions and provide equivalent safety, they may be used. The prohibition against hoisting lip or wing-type pallets by wire slings alone is included because this practice places employees working beneath the load at great risk, since these slings may cause the pallet to buckle and drop the load.

Loaded pallets that are visibly defective may not be hoisted, according to the proposed rule in paragraph (k)(4), until they have been placed on a second pallet that is acceptable, or are handled by other means, such as a sling, providing equivalent safety. This provision is similar to a requirement at § 1918.67(c).

Proposed paragraph (k)(5) has been shortened but is substantively identical to § 1918.67(d) of the longshoring regulations; the bridles for handling pallets of the types specified must be designed specifically for this use, in order to fit and lift these pallets securely.

The next provision, (k)(6), requires pallets not in use to be stacked or positioned in a manner that will prevent them from falling on employees or otherwise creating a hazard; the SAC recommended the proposed wording (Ex. 2:83i). The final provision proposed in this paragraph, (k)(7), prohibits the reuse of disposable pallets intended to be used for one-way transit only; these pallets are not sturdy enough to withstand repeated use.

Section 1918a.43 Powered Industrial Trucks. Section 1918a.43 contains the proposed requirements for powered industrial trucks used in marine terminals. This section was drafted after consideration of the general industry standards (Part 1910), the longshoring standards (Part 1918), the relevant ANSI standard (Ex. 67), the recommendations of the Advisory Committee, and the results of other staff research. The provisions in this section are intended to address employee hazards associated with the use of powered industrial trucks in a marine terminal; however, many of the provisions dealing with powered industrial trucks that appear in the various source documents are not directly related to employee safety and health, are unnecessarily detailed, or are design or construction specifications addressed to the manufacture, and these have therefore not been adopted for this proposal. OSHA invites comment on the adequacy of the coverage of the proposed provisions for hazards related to powered industrial trucks in the terminal environment.

Paragraph (a) delineates the scope and application of the section; the proposed provisions apply to every type of material-handling vehicle, except over-the-road vehicles, used in a marine terminal. Over-the-road vehicles are not included because these vehicles are covered by Department of Transportation regulations.

Proposed paragraph (b) prohibits an employer from modifying or adding parts to powered industrial trucks if the alteration would affect the vehicle's capacity or safe operation, unless the employer has obtained written approval either from the manufacturer or from a professional engineer before the alteration is made. The engineer must additionally have had experience with the equipment to be altered and must have consulted the manufacturer of the equipment. The instruction plates, tags, or decals on the altered equipment must be changed to reflect the new rated capacity and any changes in operating and maintenance procedures. This proposed requirement allows greater flexibility than the equivalent provision of the general industry standards (§ 1910.178(a)(4)), which only permits modifications approved by the equipment manufacturer. The types of modification to which this provision is addressed include the addition of counterweights or specialized devices, such as attachments for handling rolls of paper.

Proposed paragraph (b)(2) prohibits unauthorized riding on powered industrial trucks; however, when the employer authorizes riding, a safe arrangement, such as a seat or platform, must be provided. Section 5.1.8 of ANSI MH 9.1 also prohibits unauthorized riding; § 1910.178(m)(3) of the general industry standards is identical in intent to the proposed provision. Employees riding on industrial trucks are in danger of falling from the vehicle unless stable and secure seating is provided.

The proposed requirements for unattended industrial trucks are based on provisions in the general industry standards, § 1910.178(m)(5), and the

longshoring regulations, § 1918.73(j). They require that unattended vehicles be left with the load-engaging means, such as the fork or scoop, in the lowered position, the controls in neutral, and the brakes set. The final proposed requirement in this paragraph mandates blocking or curbing of wheels if a truck is left on an incline, as does § 1910.178(m)(7); this precaution is the usual practice throughout industry, and is intended to prevent the uncontrolled rolling of trucks.

Proposed provision (b)(4) prohibits the operation of powered industrial trucks inside a highway vehicle or railcar that has any visible structural damage, such as a floor that has rusted through, which might adversely affect employee safety. Railcars and other vehicles very often have unsafe floors. The usual temporary method of making these floors usable is to install a metal plate, a practice specifically required by Rule 1218 of the Pacific Coast Marine Safety Code (Ex. 20), by paragraph 3, Part V of the New York Shipping Association—International Longshoremen's Association's Joint Maritime Safety Code (Ex. 19) by paragraph 1910.184(m)(7) of the general industry standards and by section 5.2.10 of MH9.1.

The requirement proposed in paragraph (b)(5) requires that rated capacities be visible to the truck's operator so that overloads can be avoided.

As stipulated in proposed paragraph (b)(6), only stable and safely arranged loads weighing no more than the amount specified by the vehicle's rated capacity may be carried. This rule is based essentially on § 1918.73(f)(3) of the longshoring regulations and is similar to section 5.1.6.1 of ANSI MH9.1, but it goes beyond these provisions to address the stability and arrangement of the load; §§ 1910.178(o)(1) and 1910.178(o)(2) of the general industry standards deal with this topic in the same manner. An industrial truck may tip over, drop the load, or go out of control if it is either overloaded or if the load is not securely arranged and positioned so that the weight is properly distributed.

Three work practices that are important to industrial truck safety are proposed in paragraphs (b)(7), (b)(8), and (b)(9); these derive from equivalent requirements in the general industry rules (§ 1910.178). The first provision states that drivers must ascend and descend inclines slowly, to prevent the loaded truck from careening out of control or tipping over. A significant source of vehicle-pedestrian and vehicle-vehicle accidents is addressed in the second provision, which requires drivers to slow down and give warning of their approach at blind intersections and other places where visibility is limited.

The third work practice provision proposes that loads which would interfere significantly with the driver's view if carried in front of the driver, e.g., on the forks, be carried with the load trailing, i.e., with the truck moving in reverse.

Steering knobs, which were common before the advent of power steering, are prohibited by proposed requirement (b)(10) because they do not provide effective steering control and can themselves cause injury to the driver if the wheel spins. They are also prohibited for seated drivers in § 1918.73(i)(2), and ANSI MH9.1 (section 5.1.5) recommends against their use entirely.

Paragraph (b)(11) requires industrial trucks with cargo-lifting devices that reach across the load to lift from the far side (beyond the operator's view) to be fitted with mirrors or devices that will permit the operator to see the loading process clearly. The SAC recommended a similar requirement (Ex.2: 87ai), and MH9.1 contains a similar requirement (section 5.1.10.3). No similar rule appears in other OSHA regulations. The proposed rule would apply principally to large, specialized handling vehicles such as piggy packers that hoist containers or trailers by reaching across them and grasping them on the far side; most such vehicles are located in intermodal container-handling yards. OSHA would appreciate the views of interested parties on this proposed provision. For example, should OSHA also require that an employee on the ground supervise these lifting operations unless the operator has an unobstructed view at all times?

Paragraph (c) concerns the maintenance and repair of powered industrial trucks, which are essential to safe vehicle operation. The first proposed provision, (c)(1), states that only designated persons may perform repairs on these vehicles; it is similar to the general industry rule at § 1910.178(q)(1). The provision is intended to prevent unqualified or unauthorized persons from performing maintenance work on powered industrial trucks, a practice that may cause accidents.

The proposed requirement ((c)(2)) dealing with disconnecting the battery during electrical system repair (except when the power must be on to test or repair the system) is almost identical to the requirement at § 1910.178(q)(4), but would allow systems that must be energized during "troubleshooting" or servicing to have batteries connected only during these operations. The proposed procedure would protect employees from electric shock during repair work.

The next provision, (c)(3), proposes that replacement parts whose function might affect operational safety be equivalent in strength or performance capability to the original parts which they replace; this rule derives from a provision at § 1910.178(q)(5) and is designed to ensure that vehicles and components of their lifting apparatus are maintained and repaired in a manner that will preserve their original strength capabilities.

The proposed requirement in paragraphs (c)(4) governing brake systems on powered industrial trucks used in marine terminals has been developed specifically for this industry because failures of these systems may cause accidents. There is no equivalent provison in the general industry or MH9.1 standards, although both of these standards contain general repair and safety device provisions.

The proposed provisions in paragraph (c)(5) require that vehicles be maintained in proper working order and be checked by an authorized person each day of use, and that any safety device, such as a horn or sprocket or overhead guard, be in place and operable during use, unless specifically exempted (see paragraph (e)(iv) of this section). The last requirement in this paragraph stipulates that no truck having a fuel system leak or any other defect affecting safety, such as failing brakes, may be operated. Requirements in this paragraph are based essentially on similar provisions in the longshoring regulations (§ 1918.73(a)), ANSI MH9.1 (section 5.1), and in Part 1910 (§ 1910.178(p) (1) and (4)), and are intended to preserve the operational safety of industrial vehicles and to protect their drivers and other employees from injuries.

Paragraph (c)(6) would require that records of the daily truck inspection be kept at the terminal for at least thirty days, so that the equipment's maintenance and repair history is available at the terminal.

Truck repairs involving the fuel or ignition systems are required by proposed paragraph (c)(7) to be performed away from active work areas and in locations equipped with fire extinguishers or other protection against unwanted workplace fires. The general industry standards have a similar rule (§ 1910.178(q)(3)).

Paragraph (d) concerns power-operated industrial trucks approved for use in hazardous atmospheres. The first

proposed requirement defines "approved" as it is used in this section, i.e., approved by a nationally recognized testing laboratory for use in a particular hazardous atmosphere. According to the proposal, trucks used in such atmospheres are required to be approved except where U.S. Coast Guard regulations (33 CFR 126.15) apply; any approved vehicle must bear a label or identifying mark indicating testing laboratory approval. This topic is covered in great detail in § 1910.178 of the general industry standards; however, OSHA has concluded that in the marine terminal context, it is sufficient to state that power-operated industrial trucks used in hazardous atmospheres be approved for use in the particular hazardous atmosphere. (Classifications of hazardous locations are set forth in Subpart S of Part 1910.)

Fork lift trucks, a particularly hazardous class of powered industrial trucks, are addressed in paragraph (e). The proposed requirements appearing at (e)(1) are essentially similar to those in § 1918.73(b) and deal with overhead guards on fork lifts. The first proposed provision, (e)(1)(i), differs from the existing longshoring requirement in that overhead guards would only be required in situations in which falling loads present a hazard to the truck operator, since many tasks in a terminal are performed in open areas free of overhead hazards, such as suspended loads. The proposal also mandates that the guard be strong enough to protect against the sort of objects likely to fall against it; a guard strong enough to withstand the full impact of a capacity load would be so heavy that it would interfere with the vehicle's stability. This provision is almost identical to one appearing in the general industry standards at §>1910.178(m)(9). The proposed provisions at (e)(1)(iii) prohibit guards from obstructing the operator's view and require any openings in the guard to be smaller than any unit of cargo being handled.

Proposed paragraph (e)(1)(ii) requires guards to be built so that failure of the truck's mast tilting mechanism will not dislodge the guard; this requirement is similar in intent to paragraph (b)(4) of § 1918.73 of the longshoring regulations and section 5.1.1.4 of ANSI MH9.1. The overhead guard provision at (e)(1)(iv) states that any guard required by this paragraph may only be removed when work cannot be conducted with the guard in place, such as in areas of low clearance where the truck's operator is in no danger of hitting overhead obstructions or of being hit by falling objects; this proposed requirement parallels the rule at § 1918.73(b)(5). Paragraph (e)(1)(v) would require overhead guards to be large enough to extend over the operator during all truck operations, including forward tilt.

Paragraph (e)(2) addresses load backrest extensions, and is based on § 1910.178(e)(2) of the general industry standards. The proposal requires a load backrest extension if the fork lift operator might be exposed to a backward-falling load. This equipment would only be necessary for high lifts, in which the load is higher than the truck's mast. This subject is also covered in section 5.1.2 of MH9.1, although none of the detailed ANSI design requirements for extensions have been included in the proposal because these extensions are stock items.

Forks and their attachments and extensions are covered in paragraph (e)(3)(i), which is a similar but stronger version of a longshoring provision (§ 1918.73(e)). The proposed requirement adds that this equipment may only be used to perform the tasks for which it was intended by the manufacture; improper use of the forks (for example, to pry open a railcar or cargo door) may result in overturning the vehicle, dropping the load, or in causing other hazards. Proposed paragraph (e)(3)(ii) prohibits transporting employees on the forks of these vehicles, an extremely hazardous practice that has caused serious falls and other injuries (Ex. 49).

The proposed requirement concerning counterweights, (e)(4), states that these weights must be secured so that they will not fall. It does not require that they be permanently attached to the vehicle as long as they are secured sufficiently to prevent them from falling during vehicle movement. This provision has been drafted for this proposal and no similar requirement appears in the longshoring regulations.

The capacities and weights of fork lift trucks addressed in paragraph (e)(5). The first proposed provision, (e)(5)(i), requires employers to observe the rated capacities, with and without counterweights, of these vehicles. Rated capacities and vehicle weights (with and without counterweight) must be marked on the vehicle and be visible to the operator. Vehicle weights must be marked because cranes and ship's gear are often used to hoist these trucks, and if the capacity of the hoisting equipment is exceeded it may fail. This provision combines several requirements from § 1918.73(f) of the longshoring regulations, and the subject is also addressed in paragraph 5.1.6 of ANSI MH9.1.

The second provision of this paragraph, (e)(5)(ii), re-states the proposed requirement in (e)(5)(i) for the situation in which more than one fork lift is used to lift a load. (Two or more fork lifts are sometimes required to work together to lift a particularly bulky piece of cargo.) The proposed requires trucks working in unison not to lift a load exceeding the total combined lifting capacity of all the trucks lifting the load; exceeding this capacity could cause the vehicle or vehicles to tip over. The longshoring regulations contain the same provision (§ 1918.73(f)(4)), as does ANSI MH9.1 (section 5.1.6.2).

The practice of lifting employees on the forks of fork lift trucks is covered in proposed paragraph (e)(6). Provision (i) prohibits employees being lifted on the forks of the vehicle or on a pallet or load being hoisted on the forks. However, proposed paragraph (e)(6)(ii) would permit employees to be lifted on the forks only if a suitable platform is secured to the forks or lifting carriage. The platform would be required to have a railing meeting the requirements of § 1918a.112(c) and to be fitted with a toeboard if tools beng carried by employees might fall on employees below. The platform floor must also be skid resistant. Additionally, employees on the platform must have an emergency shut-off switch or other means of shutting off the power to the truck if they control elevation of the lifting carriage, and they must also be protected from moving truck parts and from overhead falling hazards. Unless the employees on the platform control the lift, the fork lift operator must remain at the controls at all times, and a final proposed provision allows only minor adjustment in truck position while employees are elevated on a platform. The proposed precautions for lifting employees on a platform attached to the forks or lifting carriage are compatible with requirements on the the same subject in § 1910.178(m)(12) of the general industry standards and in section 5.1.9 of ANSI MH9.1. However, the proposed provisions go considerably beyond the requirements of the OSHA general industry standards because the misuse if fork lifts to hoist personnel is reported to have caused accidents since these regulations were first developed (Ex. 49).

Paragraph (f) of proposed § 1918a.43 deals with bulk-cargo-moving industrial trucks such as front end loaders and is based on § 1918.73(c) of the longshoring regulations. Provisions of this paragraph require an operator's guard on crawler-type cargo-moving vehicles used in situations where the operator may be struck by an overhead projection or be hit by falling objects. Any guard

required, and its attachments, must be strong enough to withstand a load equal the pull necessary to deform the machine's draw bar.

Straddle trucks, not at present specifically addressed by any OSHA regulation, are covered in proposed paragraph (g). Operators mounting or dismounting from these trucks are sometimes exposed to contact with moving drive chains or other nip points. Provision (g)(1) proposes that straddle trucks have a permanent means of access, such as a ladder, equipped with any handholds necessary to ensure operator safety, and the proposed requirements of paragraph (g)(2) specify guarding of moving parts. Another source of straddle-truck accidents is addressed in proposed paragraph (g)(2)(ii), which requires personnel-deflecting guards around the leading edges of front and rear wheels when the truck is near employees, unless the truck has such protection built in. The final provision in this paragraph proposes that straddle truck operators have devices to ensure the greatest visibility possible in all directions, to avoid vehicle collision and pedestrian accidents. ANSI MH9.1 addresses these straddle truck hazards in a similar way (section 5.1.10).

Trailer-spotting tractors, also known as fifth wheels, hustlers, and by other names, are addressed in proposed paragraph (h); this topic is not presently covered by any specific OSHA regulation or by ANSI MH9.1. Trailor-spotting tractors are vehicles used exclusively and extensively within terminals to haul intermodal containers mounted on chassis; these vehicles are not covered by highway regulations. They are often not equipped with adequate handholds or adequate means of access to the fifth wheel, both of which are necessary to protect employees engaging and disengaging chassis. Secure access is addressed in paragraph (h)(1).The next proposed provision, (h)(2), stipulates that the rear windows of trailer-spotting tractor cabs be safety glass or regular glass protected by means such as screen, to avoid having the glass shattered and the driver injured by a flying brake hose.

Section 1918a.44 General rules applicable to vehicles. Section 1918a.44, covers general rules applicable to vehicles. It applies to material handing vehicles used in marine terminals, except for those matters, addressed in paragraphs (c) and (m), falling under ther jurisdiction of the Department of Transportation; examples of vehicles not covered by the proposed requirements are highway vehicles, intermodal containers on chassis, buses, and automobiles.

Paragraph (b) proposes that all private vehicles (except those carrying cargo) must park in designated areas that are not simultaneously being used for storage and parking. This proposed provision is similar to a requirement in section 5.2 of ANSI MH9.1. It is directed at accidents involving private vehicles and cargo-handling vehicles, such as the fatal accident in Houston caused by a private car colliding at night with a container chassis that had been parked in the terminal parking lot (Ex. 68). The SAC recommended that the provision prohibit using any terminal parking area for cargo storage (Ex.2: 98i), but OSHA believes that the language of the proposal allows more flexibility and achieves equivalent safety by limiting the prohibition to concurrent parking and storage use.

Proposed paragraph (c) addresses the hazard of uncontrolled trailer movement that would result from disconnecting a tractor from its trailer before the trailer's road wheels have been completely immobilized, for example by chocks. Front end support (such as that supplied by landing gear or a jack) mut also be supplied for the trailer, if support is necessary to prevent the trailer from tipping when a vehicle enters it to load or unload. The rear end of the trailer must also be supported (for example by a dock lock-on mechanism or a jack) if the trailer is of the less common type that could tip when a vehicle enters it from the rear. Both ANSI MH9.1 (section 5.2.3.) and the general industry standards (§ 1910.178(m)(7)) have similar provisions for front end support. However, the proposed requirement for rear end support is newly developed. One of the most common loading dock accidents occurs when a lift truck entering a trailer falls into the space between the trailer and the dock because the trailer has "crept" forward or tipped on end. The proposed requirements should prevent these and many other loading dock accidents.

Proposed paragraph (d) requires employers to ensure that operators of motor vehicles in a terminal observe the posted speed limits and any other traffic signs; the intent of this proposed requirement is identical to that of section 5.2.6 of ANSI MH9.1 and § 1910.178(n)(l) of the general industry standards.

Paragraph (e) proposes the posting of stop signs at blind intersections and at exits and entrances where visibility is limited, unless traffic signals, mirrors, or other means of eliminating the collision hazard are provided. Section 1910.178(n)(4) partially addresses the same hazard, as does section 5.2.7 of ANSI MH9.1. As noted above, vehicle accidents have become the most common type of accident in marine terminals.

The proposed rules in paragraph (f) mandating the establishment of vehicle routes, traffic rules, and parking areas within a terminal have been stated in performance language to be adaptable to the variety of conditions existing at container terminals. The specific means of achieving this level of traffic control is left to the employer's discretion, but the importance of these practices to employee safety cannot be overestimated.

Drivers of vehicles are required by proposed paragraph (g) to honk their horns to warn pedestrians of the approach of the vehicle, and vehicular traffic lanes crossed by employees or used for pedestrian passage must be equipped with signs or other means of warning drivers that pedestrians may be in the lane, according to proposed paragraph (h). The ANSI provision (section 3.22.8) on the same topic is almost identical to these provisions.

The hazards of areas such as check-in/check-out lines, which require both emplyees and vehicles to be present in the same area during the course of routine work assignments, are addressed in paragraphs (i) and (j). For example, employees checking the load on one vehicle might be hit by another container-carrying tractor moving into place in the check-out line. The first provision requires signs to be posted to warn drivers, while the next rule mandates a distance of at least 20 feet between the first two vehicles in a check-in or check-out line. The SAC recommendation (Ex.2: 63i) could be interpreted as requiring 15 feet between any two trucks, but it is only necessary to maintain this clearance between the first two vehicles because employees only work at the rear of the first vehicle, which then moves out of the terminal while the next vehicle moves up to be checked. Proposed paragraph (k) would prevent injuries caused by free-rolling vehicles left with their motors running.

Proposed paragraph (l)(1) states that a secure ramp must be provided for employees and vehicles to use to load or unload a vehicle whose end is elevated, and also requires the vehicle's wheels to be chocked or a dock lock-on device to be used to prevent accidents caused by inadvertent movement of the vehicle during loading or unloading; ANSI MH9.1 has a similar requirement (section 5.2.9).

Any ramp used is required by paragraph (l)(2) to have a safety factor

of four for any load being carried across the ramp.

The floors of highway vehicles, addressed in proposed paragraph (m), are required to be safe for employees and vehicles working in them, a requirement similar to an earlier proposed provision applying to railcar floors. Trailer and over-the-road vehicle floors are often rusted through or are uneven; metal plates can be used as supplemental flooring in many of these instances. Provisions in both the general industry standards (§ 1910.178(m)(7)) and ANSI MH9.1 (section 5.2.10) are directed to the same hazard.

Paragraph (N) proposes that cargo such as pipes, logs, or other products that could spread and roll, thus endangering employees working nearby, be secured against movement. Means of complying with this requirement might be lashing the cargo as a unit or placing it in a restraining device. The proposed provision would apply to flatbed trucks, platform containers and other conveyances without sides, and is included in accordance with a suggestion of the SAC (Ex.2: 99i). The ANSI MH9.1 (section 5.2.11) contains a similar requirement, although it applies to flatbed trucks only.

The proposed requirement that vehicles used to transport personnel in marine terminals be kept in good working order, with functional safety devices (paragraph (o)), has significant accident prevention value. Failure of the brake system, for example, could be caused by faulty maintenance procedures. The proposed provision derives from a requirement in the longshoring regulations (§ 1918.73(a)), but has been broadened beyond automobiles to include any vehicle used to transport personnel.

The final paragraph in § 1918a.44 proposes precautions to be taken during servicing of multi-piece rim wheels in the marine terminal environment. The proposed requirements in this section conform to those of the general industry standard for multi-piece rim wheels (§ 1910.177) recently published by OSHA (45 FR 6706, January 29, 1980). The principal hazard associated with the servicing of wheels of this type is the possibility of an employee being struck by a wheel component thrown from an inflated wheel during an explosive separation. These provisions apply only to servicing of tube-type vehicle tires that are mounted on multi-piece rims; paragraph (p)(2) defines a multi-piece rim. The hazards associated with servicing these rims are well documented and are discussed in the preamble to the general industry rule.

Proposed paragraph (p)(3) addresses employee training and competence in multi-piece rim servicing procedures, the most important element in any safety program designed to reduce the hazards associated with these wheel rims. Proposed requirements (p)(3)(ii)(A) through (G) detail the skills an employee must demonstrate to satisfy the competence qualification. Compliance with these requirements should greatly reduce or eliminate multi-piece rim accidents in terminals, because the greatest number of injuries have been shown to be caused by improper mounting procedures, use of damaged parts, and tire overinflation (45 FR 6707, January 29, 1980).

Employers are required by proposed paragraph (p)(4) to ensure that the servicing procedures included in provisions (p)(4)(i) through (p)(4)(ix) are observed when multi-piece rims are being serviced. These procedures are substantively identical to those in the general industry rule.

Paragraph (p)(5) requires that a chart containing the Department of Transportation, National Highway Traffic Safety Administration's instruction on the topic and appropriate for the types of wheels being serviced in the terminal be available, at the terminal, in addition to a current rim manual with the manufacturer's instructions for the wheels being serviced.

Restraining devices to be used when multi-piece rims are being inflated are dealt with in proposed paragraph (p)(6). These devices are essential to employee safety if the rim separates explosively from the wheel. The type of restraining device is not specified in the proposed provision, and a device would meet the requirement as long as it constrains rim components effectively. The proposed requirement at (p)(6)(ii) states that these devices must be kept in proper working order so that they remain capable of performing their function. The final proposed provisions in this paragraph, (p)(7) and (p)(8), require inflation hoses to have a clip-on chucks and be sufficiently long so employees can stay clear of the danger area during inflation, and also prohibit the use of any servicing tools not specifically recommended in the rim manual required in (p)(5). Finally, only those wheel components that are interchangeable accordingly to the chart or manual specified in proposed paragraph (p)(8)(ii) may be used interchangeably.

Section 1918a.45 Cranes and derricks. Proposed § 1918a.45 deals with cranes and derricks which are in use in the marine terminal environment.

The use of cranes and derricks is increasing on the waterfronts of the United States, and crane accidents are frequent (Ex. 43). A study of mobile crane accidents in construction, conducted by the Construction Safety Association of Ontario, showed that one-fifth of all fatal construction accidents involve cranes (Ex. 28: 2, 3). Of these accidents 23% involved rigging failure, 53% resulted from inadequate or improper securing or handling of loads, 12% were caused by overloading of the crane, boom collapse or crane overturning, and 6% involved operator error. OSHA statistics do not identify crane accidents that have occurred in marine terminals, but the Bureau of Labor Standards, OSHA's predecessor, did analyze and tabulate crane accidents on the waterfront (Ex. 43). This analysis showed that crane accidents were increasing with the increase in the use of this type of equipment in cargo-handling operations. OSHA welcomes any additional data on crane injuries and accidents associated with the use of cranes in marine terminals.

Many of the provisions in this section of the proposal are based on similar requirements in the longshoring regulations and many have been developed on the basis of staff research and after consideration of the Advisory Committee's coments on this subject. The final SAC recommendation (Ex. 2: 100i) urged OSHA to evaluate coverage of cranes and derricks in the general industry standards (§§ 1910.179, 1910.180, and 1910.181), and to consider applicable provisions from the longshoring standards as well. The crane and derrick regulations in the proposal are the result of any analysis of these standards of applicability, appropriateness, and adequacy in the marine terminal environment. As a consequence, the proposal addresses every type of crane currently used in a terminal facility; the coverage of this topic in the general industry standards only applies to a few of the types of cranes used in a marine terminal. Further, many of the extensive and stringent cerfication requirements for cranes used in the maritime industries (see 29 CFR Part 1919) have been incorporated into this proposal; many of these provisions, for example those for inspections, are more rigorous than similar provisions in the general industry standards.

Proposed paragraph (a)(1) specifically lists types of cranes covered by this section. The type of crane specified in (a)(1)(vi) has been defined to distinguish it from an ordinary straddle truck; for

the purposes of this proposal any straddle-type unit capable of straddling two or more intermodal containers is sufficiently large to be classified as a crane. Straddle trucks that only have the capability of lifting one container are not classified as cranes because they cannot lift the container high enough to endanger employees below.

Overhead bridge cranes are also addressed in this proposed section, although they are not covered in the existing longshoring regulations because there were few cranes of this type being used in maritime applications at the time these rules were promulgated. Since then, however, the use of this type of crane has increased, and there have been several serious accidents involving runaway bridge cranes in marine terminals (Ex. 34).

Paragraph (a)(2) proposes to exclude equipment adapted from industrial trucks; this type of modified equipment is also not classified as a crane in section 1918.3(r)(5)(i) of the longshoring regulations. A further example of equipment not classified as a crane or derrick is a chain hoist, which would therefore also not be included in the scope of this section.

Proposed paragraph (b)(1) addresses ratings for cranes and derricks other than bridge cranes, and is based essentially on § 1918a.74(a)(2) of Part 1918. It requires that cranes be equipped with a rating chart visible to the operator and containing all the manufacturer's capacity ratings, such as operating radii for all permissible boom lengths and jib lengths. This information is needed by the operator to ensure that lifts are within the crane's capacity. ANSI MH9.1 (section 5.3.1.) contains a similar requirement.

Proposed paragraph (b)(2) is similar to the provision at § 1918.74(a)(5) of the longshoring regulations, and requires employers to observe the appropriate rated working load limits. The next proposed provision, (b)(3), prohibits employers from increasing load ratings unless the manufacturer of the crane has approved the increase. Since a crane's rated capacity determines the weight of the load that can be hoisted, the rating can only be increased after careful analysis of the crane's design characteristics and subsequent structural alteration of the crane. If the manufacturer's services are not available, the proposal requires the employer to obtain an engineering design analysis, performed or approved by the agency certificating the equipment under Part 1919, to ensure that increasing the designated working loads will not capsize the crane or be otherwise hazardous. The paragraph's final proposed provision requires that any structural changes to equipment necessitated by increasing the ratings be performed before the equipment is returned to service. Examples of changes that would affect a crane's rating are using a different boom or wire of a different size. The requirements are similar to but more extensive than those in the certification standard (29 CFR 1919.77).

Radius indicators or boom angle indicators visible from the operator's station are required on certain cranes by the proposed rule that appears in paragraph (c); the longshoring regulations contain a similar provision, (§ 1918.74(a)(3)), as does ANSI MH9.1 (section 5.3.21). Indicating devices of this type are essential in cases where the weight of the load that can be hoisted safely varies with the radius or angle of the boom.

Proposed paragraph (d) prohibits placing sideloading stresses upon the boom, for example by using a crane to pull railcars or drag (bull) cargo. This provision recognizes that it is not always possible to avoid a small amount of sideloading but that to exert a significant degree of sideloading is to invite boom failure or other disaster. Both the longshoring regulations and ANSI MH9.1 contain similar prohibitions (§ 1918.74(a)(7) and section 5.3.20, respectively). OSHA would appreciate comments defining or specifying the amount of sideloading that presents a hazard to employees working on or near the crane under various working conditions, and information about the kinds of operations in which sideloading is likely to be a problem. Suggestions for work practices that would prevent sideloading, such as positioning the load directly beneath the hoisting mechanism, would also be appreciated.

The next proposed provision, (d)(2), forbids operation of a crane or derrick that has a functional defect that might affect the safety of the operation adversely. Examples of such defects are damage to the boom, boom cord, or lacing or to the wire rope. Rules directed at the same hazard appear at § 1918.74(a)(8) of the longshoring regulations, section 5.3 20 of ANSI MH9.1, Rule 1428 of the 1979 Pacific Coast Marine Safety Code, and the 1970 Joint New York Maritime Safety Code (paragraph 12, Part 1) (Ex. 20; 19).

The guards addressed in proposed paragraph (e)(1) would protect employees from contact with moving machine parts such as gears and chain or belt drives; equivalent requirements appear in ANSI MH9.1 (section 5.3 17.6), § 1910.181(j)(1)(i) of the general industry standards, and in a more general manner for shipboard use in § 1918.53(a)(1) of the longshoring rules. Caught-in-and-between accidents involving nip and shear points are common around any unguarded moving machine parts, and the proposed requirement is designed to prevent these injuries. The general industry requirements stipulate that the guards used must be strong enough to withstand the weight of a 200-pound load; the proposal states this requirement in more performance-oriented language.

Proposed provision (e)(2) requires crane hoisting hooks to be latched or otherwise secured so that the load cannot accidentally disengage. This requirement has evolved from a precaution originally directed at ship's burtoning gear (two fixed booms, each with a fall, attached to a common hook) and was meant to apply in situations when, for example, auxiliary gear such as an empty bridle was used with a rapidly moving ship's hook. Cranes designed for use ashore, such as mobile cranes, which have devices such as latches on their hooks, are becoming increasingly common in the marine terminal setting.

The next proposed provision, (f)(1), directs either that operating controls be marked or that a diagram indicating control functions be posted at the operator's station; this rule is designed to reduce the hazards caused by lack of familiarity with equipment. It is not uncommon in this industry for operators to be assigned to particular cranes or types of cranes with which they are not familiar, a practice that may contribute to operator error, especially in an emergency. The language of this requirement is based on that of § 1918.74(a)(2) of the longshoring rules and section 5.3.1 of ANSI MH9.1.

The controls on derrick and cranes are required by proposed paragraph (f)(1)(ii) to be self-centering so that they will return to the "off" position if the operator accidentally releases the control. This provision would become effective one year after Part 1918a becomes effective, to allow employers sufficient lead time to modify the controls or other equipment.

Crane boom stops are addressed in proposed paragraph (f)(2); no similar requirement appears in the existing longshoring regulations, because at the time these rules were promulgated there were relatively few cranes on the waterfront that needed boom stops. Since that time, however, the increased use of cranes of the types that should have these stops has led OSHA to propose this requirement; ANSI MH9.1

contains a similar provision (section 5.3.5). It would also eliminate the possibility of the crane operating at angles too great for safe lifting. The proposed requirement excludes cranes already "fitted with operable automatic limiting devices," such as some types of portal cranes. There is some debate about the effectiveness and practicality of certain types of boom stops, and OSHA welcomes any pertinent information on this topic that will aid in drafting the final rule.

Proposed paragraph (f)(2)(ii) requires the crane's purchase block to be secured so that it will not interfere with the whip line, which is used in hauling operations.

Foot pedal controls on cranes and derricks are required by proposed paragraph (f)(3) to have non-skid surfaces to prevent the operator's foot from slipping off the pedal during operation; section 5.3.7 of ANSI MH9.1 contains a similar requirement.

Means of access to cranes and derricks are addressed in paragraph (f)(4); this proposed requirement is similar to coverage of the same topic in ANSI MH9.1 (section 5.3.12). The first provision, (f)(4), requires that ladders, stairways, or other suitable and safe means of access be provided so that employees working on or operating the crane can reach their work stations safely. Footwalks are required by proposed paragraph (f)(4)(i) to be rigid and capable of supporting a load of 100 pound per square foot.

Requirements for vertical ladders more than 20 feet high are proposed in the next paragraph, ((f)(4)(ii)); these devices are required to comply with any applicable strength, safety device, or landing platform specifications for fixed ladders proposed in §1918a.119 of this document.

Proposed paragraph (f)(4)(iii) stipulates that stairways on cranes have rigid handrails meeting the requirements of proposed §1918a.112(c)(1). The next provision, (f)(4)(iv), is designed to warn employees emerging from ladders or stairways at a level immediately below the crane's rotating house from being hit by the house. This proposed requirement has been newly developed for this marine terminal proposal. It is not intended to apply to moving machine parts such as gears and chains, already addressed by paragraph (e)(1) of this section.

The requirements proposed in paragraph (f)(5) concern the crane operator's station. The first requirement is similar to a provision in ANSI MH9.1 (section 5.3.13). It requires that the operator have a clear view of the load (or signalman, if one is involved in the operation), so that the coordination and control required to conduct crane operations safely can be maintained. The ANSI requirement specifies that the operator also be able to see the boom, but this requirement has not been proposed because the operator cannot see the boom with some types of cranes, for example with some level-luffing cranes. Any glass used in the cab of a crane or derrick is required to be safety plate glass, a precaution necessary to prevent employee injury if the cab window is broken. Plate glass is specified because laminated glass may distort the viewing image. The SAC recommended a prohibition against storing objects in the cab in a manner that would interfere with the operator's view or safe operation of the equipment (EX. 2: 103i); this recommendation is embodied in the final requirement proposed in paragraph (f)(5), and is similar to the provisions at §1910.180(i)(3)(i) and §1910.181(j)(6)(i).

Counterweights or ballast are addressed in paragraph (f)(6) of the proposal, and which is based on similar provisions of section 5.3.14 of ANSI MH9.1 and §1918.74(a)(6) of the longshoring regulations. The proposed requirement states that the manufacturer's or the design specifications pertaining to type, amount, location, and securing of ballast or counterweights must be observed, to ensure safe hoisting of loads. Accidents may be caused by the use of substitute, unsecured, additional, or improperly located ballast.

Outriggers, which increase equipment stability, are required by proposed paragraph (f)(7) to be used in accordance with design or manufacturer's specifications. The requirements proposed for floats and outrigger supports are similar to provisions in the general industry standards (§1910.180(h)(3)(ix)) and the ANSI MH9.1 (section 5.3.15); these proposed provisions, which also reflect current industry practice, are designed to ensure that outriggers are on a firm foundation while loads are being hoisted.

Proposed paragraph (f)(8) stipulates that exhaust gases from cranes discharge away from employee work stations, to avoid exposing workers to carbon monoxide and other noxious fumes. A requirement directed at the same hazard appears in ANSI MH9.1 (section 5.3.9) and in the 1979 Pacific Coast Marine Safety Code (Rule 1432) (Ex. 20).

The proposed provision addressing electrical hazards associated with cranes, (f)(9), requires guarding or an equally effective method of protecting workers exposed to energized electrical parts in the course of their work; this precaution would not apply to electrical equipment that must be energized to perform inspection, "troubleshooting," or maintenance operations. No similar provision appears in the longshoring rules or in ANSI MH9.1, but a somewhat similar requirement does appear in §1910.179(g)(2)(i).

Requiring a portable fire extinguisher on or near the cab of each crane or derrick is proposed by paragraph (f)(10); this precaution would allow the crane operator, for example, to put out an electrical fire in the cab. This provision reflects routine practice, and similar rules appear in ANSI MH9.1 (section 5.3.4), the general industry standards (§ 1910.180(i)(5)), and the International Longshoremen's Association-New York Shipping Association Joint Maritime Safety Code (1970)(Ex. 19: 52). U.S. Coast Guard regulations do not mandate fire extinguishers on all cranes in marine terminals. Extinguishers using carbon tetrachloride or chlorobromomethane, which produce toxic fumes, are prohibited.

The proposed wire-rope-on-drum provision ((f)(11)) is similar to a rule in the longshoring standard (§ 1918.52(c)(2)), but has been adapted to equipment used in marine terminals; several rules in § 1910.179(h)(2) are also similar in intent to the proposed provision, as is section 4.7.5 of the International Labour Organization Code of Practice, Safety and Health in Dock Work (Ex. 33). The precautions stipulated are designed to guarantee that sufficient and properly fastened rope remains on the drum to ensure that the rope does not slip off the drum.

Proposed paragraph (f)(12) relates to boom section assembly and disassembly, and has been newly developed because mobile crane accidents caused by failure to block the boom are very common throughout industry. In the past 22 years, for example, 30 workers in Florida alone have been killed by falling boom sections that were not blocked during assembly or disassembly (Ex. 41).

Crane and derrick brakes are covered in proposed paragraph (f)(13). Each hoisting unit is required to have at least two means of braking, one of which must directly affect the drive shaft (or other reducing gear component), which controls the hoist mechanism. Each of the brakes required must be capable of holding 1½ times the crane's rated load. ANSI MH9.1 (section 5.3.6) contains similar requirements.

The proposed requirements that appear in paragraph (g) apply to rail-mounted cranes other than those of the locomotive type. Paragraph (g)(1)

identifies specific types of cranes falling within the scope of this paragraph; overhead and gantry cranes, both of which are types of bridge cranes, are covered, as are portal cranes, which are revolving cranes with elevatable booms.

Paragraph (g)(2) requires the rated load to be marked clearly in the cab and on each side of any bridge crane; ratings must be legible from ground or floor level to be visible to all employees involved in the hoisting operation.

Wind-indicating devices, which are the subject of some controversy in the industry, are addressed in proposed paragraph (g)(3). The first provision, (g)(3)(i), requires all rail-mounted cranes (except locomotive cranes) to be individually fitted with an operable wind-indicating device. The anemometer or similar device must be set to give warning and shutdown indications appropriate to the particular crane to which it is attached. There have been many serious accidents involving cranes running away in high winds, including two fatalities (Ex. 34).

Although there is some difference of opinion in the industry over the proper location of these devices, there is no argument about the necessity for wind indicators on rail-mounted cranes. There have been many wind-related accidents involving cranes of these types, particularly the large, specialized container-handling cranes, which have more sail area than other cranes. Portal cranes have been blown the length of their tracks and fallen into the water, causing catastrophic losses. OSHA has decided, on the basis of staff research, accident records, and other evidence, that all rail-mounted cranes should be individually fitted with anemometers. A wind-indicating device mounted on a building at the work site would not be an acceptable alternative, because a device so located might not accurately reflect wind conditions prevailing at the crane's location. Wind conditions may vary widely from one site to another and be affected by altitude, buildings and other factors. The ANSI MH9.1 provision (5.3.17) directed at the same hazard simply states "Rail-mounted, portal, gantry, semi-gantry, and all other bridge-type cranes located outside of structures shall be equipped with anemometers or wind indicators in good working condition." A requirement for a wind-indicating device also appears at § 1910.179(b)(4) of the general industry standards, but its application is restricted to "outdoor storage bridges" only, and would not cover container cranes and other types of cranes found in marine terminals.

Proposed paragraph (g)(3)(ii) sets performance requirements for wind-indicating devices. These devices are required to provide both a continuous readout of wind speed and a visible or audible alert when wind speed reaches a predetermined warning or partial shutdown velocity (the warning speed), which may not exceed the crane manufacturer's recommendations for warning or partial shutdown. Another warning is required when the wind velocity reaches that speed established by the manufacturer as requiring crane shutdown and securing (the shutdown speed). Again, this speed may not exceed the manufacturer's recommended wind-velocity limit for operation of the particular crane. Both warning and shutdown wind velocities vary, depending on the crane in question. For example, some cranes must shut down when the wind reaches 35 mph, while others can operate safely at 50 mph. The proposed requirements are essential if cranes are to be adequately controlled in working conditions involving high winds.

The readout and alarm required by paragraph (g)(3)(iii) must be located in the cab to be seen and heard by the crane operator.

Proposed paragraph (g)(3)(iv) concerns posting of instructions to be followed when wind indicators show warning or shutdown velocities. Instructions must be posted in the cabs of rail-mounted cranes, and employees must comply with these instructions. Any necessary directions for coordinating the activity of more than one crane in high-wind situations must be included in the posted instructions; an example of such a situation would be two cranes working on the same track.

Means of preventing rail-mounted crane movement must be used when the wind has reached the warning velocity, according to the proposed requirement in paragraph (g)(4)(i). The preliminary steps to be taken include stopping the crane from gantrying, removing any parts of the crane that are overhanging the vessel being worked and stationing the crane so that it can be secured quickly if the wind speed continues to increase. Are there situations (for example, when the wind prevents hoisting of the boom or when the crane's boom is not articulated) when the crane cannot be moved clear of the vessel? What additional precautions should be taken in such situations?

The proposed requirement in paragraph (g)(4)(ii) specifies that each crane be secured; using all available means, when the wind reaches the predetermined shutdown speed for the particular crane in question. The most common method of securing a rail-mounted crane is the use of uniformly spaced securing points positioned alongside the crane's tracks, but rail clamps, typhoon chains, and wires and cables are also sometimes used. All available means should be used to secure a crane, because even when all means are used, it is still sometimes impossible to hold a crane in high winds. The ANSI MH9.1 standard also contains provisions directed at runaway cranes (section 5.3.17).

In paragraph (g)(5), OSHA proposes that employers monitor local weather conditions so that they will have advance warning of high wind conditions. Subscribing to local weather reporting services or listening to NOAA weather broadcasts should greatly increase storm warning times and thus reduce the number of wind-related marine terminal injuries and fatalities.

Stops and bumpers are addressed in proposed paragraph (g)(6); the provisions proposed in the paragraph are similar to but less detailed than those in sections 5.3.17.1 and 5.3.17.2 of ANSI MH9.1 or in §§ 1910.179(e)(2) and (e)(3) of the general industry standards. As proposed, either stops or bumpers are required ((g)(6)(i)) on all rail-mounted cranes; stops are used on the truck's tracks and are designed to limit the movement of the bridge or trolley, and bumpers are used on the trolley's tracks to reduce the force of impact, thus decreasing the likelihood of employee injury and equipment damage. As proposed, any stop designed to operate by engaging the tread of a wheel must be at least equal in height to the radius of the wheel engaged, to ensure effectiveness of the device.

Proposed paragraph (g)(6)(ii) requires bumpers or other devices on the adjacent ends of all cranes or trolleys used on the same runway or bridge with other cranes or trolleys. Examples of means other than bumpers that would prevent crane collision are automatic electronic controls or sensing devices. OSHA's general industry crane standard (§ 1910.179(e)(2)(i)) has a similar requirement (Ex. 42).

Although crane and trolley stops and bumpers are effective in reducing the hazards associate with runaway cranes or with two cranes colliding, no stop or bumper can eliminate these hazards entirely. For example, the most effective bumper available is designed to eliminate impact damage only for a crane traveling without load at 20% of rated load speed (Ex. 35: 26), conditions which would clearly be exceeded in many emergency situations. Similarly, no stop device or system of stops will hold a rail-mounted crane that is already in motion or has not been secured before high winds occur. The

limitations of stops and bumpers underscore the importance of the crane wind-indicating devices required in this section of the proposal.

Paragraph (g)(7) proposes that when employees may be in the vicinity of the tracks, crane trucks must be equipped with means, such as sweeps, to deflect employees from the track when the crane approaches. A similar requirement appears in the general industry regulations, § 1910.179(e)(4), and in ANSI MH9.1 (section 5.3.17.3). This provision, in conjunction with the proposed requirement at (g)(9) should ensure that employees on the track will have adequate warning of and protection from the movement of a traveling crane.

To ensure safe employee passage between a crane and another structure, proposed paragraph (g)(8) requires a minimum clearance of 3 feet for the area to be used by employees for passage. No similar requirement appears in the general industry standards or the ANSI MH9.1 standards, but the often limited working spaces typical of marine terminals warrant is inclusion in this proposal

Each rail-mounted crane is required by proposed paragraph (g)(9) to have a warning device to alert employees in the crane's path that the crane is traveling toward them. This proposed requirement may be met by using either an audible or a visible warning device, such as a gong or light. The provision should not be interpreted to mean that a warning should be sounded continuously when a crane is traveling, because such a warning would soon cease to be effective. For maximum effect, the warning device is to be used only when employees are in danger of being hit by the crane. The equivalent general industry requirement, § 1910.179(i), applies only to overhead and gantry cranes and does not cover portal cranes, which are very common on the waterfront.

The proposed rule in paragraph (g)(10) deals with communication between the cab and the base of rail-mounted cranes, and is intended to ensure that effective communication is available between the operator, who is often far away from the ground, and employees at the base of the crane. Any effective means of achieving this communication, other than hand signals, may be used. Neither the general industry standards nor ANSI MH9.1 has a similar requirement.

The proposed requirement in paragraph (h) is directed to the stability of locomotive cranes; it stipulates that outriggers be used during hoisting operations unless the force of the load being hoisted is distributed so that it is not carried by the crane truck's springs, which might cause the crane to collapse. An equivalent provision appears at § 1910.180(h)(3)(xi) of the general industry standards.

The requirements proposed in paragraph (i) relate to general crane operations; most of these provisions are similar to coverage of the same topics in the longshoring regulations, the ANSI MH9.1, and the general industry standards.

The first proposed provision, (i)(1), is directed to the hazardous but sometimes necessary practice of using two cranes working in unison to hoist a large and heavy load. To be preformed safely, this type of operation requires close coordination and supervision, and the requirement that one person be designated to direct the operation and instruct all involved personnel is designed to ensure the necessary level of supervisory control and skill. This proposed requirement parallels the rule in § 1910.180(h)(3)(xii) of the general industry standards.

The proposed rule ((i)(2)) requiring guarding of areas accessible to employees within the swing radius of the body of a revolving crane is based on provisions in the longshoring regulations (§§ 1918.55 and 1918.74(c)). These provisions were originally promulgated in response to fatal accidents in which employees were caught between a part of the crane and another structure or between parts of the crane itself (Ex. 43). A SAC recommendation (Rec Vol 103i) supported inclusion of this provision; the OSHA proposed rule has gone beyond the committee's recommendation to include the language "or between parts of the crane" and to specify that the means of guarding be physical, which would prohibit the use of signs only. Examples of means of guarding that might be used are sawhorses and boards, roping off, or extending wires from the crane chassis. A similar provision appears in section 5.3.16 of ANSI MH9.1.

The hazards addressed in proposed paragraph (i)(3) are also covered by provisions in ANSI MH9.1 (section 5.3.11) and the general industry standards (§ 1910.180(h)(3)(xiii)). Since both the boom and the hook of a crane may swing during travel from one job site to another, the proposal requires that they be properly secured during transit, except in those situations specifically noted in the proposed requirement. When the boom is secured to a dolly, it cannot slew, and when the operator is turning the house, he has control of the crane's movement.

The appropriate precautions to be taken when a crane is left unattended between shifts are specified in proposed paragraph (i)(4). No similar requirements appear in the general industry standards (except for a requirement that operators remain at the controls while loads are suspended (§ 1910.180(h)(4)(i)) ANSI MH9.1 or the existing longshoring rules. Hôwever, the hazards of unattended cranes, such as crane runaway in high winds or falling of a load left suspended, are addressed at least minimally in the following industry developed and consensus standards: Mobile Hydraulic Crane Standards, Standard No. 2, Power Crane and Shovel Association (paragraph 8.3.3.8); Mobile Power Crane and Excavator standards, Standard No.1, Power Crane and Shovel Association (Paragraph 8.3.8.8); and the ANSI B30.5–1968, Crawler, Locomotive and Truck Cranes (section 5.3.1.3 f) (Ex. 91). As proposed, the standard provides that unattended cranes may not be left with suspended loads (except as noted) and must have clutches disengaged, power sources turned off, wheels blocked or otherwise secured against travel, and boom lowered and secured. These precautions are designed to designed employee injuries caused by uncontrolled crane travel, falling loads, and swinging booms. OSHA particularly welcomes comments on appropriate precautions to be taken when a crane is left unattended; for example, are there situations in which it is not feasible to take the proposed precautions? If these precautions are not taken, what alternative measures would be appropriate?

Although the next paragraph, (i)(5), addresses a hazard, crane operation near power lines, that is rarely encountered in the marine terminal setting, the seriousness of the hazard requires the proposed regulatory coverage. The general industry and construction standards contain nearly identical provisions (§ 1910.180(j)(1) and § 1926.550(a)(15)). The proposed requirements specify that, unless electric power lines are deenergized and grounded or an insulating barrier independent of the crane or derrick has been erected to prevent contact, cranes may only be operated near electric lines if they maintain the clearances specified in provisions (i)(5)(i) (A), (B), and (C). These minimum overhead clearances are essential if electrocutions caused by parts of the crane hitting power lines, which have been common throughout construction and general industry (Ex. 28:2), are to be prevented. The proposed clearances are identical to those in the general industry standard.

Proposed paragraphs (i)(5) (ii) and (iii) address boom guards and energized lines, respectively, and both provisions are nearly identical to rules in the general industry standards (§ 1910.181(j)(5) (ii) and (iv)). Although proposed paragraph (i)(5)(ii) permits the use of boom guards or proximity warning devices, these devices do not offer adequate employee protection against electric shock and may therefore not be used in lieu of maintaining the overhead clearances specified above. Proposed paragraph (i)(5)(iii), which also reflects industry practice, requires the employer to assume that electric lines are energized until he has contacted the agency responsible for the line (which is usually a utility company) and until that agency has indicated that the line has been deenergized, as required by proposed paragraph (i)(5)(iii). A similar requirement appears in the general industry regulations (§ 1910.180(j)(2)).

The requirements grouped under proposed paragraph (j) concern precautions to protect employees being hoisted by a crane, for example when employees are being placed on the top of intermodal containers. The same topic is covered in OSHA's ship repairing and shipbuilding regulations (§ 1915.41(a)(9) and § 1916.41(a)(9)).

The first two proposed provisions, (j)(1) (i) and (ii), stipulate that employees may only be hoisted by a crane or derrick load hoisting apparatus if a protected platform or boatswain's chain is used. Proposed paragraphs (j)(1)(ii) (A)–(F) list the requirements any platform used to hoist employees must meet; these include proposed specifications for platform and load weights, safety factors, anchoring, access doors, and overhead protection.

The proposed provision dealing with wedge and socket attachments, (j)(1)(ii)(F), prohibits the use of these attachments to hoist employees unless the line is doubled back and secured by a clamp, which will prevent slippage. The proposed requirements at (j) (2) and (3) are concerned with hoist mechanism control and immobilization of variable-radius booms during hoisting of personnel; these precautions ensure that the operator has positive control and that the boom does not rotate or extend accidentally. Without power-down capability, the action of the brake would be the only protection against the load slipping on the way down.

Proposed paragraphs (j) (4) and (5) both deal with devices used to hoist employees by crane or derrick. The first proposed requirement stipulates that unless a net approximately 5 feet in height surrounds the sides of the lifting platform, all employees being hoisted must be protected against falling by a safety belt or by a harness and lifeline, attached either to the hoist mechanism of the crane or to the lifting device itself. In addition, it is proposed that platforms or other employee hoisting devices be inspected before each day's use and be removed from service if defective.

The provisions proposed in (j) (6), (7), and (8), which also reflect current industry practice, are designed to ensure employee safety during personnel hoisting operations. The first of these proposed requirements would ensure effective communication, by means such as visual or voice contact or by means of hand signals, between the employees being hoisted and the crane operator (or signalman, if one is involved in the operation). The next provision requires crane operators to remain at the controls continuously during employee hoisting operations (a similar requirement applicable to any load being hoisted appears at § 1910.180(h)(4)(i) of the general industry standards).

The proposed rule at paragraph (j)(6) prohibits crane travel during the interval when employees are being hoisted, to reduce the amount of crane motion during this operation to a minimum; in situations in which crane travel is unavoidable, for example, when transferring employees into position, the crane may make minor movements while employees are elevated if all other proposed personnel hoisting requirements have been met.

The final proposed provision in paragraph (j) is addressed to the use of intermodal container spreaders to lift employees on and off containers. A personnel platform that could be used for this purpose was first devised by a U.S. steamship operator and stevedoring firm in the 1960's, and since then the use of this device has spread widely. The requirements proposed in (j)(9) offer protection against falls while personnel are being hoisted in this manner, and the final statement in this paragraph proposes that the provisions of paragraphs (j)(1)(i), (j)(1)(ii)(A), (j)(1)(ii)(B), (j)(1)(ii)(E), (j)(4) and (j)(8) not apply when intermodal container spreaders, rather than hoisting platforms, are used to hoist employees. These four proposed requirements are unnecessary when spreaders are used, because spreaders are stable, strong and secure, and are only used in situations where there are no overhead hazards; i.e., no suspended drafts.

Routine crane and derrick inspections are covered in proposed paragraphs (k)(1) through (k)(4); provisions that are similar in intent to proposed paragraphs (k)(3) and (k)(1) appear in the existing longshoring regulations (§§ 1918.74(a)(8) and 1918.61(a), respectively), and extensive crane and derrick inspection requirements are found in the general industry standards (§ 1910.179(j); § 1910.180(d); § 1910.181(d)). The proposal would allow only designated persons to perform inspections or repairs on cranes or derricks, and any defects in functional operating components found during inspection would be required to be reported to the employer. In turn, the employer must inform the operator of any defects, which would then have to be repaired before further use of the equipment.

The final provision in this paragraph, (k)(4), proposes that a record of required monthly inspections be maintained for at least six months, so that maintenance personnel will have access to the equipment's service and repair history. OSHA would appreciate receiving comments and information about the need for the monthly inspections called for in proposed paragraph (k)(2), particularly in view of the stringent existing crane certification requirements for annual and daily inspections (§ 1919.15(c)).

Section 1918a.46 Crane load devices. Proposed § 1918a.46 covers crane load devices and is an updating of § 1918.74(a)(9) of the existing longshoring rules. Regulations governing load-indicating devices were first incorporated in the maritime rules in 1971, because cranes used in the marine environment must often operate in more critical situations and under harsher conditions than generally prevail elsewhere. For example, in stevedoring, cargo is being hoisted into and out of vessel holds and the hoisting equipment is therefore subject to more shock loading, impact damage, and sideloading stress than equipment used in open spaces.

Since promulagation of the maritime rules in 1960, however, some load devices have been reported to be less sturdy and less reliable than originally thought; in addition, the serviceability and accuracy of these devices have been shown to be highly dependent on the quality of the maintenance performed on the device itself and on the crane to which it is attached. For example, a load-indicating device that relies on factors affected by sheave friction (such as tension on the wire) will not operate properly if the sheaves present more than the proper amount of friction. Lack of success in using these devices has led many people in the marine industry to recommend that load-indicating devices not be required in the proposal or in any future marine

terminal rule. However, OSHA believes that, given proper maintenance procedures, these devices provide significant protection for employees working with cranes. There are no available statistics attesting directly to the effectiveness of load-indicating devices, but other countries, such as Great Britain and Germany, and organizations such as the International Labour Organization (Code of Practice, Safety and Health in Dock Work, 1977) (Ex. 32: 63, 64) have required or recommended these devices for several years. It has been suggested (Ex. 28: 4, 5) that the required use of such devices is responsible for the smaller percentage of crane capsizing accidents in Great Britain (25% of all crane accidents) compared to the United States and Canada (35%). Neither the OSHA construction standards nor the general industry standards require these devices. OSHA would appreciate any information or statistics, including accident reports, that would be helpful in addressing this topic in the final standard for marine terminals.

The first proposed rule ((a)) of the crane load device section requires each crane to have means of determining or limiting the loads hoisted; the exceptioms to this proposed requirement are stated in paragraphs (a)(1) through (a)(4). Cranes using a clamshell or bucket to handle bulk cargo or those using a magnet or similar hoisting device (other than a hook, spreader or sling) are exempted from the load device requirement because the dimensions or physical characteristics of a bucket or magnet limit the size of the load so drastically that it is impossible to overload the crane. The proposed provision goes beyond the exemption in § 1918.74(a)(9)(viii)(*b*), which is allowed only "while handling bulk commodities or cargoes by means of clamshell bucket or magnet," because there are other commodities and other hoisting configurations which similiarly pose no threat of overload. Similarly, cranes used exclusively to handle hose-handled products, such as bulk liquids, are excluded because no loaded hose weighs enough to present on overload hazard. Determining accurately, the weight of a load to be hoisted is often essential if overloading accidents are to be prevented. An example of a load whose weight is otherwise impossible to determine is a lift consisting of water-soaked logs, a common type of cargo in West Coast ports. In addition, the weights painted on steel ingots and loaded intermodal containers are often incorrect.

Proposed paragraph (a)(3) would permit employers to dispense with a load device if they can demonstrate that a crane will not be used to handle loads beyond the crane's load ratings at any working radius; this provision represents a rewording of the requirement in § 1918.74(a)(9)(viii)(*d*) of the maritime regulations. As proposed, an employer could demonstrate that a particular crane never exceeds its rated loads by making the pertinent cargo manifest, stow plan, or bill of lading available. This proposed requirement would ensure that the crane's load rating is not exceeded.

The final exemption, stated at paragraph (a)(4), is substantively identical to the provision appearing at § 1918.74(a)(9)(viiii)(*a*) of the longshoring regulations, and proposes that trolley-equipped container-handling cranes need not have had load devices, if they are in compliance with the rules proposed in § 1918a.71(b), (c), (d), and (e) of this Part for determining container and load weight, or if lifts are made with a lifting beam supplied by the manufacturer. Proposed paragraph (a)(4) should not be interpreted as permitting a crane fitted with a weighing device to be used to weigh a load, a hazardous practice which may involve lifting loads of unknown and perhaps excessive weight. Some employers have installed weighing devices that provide an actual readout in the cab of the weight of every load, but OSHA does not propose that such a readout be required because the load should be weighed before it is hoisted. Compliance with this proposed provision is required in addition to the requirements proposed in § 1918a.71(a) through (e), which require a weighing scale to be used.

Proposed paragraph (b) specifies the requirements to be met by whatever load-indicating or load-limiting device is chosen by the employer to comply with proposed paragraph (a); the criteria are essentially the same as those in the maritime regulations (§ 1918.74(a)(9)(ii)). Proposed paragraph (b)(1) is appropriate in the case of cranes with elevatable variable radius booms, and permits employers to use any means of indicating load weight directly, except a hook scale or a dynamometer, which are not sufficiently accurate for this use; this option would require operators to use weight indications together with crane ratings, where this is appropriate, to ensure that the hoisting operation is within a safe range. The proposed alternative outlined in paragraph (b)(2) would permit the use of a load-moment device, computer, or other equipment or system that automatically indicates that the rated load is being approached or has been reached or exceeded, and the last proposed provision, (b)(3), would allow employers to equip their cranes with a limit switch or other device that shuts off power to prevent overloading.

Performance requirements for crane overload or load-indicating devices are addressed in proposed paragraph (c); these provisions loosely parallel those in § 1918.74(a)(9). The first proposed provision requires any device used to have a range compatible with the range of the crane. The accuracy ranges required for load-indicating devices are specified in proposed paragraph (c)(2), and are based on the standards used by manufacturers of these devices and set forth in Society of Automotive Engineers standard J376 (Ex. 39: 1, 2). Since the state of the art for these devices is such that the specified accuracy cannot be attained at the extremes of the crane's ratings, the proposal requires a means of warning the crane operator when the load falls within these extreme and inaccurate ranges.

Limit switches or equivalent devices must meet the accuracy requirements proposed in paragraph (c)(3), and the rule in proposed paragraph (c)(4) requires any load-indicating load-limiting device to meet the performance requirements at temperatures ranging from −22° F to +122° F, which would include those commonly encountered in the marine terminal environment.

Proposed paragraph (d) requires load-indicating devices to be checked before each day's use unless the device manufacturer has certified that the device will meet the performance requirements of paragraph (c) for a specified and unexpired period of time, and there is a record of this certification at the terminal.

In cases where the load-indicating device itself forms part of the weight-bearing structure, as is the case when a load cell is used, proposed paragraph (e) states that the device's strength factor may not be the limiting strength factor of the crane to which the device is fitted. A similar requirement appears at § 1918.74(a)(9)(iv) of the longshoring standards. Any load-indicating readout or device labeling is required by proposed paragraph (f) to be compatible with or convertible to the measures used on the crane rating chart, which is essential if indications and chart are to be used together safely and effectively. The provisions in this paragraph are similar in intent to those in § 1918.74(a)(9)(v) of the longshoring regulations.

In paragraph (g), OSHA proposes that manufacturer's installation, maintenance, and use instructions be

followed for cranes and load-indicating devices; the effectiveness of these devices is heavily dependent on proper maintenance of both crane and device.

Proposed paragraph (h) is directed to devices that use radius or boom angle as a factor in determining load capacity; the provisions specify the accuracy ranges required for these devices. As proposed, a chart would be required if conversion from angular to linear measure (or vice versa) is necessary. Similar requirements may be found in the maritime rules (§ 1918.74(a)(9)(vii)).

In paragraph (i), OSHA proposes performance tests for load devices and requires installations to be tested when initially fitted, at intervals recommended by the manufacturer, when an inaccuracy is noticed, and when surveys are required by certification procedures. The performance test must be in accordance with manufacturer's instructions (if these are available), and must include testing of all functions. Performance test for load-indicating devices are not addressed in the longshoring rules or in the general industry standards, but they are recommended in SAE J376 standard (Ex. 39: 3, 4).

Test records are covered in paragraph (j), which proposes that records of the most recently conducted performance test be maintained for each load device. Such a record would be required to note the accuracy of the device and any recalibration that was required to restore accuracy.

Section 1918a.47 Winches. Both fixed and portable winches are covered in proposed § 1918.47; the provisions in this section closely parallel the recommendations of the ad hoc Advisory Committee (Rec Vol 117i). The first proposed provision requires moving winch parts to be guarded to protect employees from being drawn into the winch; bars or another type of guard over the drum would meet this requirement. A similar provision appears at § 1918.53(a)(1) of the longshoring industry standards. All winches are required by proposed paragraph (b) to have stop controls that can be easily identified and reached by the operator in an emergency. Both the ANSI marine terminal standard (section 5.4) and the longshoring rules (§ 1918.70(b)) address the proper securing of portable winches to prevent shifting during use. However, proposed paragraph (c) permits greater flexibility than these rules by allowing a winch to be moved during use if necessary and by recognizing that it may not be possible to immobilize a portable winch entirely. For example, some portable winches, such as specialized winches on tracks, are designed to move within prescribed limits during use. Proposed provision (d) requires limit stop switches on portable winches, a safety feature that might have prevented a serious winch accident that occurred in a bulk-handling terminal (Ex. 21). The final provision, (e) proposes that the wire-rope-on-drum requirements from the crane and derrick section of the proposal (§ 1918a.45(f)(11)) also apply to winches, to ensure that a safe length of rope remains on the drum.

Section 1918a.48 Conveyors. The proposed requirements in § 1918a.48 cover conveyors used in marine terminals. Although OSHA has no conveyor accident data specifically related to marine terminal conveyor injuries and fatalities, conveyors are known to account for nearly 1% of all lost-workday injuries, on a national basis (Ex. 74: 1-3). The great majority of these injuries are caught-in-and-between injuries, a large number of which result in amputations (Ex. 46: 47). This degree of risk requires that every effort be made to provide protection to employees who work with and around conveyors; OSHA would be grateful for information related to the kinds of conveyors found in marine terminals, the types of material conveyed, the number of employees exposed, and any relevant accident and injury data.

The provisions in paragraph (a) propose that all danger zones associated with conveyors be guarded to ensure employee protection; there is at present no general coverage of conveyors in OSHA's general industry standards. Moving parts, such as nip and shear points and transfer mechanisms, would be required to be guarded, as would screw conveyors, areas beneath counterweights, walkways beneath overhead conveyors, and any other danger zone. The second provision, (a)(2), proposes that employers provide an elevated walkway with a guardrail for the use of employees who must cross over a moving conveyor. It also stipulates that spill guards, casings or other methods be used when necessary to protect employees walking under operating overhead conveyors.

Rollers or wheels on gravity conveyors are required by proposed paragraph (b) to be secured in position to keep them from jumping or falling out of the frame; this requirement is similar to a provision in the ANSI MH9.1 standard (section 5.5.2) and the longshoring rules (§ 1918.68(d)), and uses language recommended by the SAC (Rec Vol 117i).

Gravity roller conveyor sections are required by proposed paragraph (c) to be firmly placed and secured, to prevent material on the conveying medium itself from falling off and injuring employees. Both the ANSI MH9.1 standard (section 5.5.2) and the maritime regulations (§ 1918.68(c)) address the same hazard.

A means of braking or slowing objects arriving at the delivery end of a conveyor must be provided, according to proposed paragraph (d)(1), if employees at the transfer points might be injured by material piling up and spilling off the conveyor. An example of a method that might be used is applying an abrasive surface at the end of the conveyor. Section 1918.68(f) of the longshoring regulations and section 5.5.3 of the ANSI marine terminal document contain similar provisions. A further proposed requirement addressing conveyor brakes stipulates that electrically released brakes must engage automatically if the power supply to the conveyor fails or if the control returns to the stop position, to prevent the load from rolling or falling backward on the conveying medium; the parallel ANSI provision appears at section 5.5.3 of the marine terminal standard.

Portable conveyor stability is addressed in paragraph (e) and in the ANSI MH9.1 standard (section 5.5.3); portable conveyors that can be positioned and used at different elevations must also be held at the operating level by a locking device or other means such as wedging a block in the positioning mechanism. Portable conveyors that have toppled over have caused several accidents and injuries (Ex. 73: 3-49, 3-50, 3-51).

Proposed paragraph (f) deals with emergency stop devices at work stations of employees working along a conveyor or at fixed loading or discharge points; the equivalent ANSI MH9.1 provision (section 5.5.4) prohibits operators from leaving the conveyor's controls while the conveyor is in motion. OSHA has not included this latter requirement because the Agency believes that the remotely controlled and extensive conveyors for which such a rule would be appropriate are not generally found in marine terminals. OSHA invites comments on the use of these conveyors in marine terminals.

A requirement mandating a warning (which may be either visible or audible) unless employees are clear of the conveyor before start-up is proposed in paragraph (g), and reflects a recommendation of the Advisory Committee (Ex. 2:118i). A similar provision was included in the ANSI conveyor standard (B20.1-1976). This provision is intended to prevent accidents caused by the unexpected activation of the conveyor; for example, employees standing next to a vertical

conveyor might be struck by a bucket if the conveyor started without warning.

A general housekeeping requirement is proposed in paragraph (h), which states that areas around conveyor loading and discharge points must be kept free of obstructions while employees are working. Section 5.5.7 of ANSI MH9.1 deals with the same hazards, which include falling over boxes, overexertion caused by lifting objects improperly in a cramped space, and being struck by falling objects.

Conveyor maintenance, sevicing and repair are covered by the requirements in paragraph (i), which are essentially the same as those at section 5.5.8 of ANSI MH9.1. OSHA has recently studied reports of several conveyor accidents in general industry in great detail, and has determined that injuries and fatalities related to the failure to deactivate and lock out the power supply to the conveyor while repairs or maintenance is being performed or while employees are attempting to unjam a stopped conveyor may account for as many as 25% of all conveyor-related injuries (Ex. 75: 216). Although the data on which this estimate is based cannot be separated into marine terminal vs. general industry cases, OSHA believes that they are valid for conveyors used in terminals as well.

The first provision requires deactivation, followed by locking out, of the power source to any conveyor being repaired or serviced except that such a conveyor may be operated briefly for testing or "troubleshooting" purposes, for example to jog the belt. The second proposed rule in this paragraph, (i)(2), stipulates that the conveyor's starting device be locked before any employee attempts to remove any object overloading or jamming the conveyor. This provision would prevent employees attempting to unblock the conveyor from being injured by the accidental reactivation of the conveying medium. Unjamming injuries may occur in several ways: the probe used to unjam the conveyor may itself become a lethal projectile when the conveyor suddenly starts up, or the unexpected reactivation may catch the employee off guard, causing him to be pulled into the conveyor.

The miscellaneous conveyor safety practices proposed in paragraph (j) carry forward requirements found in ANSI MH9.1 (section 5.5.9) and in the ANSI conveyor standard (B20.1–1976). These provisions state that only persons designated by the employer may operate, repair, or maintain conveyors. They also prohibit riding, walking, or climbing on conveyors or their components, and require safety devices and overload switches to be in place and functional when the conveyor is used. The prohibition against employees riding the conveying medium has been included on the recommendation of the SAC (Ex. 2:120 i), and would deal with a source of conveyor accidents (Ex. 73: 250).

Section 1918a.49 Spouts, chutes, hoppers, bins, and associated equipment. Proposed § 1918a.49 deals with bulk-loading spouts, chutes, hoppers, bins and associated gear and equipment. Chutes and spouts are used to carry such material as grain, coal, scrap steel, and sugar; there have been several reported fatalities (Ex. 48) caused by the failure of chutes and spout rigging, which is often located so high above the ground that close inspection is difficult. OSHA proposes to require certification of this gear for marine terminals under Part 1919 because of the number of accidents and injuries associated with it. The inspection requirement in proposed paragraph (a) is essential because the equipment used to handle bulk commodities frequently escapes the kind of scrutiny directed to other cargo-handling gear, with disastrous results if the rigging or gear fails. The cross-reference calls attention to the certification requirement for this type of equipment.

The next proposed requirement, paragraph (b), states that instantaneous and direct communication must be available between the shipboard work station at the discharge end of a loading spout or chute and the position in the terminal from which the flow of cargo is controlled. The Advisory Committee recommended inclusion of this provision (Ex. 2:120 i) because of the many instances when it has been necessary to stop the flow immediately to prevent employees from being hit by the conveyed material, for example when the flow has been obstructed temporarily, causing cargo to overflow the chute. The Agency intends to propose a similar requirement in the longshoring regulations in the future.

Means of preventing employees from falling into chutes and hoppers are addressed in proposed paragraph (c). Openings to chutes and hoppers are required to be guarded, for example by hinged covers or other devices, such as a railing, to prevent fall injuries. Paragraph (d) requires employers to provide a safe walkway and means of reaching the hopper for employees working on a hopper. Guardrails are required if the conditions stipulated in § 1918a.112, the proposed section on guarding of edges, are present. The ANSI MH9.1 standard protects against the same hazard (section 5.7).

Chutes used to carry materials that could fall on employees are required by proposed paragraph (e) to have sideboards to contain the material carried, a provision based on § 1918.68(b) of the longshoring regulations and similar to a requirement in section 5.5.1 of ANSI MH9.1. The proposed provisions in paragraphs (f) and (g) are intended to prevent fast-moving bulk cargo from overflowing the chute and injuring employees, and to ensure that chutes are adequately anchored so that they will not themselves be a hazard to employees working near them. Similar coverage is provided in the longshoring rules (§ 1918.68) and in ANSI MH9.1 (sections 5.5.1, 5.5.2, and 5.5.3).

In paragraphs (h), (i), and (j), OSHA proposes requirements to protect employees working around bulk commodities, such as sugar, sand, cement, grain, and coal, that are stored in bins. The principal hazards of working around bulk cargo in bins are asphyxiation and exposure to hazardous atmospheres, which occur, for example, when an employee is buried in moving grain or is overcome by pesticide fumes while performing such tasks as reinstating the flow of the cargo or cleaning the bin.

Proposed paragraph (h)(1) requires the person controlling cargo flow into the bin to be made aware that another employee is entering an empty bin. Paragraph (h)(2) states that the power supply to the conveyor or spout carrying the cargo must be locked out after the power has been shut off. The provisions in proposed paragraphs (i) provide coverage for the hazards of working in a bin filled with a bulk commodity. In addition to requirements similar to those in paragraphs (h)(1) and (h)(2), employees entering a bin containing a commodity must be additionally protected both by a lifeline and harness and by an appropriately equipped standby stationed outside the bin. The severity of the hazards associated with fumigants, pesticides, and shifting bulk material makes these precautions essential to employee safety.

Guarding of bin top openings is required by the proposed provision in paragraph (j); railings, hinged covers, and gratings are examples of means of complying with this provision.

Paragraph (k) provides that chutes and hoppers be repaired only by designated persons.

The requirements proposed in paragraph (1) cover power shovels, which are often used with hoppers to discharge or distribute commodities

such as grain, coal, or sugar. The inspection called for in the first provision is designed to reduce the number of injuries caused by defective rigging and shovel components. Operational defects that might interfere with safe operation of the shovel or associated gear are reasons for withdrawing the equipment from service according to proposed paragraph (1)(2). The final provision pertaining to power shovels requires the power to be shut off and locked out, the belt to be stopped and the hopper to be closed before employees attempt to adjust the position or parts of the shovel or rigging.

Section 1918a.50 Certification of marine terminal material handling devices. Certification of material handling devices used in marine terminals is covered in § 1918a.50; this topic is presently regulated in §§ 1918.13 and 1918.14 of the longshoring standards. Certification of material handling equipment is based on the International Labour Organization (ILO) Convention no. 32 and the ILO's Associated Code of Practice, Safety and Health in Dock Work (1977), which requires signatory nations to have minimum certification requirements for cranes, ship's gear, loose gear and other equipment. Certification requirements call for inspection and testing of cranes and ship's gear used ashore as well as aboard, and one-time testing of wire rope (by sample lot) and loose gear such as shackles, swivels, and hooks. Although the U.S. is not a signatory nation, it adheres to the convention's certification provisions. Certificating agencies accredited or approved by OSHA perform the certification in the U.S. for equipment used ashore. OSHA also recognizes the certification authority of two states, California and Washington.

Certification is intended to ensure that material handling equipment is maintained properly so that it will be capable of handling loads safely. Since 1960, the Department of Labor has required certification of ship's gear for foreign and U.S. vessels not inspected by the Coast Guard, and the Coast Guard has required certification of Coast Guard inspected vessels since 1963. Certification requirements were extended to shoreside material handling equipment in 1970. The certification requirements in this section of the proposal are not expected to affect much marine terminal equipment because most cranes and other similar assembled units will already have been certificated under the existing certification regulations.

Proposed paragraph (a) sets forth the scope and conditions under which this section applies; as noted in paragraphs (c)(1) through (c)(6), certification requirements apply to cranes and derricks, bulk cargo spouts and suckers, vertical pocket and bucket conveyors, house fall cargo-handling gear, certain types of special gear, and wire rope and loose gear.

Certification must be performed in accordance with the standards of Part 1919 of 29 CFR or by a duly authorized state agency, as described in proposed paragraph (b).

Details of the tests and documentation required are provided in proposed paragraphs (c)(1) through (c)(6); many of these provisions parallel requirements in the longshoring regulations. The proposed rule for cranes and derricks is based on material in §§ 1918.13 and 1918.14. The proposed provision in § 1918a.51(c)(2) applies certification procedures to bulk cargo spouts and suckers; the collapse of these devices has caused several reported fatal accidents in the past (Ex. 48). A similar requirement appears in the longshoring rules (§ 1918.13(d)).

Vertical and bucket conveyors, other than those in grain elevator structures, must be inspected annually, according to proposed paragraph (c)(3). This is a newly developed provision recommended by the SAC (Ex. 2: 121 ia). Examples of terminal conveyors that would fall under the scope of this proposed rule are banana and sugar conveyors used to load and unload vessels. There may be other permanently installed vertical conveyors, such as bulk cement handling equipment, which should be exempted from coverage by the standard because their operation does not require the presence of employees. OSHA would particularly welcome information on the numbers and types of conveyors meeting this condition, and the Agency is also interested in comments relating to the scope of this provision.

House fall cargo-handling gear must be tested as a unit, as specified in paragraph (c)(4); there is no similar Part 1918 coverage, although both the ANSI MH9.1 and the longshoring rules require inspection and keeping of inspection records for this gear. Because this type of gear is falling into disuse, inspection and maintenance procedures have often been overlooked. The proposed rule would ensure that this equipment and its supporting structures meet certification requirements. The Advisory Committee recommended inclusion of this provision (Ex. 2: 121 ia).

Special stevedoring gear used ashore must be certificated in accordance with the proposed provisions in paragraphs (c)(5)(i) through (c)(5)(iii). Similar requirements for gear used aboard vessels are found in the longshoring rules (§1918.61(b)); however, extending this coverage to the shore side of the operation should reduce the number of accidents caused by improperly maintained specially rigged gear. Proposed paragraph (c)(5)(ii) requires spreaders that are not part of ship's gear to be certificated. In the past, spreaders consistently used with a particular crane have been certificated in connection with the crane's unit proof test, while spreaders not so used have been considered special stevedoring gear and have therefore been tested only in accordance with the pertinent longshoring requirement (§1918.61(b)). Spreaders are often exchanged among different cranes, and in the past only those used with container cranes have been tested. This proposed provision will not affect much equipment because many employers have had these spreaders certificated, although they were not required by law to do so.

Loose gear and wire rope purchased or obtained after the date specified in proposed paragraph (c)(6) and used in material handling must also be tested and certificated. A certificate obtained at purchase stating that the rope has been tested by sample lot would meet this requirement. The provision is intended to apply only to wire rope and loose gear used in material handling applications, where failure of the rope could be disastrous, and would not apply to rope used in less critical situations, such as for lashings or railings.

The proposed provision in paragraph (d), which is similar to rules in the longshoring regulations (§1918.13(e) and (f)), has been included to ensure that equipment that is partially disassembled and then reassembled in a new configuration, such as a mobile crane, is not considered a new piece of equipment requiring new certification procedures. Examples of equipment routinely used in difference configurations are cranes used alternately with a long and a short boom, or those used with various hoisting mechanisms, such as magnets, clam shells, and hooks. The requirement proposed at paragraph (e) seeks to avoid duplication of certification surveys by not requiring re-certification when certificated equipment is moved to another jurisdiction, for example, when a crane certificated in Washington moves to Oregon. A nearly identical

requirement is included in the longshoring rules (§1918.13(f)).

Proposed paragraph (e) draws attention to the fact that certification procedures are no substitute for routine maintenance and inspection; the language is identical to that of §1918.13(h) of the existing longshoring regulations.

The proposed provisions in paragraph (g)(1) and (2) state clearly the intervals allowed between required certification surveys; these requirements have been included because there has been some confusion in the past about these dates. For example, some employers have had equipment inspected twice in one year: once for the annual survey and once for the quadrennial survey. However, no annual survey is required in the year in which a quadrennial survey is performed. The requirement in proposed paragraph (g)(2) states that equipment which has not been in use for 6 months or more (and has therefore probably not been properly maintained) must have the more thorough certification survey required of equipment entering service.

Loose gear such as shackles and swivels is required by the rule in proposed paragraph (h) to be marked after it has been tested if it is to be used in a hoisting application. OHSA intends to add an equivalent provision to the shipboard (longshoring) regulations in the future, as has been done in the maritime regulations of other nations; a similar provision appears in section 6.7 of the ANSI MH9.1 standard.

Single sheave blocks used in hoisting are presently covered by the certification requirements of §1919.21(b); the proposal (paragraph (h)) would simpy extend these and other certification requirements to equipment used ashore. Unlike multiple sheave blocks, single sheave blocks have two safe working loads, depending on the method of use, and marking could therefore be critical to safety. The requirements proposed in this paragraph have been limited to newly obtained equipment because of the difficulties involved in marking and certificating all existing units of loose gear. These proposed provisions will ensure the use of tested equipment in cargo handling by requiring that identifying marks of the testing be traceable to related certification documents, which must be available at the terminal.

Cargo-handling equipment exempted from the certification requirements is listed in proposed paragraphs (i)(1) and (i)(2); the list of equipment exempted in the proposal includes equipment excluded from certification coverage in ANSI MH 9.1 (section 6.8). However, the ANSI standard also excludes vertical pocket conveyors, such as banana legs, which are used in terminals. Cranes used exclusively to hoist personnel, such as cherry pickers, are also excluded in MH9.1. The proposal requires certification of straddle trucks which are large enough to be considered cranes rather than industrial trucks. OSHA believes that any industrial truck sufficiently large to hoist two intermodal containers should be treated for regulatory purposes as a crane. The list of equipment excluded from Part 1918 certification requirements (§ 1918.3(r)) is almost identical to the ANSI MH9.1 list, except that the longshoring regulations do not mention bridge cranes, which are not used aboard ship. These cranes ar included in the proposal. Most cargo-handling equipment in marine terminals that is not required by the proposal to be certificated is used in activities that do not expose employees to hazardous situations, such as ore loading at facilities that are largely unattended, or in operations involving modified industrial trucks that cannot lift a large load to a height that would endanger employees below. Restricting the exemption of bulk coal-loading facilities to equipment not of the types illustrated in Figures II–I through II–22 of proposed Appendix II and to equipment that does not use the types of booms or spans shown in these illustrations makes the proposal's certification requirement more stringent than the parallel provision in the longshoring rules. Although specialized car dumpers and equipment used only at high-volume coal-loading facilities would not have to be certificated, other more versatile and less specialized equipment which is not used primarily in coal-loading operations would have to be certificated.

Section 1918a.51 Hand tools. Hand tools used in marine terminal operations are covered in proposed § 1918a.51, which is based on similar provisions in the longshoring regulations (§ 1918.72 (a) and (b)). Employers are required by the proposed rule in paragraphs (a) to provide employees with hand tools that are properly maintained and in safe condition. Examples of defects that would affect a tool's safety are loose handles and mushroomed heads.

Portable electric hand tools are addressed in proposed paragraph (b)(1), which is essentially identical to coverage of the same hazards in the longshoring regulations (§ 1918a.72(b), but is more stringent than that in the general industry standards (§ 1910.243(a)(2)(ii)). OSHA has received petitions (Ex. 92) from power tool manufacturers requesting that a requirement similar to the one in paragraph (b)(1) be deleted from the shipyard regulations. However, the Agency believes that an off switch and operates independent of hand pressure offers substantilly less protection to employees because the tool can continue to operate even after it has fallen or been dropped, and it can also easily be turned on accidentally.

The requirement proposed at paragraph (b)(2) is intended to protect employees from being cut while using a portable powered circular saw. It requires adequate guarding of the blade, and is similar to coverage in § 1910.243(a)(1).

The proposed rule in paragraph (c) applies to tools used to cut metal banding or strapping around cargo and requires that cutting tools be used for this purpose. Performing this operation with improper tools, such as a claw hammer, may cause accidents if employees performing the cutting or standing nearby are struck by a flying metal strap. No similar rule appears in the OSHA general industry or longshoring standards, nor is the topic addressed in ANSI MH9.1

Subpart D—Specialized Terminals

Subpart D of the proposal covers specialized marine terminals, such as those devoted to intermodal containers and roll-on roll-off operations, and terminals handling menhaden fishing vessels. The provisions in each section would apply, in addition to any other appropriate provisions in Part 1918a, to operations and equipment in the particular terminals addressed in each of those sections.

Section 1918a.71 Terminals handling intermodal containers or roll-on roll-off vehicles. Proposed 1918a.71 covers marine terminals handling intermodal containers or devoted to roll-on roll-off operations. A roll-on and roll-off operation is one in which a wheeled vehicle (such as a truck or container on chassis) is pushed, towed, or driven aboard a vessel, which then carries these vehicles in ocean trade. These terminals are addressed separately in the proposal because the proliferation of container-handling facilities and the rapid development of containerized cargo-handling techniques, which eliminate much of the manual and mechanical handling of cargo, have been reflected in a change in the types of accidents occurring at these terminals. Traffic accidents are now the most frequent kind of accident in specialized facilities of this type, in contrast to accidents such as struck-by and caught-in injuries that are associated with traditional break-bulk cargo handling.

This section is therefore addressed principally to traffic hazards and accidents specifically associated with container handling. The section of ANSI MH9.1. (section 3.22) dealing with container terminals is more extensive and more detailed in regard to traffic control provisions, but is not as comprehensive as the proposal's coverage of container handling.

The provisions proposed in paragraphs (a) through (f) have been written in simplified and performance-based language, but are based substantively on paragraphs (a) through (b)(6) of § 1918a.85 of the longshoring regulations. These requirements are directed at one of the principal operational difficulties and safety hazards associated with containerized cargo, that of accurately determining the weight of a container and its contents. Misjudging this weight can lead to cranes capsizing and dropping loads, and other types of accidents.

Container and load weights must be marked in pounds, to prevent mishandling in U.S. ports, but they may also bear metric equivalents. These proposed requirements specify a means that may be used to calculate the container's gross weight in cases where the terminal has no weighing scale.

Proposed paragraph (d) exempts open-top containers carrying only vehicles or gas cylinders from the gross weight requirement, because no container of this type can be loaded with enough cylinders or vehicles to present an overload hazard.

Weights of inbound containers from foreign ports may be established either by calculation, weighing, or using the bill of lading, cargo stow plan, or ship's manifest (proposed paragraph (e)).

The final container-weight provision, paragraph (f), prohibits lifting any container that weighs more than the hoisting equipment's rating will permit.

The proposed requirements in paragraphs (g) and (h) are directed at pedestrian hazards that occur in busy terminals, at which employees are engaged in many different tasks involving many types of powered equipment. Many terminals already have designated pedestrian areas, as required in proposed paragraph (g), but the number of traffic accidents in terminals of this type (Ex. 45) makes the establishment of pedestrian and vehicle routes essential in all such facilities.

A member of the Advisory Committee recommended (Rec Vol 62i) that employees be prohibited from walking beneath suspended containers, a requirement similar to provisions in the general industry standards (§§ 1910.179(h)(3)(vi) and 1910.180(h)(3)(b)(vi)), and in ANSI MH9.1 (section 3.22.2). The ANSI provision prohibits hoisting containers over pedestrian aisles "unless suitable precautionary measures are taken." Containers are occasionally dropped accidentally, for example when the locking mechanism releases in mid-air. Proposed paragraph (g)(2) requires employees to stand clear while containers are suspended or being hoisted overhead. OSHA would appreciate information about the operational difficulties, costs, and benefits that can be anticipated as a result of compliance with this requirement. For example, does this provision reflect current practice in intermodal container terminals? What kinds of warnings, if any, should be required?

Employees required to work around container-handling equipment or near a traffic lane must have high-visibility vests or other clothing offering equivalent protection, so that vehicle operators can see them easily (paragraph (h)). There is no similar ANSI or Part 1918 coverage.

Proposed requirements governing the handling of intermodal containers are included in paragraphs (i)(1) through (i)(3); these precautions are necessary because improper handling of containers may cause structural damage to the containers, leading to serious accidents. There are almost three million intermodal containers, which are owned by companies from different countries, moving in world trade; these units are of many types but are built to the requirements of ANSI NH5.4–1972/ISO TC–104 document (Ex. 64), which also establishes the means by which containers of particular designs are to be hoisted.

The proposed provisions at paragraph (i) outline the methods to be used to hoist containers in specific situations (except when the container has been damaged so that special means, such as appropriately used slings, are necessary). The instructions specified in detail in paragraphs (i)(1) conform to those in the ANSI/ISO standard (Ex. 64), and are included because, when used with properly loaded and undamaged containers, these techniques reduce the hazards associated with container handling. Neither the longshoring regulations, which were published before the ISO standard, nor the ANSI marine terminal standard deals with container hoisting in detail. Procedures for hoisting containers from top and bottom fittings appear at proposed paragraphs (i)(1) (i) and (ii), respectively.

The provision proposed at paragraph (i)(1)(iii) prohibits hoisting containers from above or from one side only, unless either the container is designed to be handled in this manner. This proposed requirement would allow hoisting of 20-foot-long containers by fork lift trucks if the containers are fitted with suitably maintained fork lift pockets. The final requirement proposed in this paragraph, (i)(1)(iv), is intended to cover specialized containers and to allow flexibility for technological advances in container design, a rapidly developing field.

Container spreaders that have lanyards to activate the releasing device are covered in paragraph (i)(2)(i); this equipment is used principally in break-bulk terminals. The proposed provision prohibits the use of lanyard-triggered releasing devices unless the employer can ensure that the lanyard will not snag on an object, accidentally triggering release of a container; such an accident occurred in a marine terminal in Seattle (Ex. 69).

A similar hazard is addressed in proposed paragraph (i)(2)(ii), which deals with twistlock securing systems on container spreaders. If these systems are not properly maintained, they may release a suspended container in mid-air.

Proposed paragraph (i)(3) requires that containers be secured while they are being transported in the terminal. Failure to secure containers adequately has caused several accidents in the past. For example, unsecured containers have fallen from chassis when the vehicle turned the corner too sharply (Ex. 70).

The proposed requirements in paragraphs (j)(1) and (j)(2) are intended to avoid accidents that occur when employees handle seriously damaged intermodal containers. The first provision proposes that containers received in the terminal be inspected before they are handled further, to determine whether they have sustained damage during transit that would make them hazardous for employees to handle. A similar requirement, limited to outbound containers, appears in section 8.1.2.2 of ANSI MH9.1, and the same hazard is addressed by § 1918.85(d) of the longshoring rules. Any container found to have a defect, such as a damaged fitting, that might affect safe use is required by proposed paragraph (j)(2) to be removed from service, identified as unsafe, and kept from use until the defects have been repaired. The Part 1918 requirement (§ 1918.85(d)) is directed to the same hazard, and ANSI MH9.1 also contains a similar provision (section 3.22.9).

Section 1918a.72 Grain elevator terminals [Reserved]. Section 1918a.72

of the proposal has been reserved at this stage of the rulemaking because OSHA is currently developing a standard applying to both safety and health hazards associated with grain-handling facilities. Provisions developed for OSHA's general industry grain-handling facilities proposal that are also applicable to grain elevators at marine terminals will be proposed as additions to the marine terminal standard in the future. After public comment and evaluation of the evidence received in connection with the general industry rulemaking, OSHA intends to propose the incorporation of safety and health coverage specifically tailored to marine terminal grain elevators into this section. Until then, grain elevators at marine terminals would be covered by the applicable requirements in the other subparts of Part 1918a, and would not have additional requirements prescribed for them as "Specialized Terminals" (§ 1918a.71).

Section 1918a.73 Terminal facilities handling menhaden and similar species of fish. Proposed § 1918.73 contains rules applicable to terminal facilities that handle menhaden and similar fish. Menhaden is a term applied to several species of trash fish. The menhaden fishing industry operates on the Atlantic and Gulf coasts, and there is a smaller and similar operation on the West coast. In volume of catch, the menhaden industry forms the largest part of the U.S. fishing industry. Products made from menhaden and similar species of fish include fertilizer, pet food, and fish oil. The material in this section of the proposal was developed in conjunction with the National Fish Meal and Oil Association and in response to reports of several fatalities at menhaden facilities that were caused by exposure to hydrogen sulfide, which is produced by rotting fish (Ex. 44). Parallel coverage for shipboard application will be added to the existing Part 1918 regulations when these are revised in the future. There are approximately 25 facilities devoted exclusively to menhaden handling in this country; most of these already comply with the safety practices outlined in this section. The MH9.1 standard contains detailed coverage of menhaden-related hazards.

To protect employees from exposure to hazardous levels of hydrogen sulfide, the provisions proposed in paragraph (b)(1) require adequate ventilation of brailwater storage tanks. Brailwater is recirculated into the boat's hold to wash out the menhaden. Unless other effective methods of removing hazardous levels of hydrogen sulfide are used, storage tanks must be drained completely after daily use. The proposed requirements in paragraph (b)(2), which require draining, rinsing, and atmospheric testing of tanks, are designed to protect employees from hazardous exposure to hydrogen sulfide or to an oxygen-deficient atmosphere, hazards commonly associated with a confined space such as a closed brailwater tank, in which hydrogen sulfide or other noxious atmosphere has displaced the available oxygen.

Tests to establish that atmospheric levels are safe may only be conducted by designated persons using equipment appropriate for testing in these situations, according to proposed paragraph (b)(3). Hoses and pipelines conveying used brailwater must be drained and left open to the air at the end of each day's use (paragraph (c)), to allow any hydrogen sulfide fumes to dissipate.

Respiratory protective equipment must be appropriate for protection against hydrogen sulfide and oxygen deficiency, and must be immediately available at the terminal, according to the provisions proposed in paragraph (d). Provisions addressed to rescue attempts in dock tanks are also proposed in this paragraph. Employees entering a tank must wear lifelines and harnesses and be equipped with the appropriate respiratory protective equipment. Two similarly equipped standbys must also be stationed outside the tank. Confined space accidents often cause the death of the employee working in the tank and other employees trying to effect rescue (Ex. 24). The rescuers are usually overcome because they fail to don the proper respiratory equipment and instead spontaneously rush into the space to help, and are then themselves overcome.

The provisions in proposed paragraphs (e) and (f) require informed supervisory personnel, familiar with the dangers of hydrogen sulfide and oxygen-deficient atmospheres and the precautions and equipment for reducing or eliminating these hazards, to be present whenever brailwater is being discharged from a vessel. This provision is intended to provide the necessary level of supervisory control to deal effectively with this hazard. These personnel will perform any procedures, such as testing to make sure that used brailwater is safe to be recirculated into the hold (where employees will be working), that are necessary to protect employees from hazardous exposures. Brailwater can be treated to remove contaminants and then re-used. The ANSI marine terminal consensus standard (section 3.23) contains similar coverage but also includes provisions pertaining to conditions aboard vessels, coverage more appropriately located in the longshoring regulations.

Subpart E—Personal Protection

Subpart E of the proposal is concerned with personal protective equipment designed for eye, respiratory, head, and foot protection. In keeping with recent OSHA Policy (see the standard for occupational exposure to acrylonitrile, 43 FR 45762, October 3, 1978), the proposal requires any protective equipment mandated by the standard to be provided to employees without charge.

Section 1918a.91 Eye protection. The proposed provisions relating to eye protection are nearly identical to those of ANSI MH9.1 (section 7.1) and the existing longshoring rules (§ 1918.101), except that the proposal adds a cross-reference to the more extensive eye protection required against radiant energy by proposed § 1918a.152(h).

Section 1918a.92 Respiratory protection. The SAC recommended (Ex. 2:124aii) that respiratory protective equipment be used in accordance with the requirements set forth in 30 CFR Part 11, a suggestion with which OSHA concurs; the present longshoring regulations require respiratory equipment to be approved by the U.S. Bureau of Mines, but this function is now exercised by the Mine Safety and Health Administration and the National Institute for Occupational Safety and Health.

Many of the provisions in the proposed respiratory protection section are almost identical to coverage directed to the same hazards in the longshoring regulations (§ 1918.102); proposed paragraphs (a) through (j) derive from these rules, which are also compatible with similar requirements in § 1910.134 of the general industry standards. The proposed provisions in paragraph (j), are designed to ensure that proper aid is available whenever an employee is exposed to a hazardous atmosphere, whether or not the atmosphere is immediately hazardous to life and regardless of the type of respirator worn. The capability of the respirator and the degree of standby protection required vary with the level of hazard involved. For example, a canister-type gas mask might be used in an atmosphere containing a low concentration of ammonia, but self-contained breathing apparatus might be required for an oxygen-deficient atmosphere.

Section 1918a.93 Head protection. The head protection provisions proposed in § 1918a.93 differ somewhat

from present Part 1918 coverage (§ 1918.105) of this topic and from similar rules in the general industry standards (§ 1910.135). The present longshoring provision requires all employees on board vessels to be protected by hard hats. OSHA recognizes that some work situations in marine terminals do not expose employees to potential head injury; the proposal therefore only requires hard hats to be worn by employees exposed to potential head injury. This proposed provision follows the recommendation of the SAC (Ex. 2:127i).

Section 1918a.94 Foot protection. The foot protection section of the proposal (§ 1918a.94) differs from similar coverage in the existing maritime rules by requiring employers to ensure that their employees wear safety shoes in situations where they might be needed; the longshoring standard (§ 1918.104) only requires that employers make foot protection available to employees. The equivalent provision of the ANSI marine terminal standard (section 7.4) prohibits employees who are not wearing adequate footwear from working, but is otherwise similar to the proposal's treatment of the topic. The SAC also recommended (Ex. 2:128i) protection against foot injuries, which are common in cargo handling. At present, some ports, such as Philadelphia, provide employees with safety shoes but do not attempt to ensure that they are worn. OSHA would appreciate receiving information on current practice, foot injury incidence, and any related cost information.

Section 1918a.95 Other protective measures. Section 1918a.95 deals with other protective measures required in certain work situations. The proposed protective clothing provisions (paragraphs (a)(1) and (2)) are similar to rules in the maritime regulations (§ 1918.103) and the ANSI MH9.1 (section 7.6); these practices are already widely used throughout the industry. The proposed requirement that employers provide special protective clothing is not intended to apply to such standard items of clothing as work gloves; an example of a task requiring special protective clothing such as hoods or aprons would be handling leaking cargo packaging or cleaning a caustic tank.

Protective creams or ointments appropriate as barriers against the substance being handled are required whenever the substance involved demands this form of protection. The ANSI marine terminal standard contains a similar provision (section 7.5), but the existing longshoring regulations do not address this hazard. Examples of the types of exposure that might require protective ointment or cream are leaking containers of mildly corrosive or irritating substances. In general, however, barrier creams provide only minimal protection against cutaneous hazards, and gloves or indirect handling methods are more effective and are usually used in these situations.

Proposed paragraph (c)(1) requires employees such as line handlers, who may be pulled into the water in the course of their work, to be provided with personal flotation devices; no similar provision appears in the ANSI standard. The weight, pull, and cumbersome nature of the lines being handled all combine to make protection against drowning necessary; it is not unusual for a mooring line to pull an employee into the water. The remainder of the requirements in proposed paragraph (c) are standard practice in the industry; similar provisions appear in the longshoring rules (§ 1918.106).

Proper eye washing and any other appropriate emergency washing facilities are required by proposed paragraph (d) if employees are exposed to hazardous substances, such as any liquid acid that requires flushing if it contacts the eye. Parallel provisions appear in the general industry rules (§ 1910.151(c)) and in ANSI MH9.1 (section 7.7).

Subpart F—Terminal Facilities

Section 1918a.111 Maintenance and load limits. Hazards associated primarily with the structural features of marine terminals are addressed by the provisions of proposed Subpart F. Section 1918a.111 deals with maintenance of walking and working surfaces and their structural integrity, requiring load limits to be posted and observed to prevent excessive loads from damaging floor surfaces in cargo areas. This requirement is not meant to apply to areas in a terminal such as offices or storage lockers, which are not used for cargo-handling and would therefore not be subject to overloading. Both the general industry standards (§ 1910.22(d)) and the ANSI standard (section 3.1.1) contain provisions designed to protect employees and machinery from the hazards of unsafe floors; however, the proposal differs from the general industry standard in that it limits these requirements to active cargo areas.

Section 1918a.112 Guarding of edges. The various types of protection for employee hazards associated with open sides and edges covered in proposed § 1918a.112 include curbs, railings and toeboards. This section of the proposal is written primarily in performance language.

To protect vehicles and their operators from falling off an apron or bulkhead edge, curbs (bull rails) 10 inches in height must be provided ((a)(1)). Paragraph (a)(2) indicates that this protection is not required at loading docks, platforms and skids where cargo is moved by vehicles. The ANSI standard contains provisions directed at the same hazards (sections 3.1.4, 3.1.5, 3.1.6, and 3.1.7).

Protection against falls in situations where employees might fall more than 4 feet or into the water is addressed in proposed paragraph (b), which requires guardrails except in those circumstances specified in (b)(2)(i)–(iv). The SAC recommended guardrails at edges in cases where the fall distance was 4 feet or more (Ex. 2: 11i). The exceptions listed in paragraph (b) apply to work places, such as loading docks; to equipment, such as railroad rolling stock (covered by other Federal agencies); and to waterside edges used for cargo handling. Since falls from elevations account for as many as 340,000 work-related injuries annually (Ex. 59: 5), the importance of fall protection for employees cannot be overemphasized.

Guardrails used to protect marine terminal employees must meet the strength requirements and be positioned as specified in proposed paragraph (c), but the material used in guardrail construction is left to the employer's discretion. Flexible railings, a common feature in the marine industry, may be used if they are sturdy enough to offer adequate protection. The proposed provision also allows existing guardrails, which are often between 36 and 42 inches high, to continue to be used because they offer adequate employee protection, and replacing all such guardrails would be prohibitively costly. New guardrails are required to be between 40 and 44 inches high, a range permitting the use of guardrails in a variety of building situations. A recent ergonomic research report provides evidence for this range in guardrail height (Ex. 13: 49); this range provides the optimal protection for the greatest number of employees. ANSI coverage of the same topic (MH9.1, section 3.1.9) differs from that of the proposal because it does not take the height of existing guardrails into consideration, does not deal with flexible railings, and is restrictive in terms of construction materials.

Toeboards to protect employees from objects falling from overhead are covered in proposed paragraph (d); this provision also allows flexibility in design, material, and application by

requiring protection only in situations where objects such as tools might fall on employees below and by leaving the material and construction requirements of the toeboard unspecified. The ANSI marine terminal requirement stipulates a height of 4 inches for toeboards (section 3.1.9), but the proposal recognizes that the finished size of 4-inch lumber is closer to 3½ inches than to 4, and additionally that a drainage space may contribute to overall toeboard height.

Stairway railings and handrails are addressed in proposed paragraph (e); the provision in paragrpah (e)(1) allows a greater range in acceptable railing height (from 32 to 36 inches) than similar coverage in the general industry standards (§ 1910.23(e)(2)), to permit most existing railings to remain in place. Any railing used must be in good repair and free of splinters and sharp edges (paragraph (f)). The ANSI MH9.1 does not cover railings in terminals.

Section 1918a.113 Clearance heights. The clearance height provision in § 1918a.113 addresses an obvious hazard, that of employees hiting their heads or being injured when a vehicle hits an overhead obstruction, and uses language almost identical to that found in ANSI MH9.1 (section 3.4).

Section 1918a.114 Cargo doors. Cargo doors have been a source of accidents in marine terminals in the past. The requirements in proposed § 1918a.114 cover the three general types of cargo doors found in terminal facilities: those that are mechanically operated, sliding horizontal doors, and tackle-operated doors. The ANSI MH9.1 standard provides nearly identical coverage of these hazards (section 3.3).

Mechanically operated cargo doors operate by means of counterweights, which can themselves be hazards unless they are enclosed or otherwise guarded (paragraph (a)(1)). Proposed paragraph (a)(2) prohibits using cranes or lift trucks to open doors of this type. Using a lift truck to pry open a cargo door could easily cause the truck to topple, and using a crane for this purpose would impose an excessive sideloading stress. During cargo door repair, however, cranes and lift trucks may be used if precautions such as roping off or barricading the repair area are taken to protect employees. Doors opened only partially, for example for ventilation purposes, must be blocked or otherwise secured in this position so that they do not fall on employees working beneath or near them.

Lifting tackle used to move tackle-operated cargo doors must have shackles or other equally secure connections, such as a moused hook, to ensure that the door does not fall on employees. The lifting gear must have a safety factor of five, as recommended by the SAC (Ex. 2: 15i), to ensure that it is of adequate size and strength to hold the door. Means of holding these doors securely in both the open and closed positions are also required ((b)(3)). The ANSI standard contains two provisions (sections 3.3.2.3 and 3.3.2.4) dealing with inspection and maintenance that have been simplified and stated in performance terms in the proposal (paragraphs (b)(4)) and (b)(5)).

Horizontal sliding doors are hazardous if their rollers come out of their overhead tracks, or if they swing, as might happen in a strong wind. These dangers are addressed in proposed paragraph (c) of this section.

Section 1918a.115 Cargo-landing surfaces. Aprons (the open portions of a terminal facility immediately adjacent to a vessel berth and used to transfer cargo directly between the terminal and a vessel) must provide adequate space to allow necessary work to be performed without undue restriction of movement (proposed § 1918a.115). The hazards of working in too narrow or too restricted a space include falling into the water, overexertion, and being hit by cargo. In addition, cramped working conditions force cargo handlers to work beneath suspended loads, an extremely hazardous practice. No similar requirement appears in the ANSI consensus standard.

Section 1918a.116 Platforms and skids. The platform and skid secton of the proposal (§ 1918a.116) is intended to provide protection against falling both for employees working cargo from the platform or skid and for those working below. The provisions proposed in paragraphs (a) and (b) call for guardrails or other means of protection (such as nets) on the side edges of platforms, and require nets between second story platforms and the vessel being worked.

The requirements proposed in paragraph (c) stipulate that platforms and skids be properly maintained, have their working loads marked on or near them, and have a minimum safety factor of five. Coverage of this topic in the ANSI marine terminal standard (section 3.5) is essentially the same as the proposal. The SAC recommended (Ex. 2: 16i) adoption of similar language covering platform attachments. However, the proposal's performance requirement stipulating that platforms and skids be maintained properly and be capable of handling loads would require that platform attachments be adequate to support the loads being handled.

Section 1918a.117 Elevators and escalators. Elevators and escalators are addressed in proposed § 1918a.117; definitions of these terms appear in paragraphs (a) and (b). The general industry standards do not cover elevators or escalators, and there are elevators in use which are not covered by state or local inspection requirements, including some at waterfront facilities. The General Duty Clause (§ 5(a)(1)) of the OSH Act has often been used to cite employers for hazardous conditions associated with elevators (Ex. 71), although it is not possible to separate these citations into marine terminal, as opposed to general industry, categories. Escalators have been included in the proposal's coverage because there are some escalators in terminals that are used to move cargo, such as ship's stores, in addition to people, and these escalators may not be inspected as frequently as necessary to ensure employee safety.

The SAC recommended (Ex. 2: 17i) that escalators had elevators in marine terminals be certificated as an alternative to the thorough inspections required in proposed paragraph (e), but OSHA has not adopted this approach because most elevators are adequately inspected, and certification would require a new specially trained group of inspectors within the certificating agency. The language in proposed paragraph (e) recognizes that the designated person performing the annual inspection (and perhaps also the monthly inspection) may not be a marine terminal employee but a local government employee, insurance inspector, or employee of a service firm that provides inspection services. Evidence of the latest inspections must be posted, although earlier inspection records are not required to be retained; this provision is intended to reduce recordkeeping to the minimum level consonant with safety.

The requirements proposed in paragraphs (c), (f), and (g) cover load limits and other factors that might affect safe operation of manually operated elevators and those that do not have interlocking doors. The ANSI MH9.1 standard's coverage of elevators is similar in intent but uses language, such as "inspections shall be carried out by persons expert in the field," that OSHA has not proposed.

The proposed provision in paragraph (h) required adequate protection, such as doors, gates, or other barricades, to ensure that employees do not fall down the shaft of elevators that do not have full shaft door closings. The barrier must be in place at every landing except the one at which the elevator is positioned.

No similar provision appears in ANSI MH9.1.

Section 1918a.118 Manlifts. The section of the proposal devoted to manlifts, § 1918a.118, has been developed to apply specifically to manlifts used in marine terminals. The proposed provisions are compatible with but not identical to those on the same subject appearing in the ANSI marine terminal document (MH9.1) or the general industry standards (§ 1910.68). Several examples of manlift fatality case reports, received by OSHA in connection with another rulemaking but typical of manlift accidents anywhere, have been included in the marine terminal rulemaking record (Ex. 74); falls and crushing injuries are common in manlift accidents. The proposed section has been written to allow, to the extent possible, the continued use of existing installations, and to give the employer the widest possible latitude, consistent with employee safety, in implementing the various requirements.

Proposed paragraph (a) outlines a detailed inspection procedure for all manlift parts and related features essential to the safe operation of these devices. Inspection records, monthly and annual, must be kept for one year and be available in the terminal if they are not posted near the manlift (paragraph (b)). This provision is in keeping with the Agency's efforts to reduce recordkeeping requirements to the lowest level consistent with safe practice.

The emergency stop device proposed in paragraph (c), which would be accessible from any position on the lift, would permit an employee to stop the manlift at any point. Manlift instructions (proposed paragraph (d)) would acquaint employees with safe manlift procedures.

The proposed provisions in paragraphs (e), (f), and (g) deal with means of preventing employees on manlifts from being injured in the space above and below the manlift and the top and bottom floors of the facility housing the manlift; signs and lights are examples of such means. Accident reports of cases of employees being pinned either by a step off the manlift or between the lift and the ceiling are included in the record (Ex. 47). The automatic stop device proposed in paragraph (g) would prevent the same type of injury by stopping the manlift automatically any time an employee passed the top landing without getting off. Manlifts installed after the effective date of this standard would be required to have additional stop devices as backup.

Each step on a manlift is required (proposed paragraph (h)) to have a corresponding handhold, to provide the necessary security for employees mounting or riding the lift.

Accessible and secured emergency ladders running the entire length of the manlift must be positioned so that any employee riding the lift can leave it in an emergency (proposed paragraph (i)). This precaution, which is standard industry practice, is essential because a breakdown of the lift might, for example, leave an employee stranded 50 feet off the floor.

Landings, including emergency landings, are addressed in proposed paragraph (j), which requires that they be maintained free of obstructions and specifies that new manlifts (those built after the effective date of the standard) which have landings at intervals of 50 feet or more must have emergency landings every 25 feet or less. Landings must be guarded by an effective means of fall protection; the particular form of protection, which might be gates, railings, or mazes, is left to the employer's discretion. The final paragraph in the manlift section, proposed paragraph (k), stipulates that guards to guide (such as cone guides) and protect employees ascending on the lift be installed at each floor opening to prevent employees from hitting their heads or being knocked off the lift.

Manlifts are required by proposed provision (1) to be equipped, maintained, and used in accordance with the manufacturer's instructions. This requirement would, for example, require belts to be properly sized for the manlift configuration, handholds and steps to be uniformly spaced, and manlift components to have strength characteristics adequate for the application in which they are used.

The provisions proposed in paragraphs (m) and (n) are intended to ensure that no employee riding a manlift will be pulled into the bottom pulley or crushed between the top landing and the ceiling of the building containing the manlift. Brakes to hold the manlift when it is stopped are addressed in the final provision, paragraph (o), in this proposed section.

The proposal's coverage of manlifts is compatible with that of ANSI MH9.1 (section 3.7) but goes beyond it by requiring certain safety features such as warning signs and lights, emergency stop devices, and emergency ladders, and by enumerating safety features to be inspected. Section 1910.68 of the general industry standards contains an extensive series of detailed provisions relating to manlifts; those pertinent to employee safety in the marine terminal setting have been included, in performance language, in the proposed requirements.

Section 1918a.119 Fixed ladders. Proposed § 1918a.119 covers fixed ladders, a subject presently covered by §1910.27 of the general industry standards (Subpart D, Walking and Working Surfaces) but not addressed in ANSI MH9.1. In 1976, OSHA published a Request for Information asking for comments on the material in Subpart D of 1910 (41 FR 17102, April 23, 1976), which included questions about the requirements for fixed ladders, stairways, platforms, and other work surfaces. Many commenters responding to the notice recommended that OSHA adopt a performance-oriented approach to this subject matter whenever possible (Ex. 77). The proposed fixed ladder section uses the performance approach in many cases.

In addition, the proposal strives to make those specifications that are necessary for compliance as flexible and practical as is consistent with employee safety. For example, the proposal specifies an acceptable range, rather than a single size, for some ladder requirements (such as rung spacing), and in other cases (such as rail width or distance between ladder and structure), the proposal only stipulates the minimum dimension for particular ladder features. These minimum measurements offer adequate employee protection, even though they may not provide the extra degree of employee comfort and convenience offered by equipment built to more ample specifications. OSHA believes that requiring the minimum safe size, strength factor, or distance rather than the corresponding ideal measurements for these features will permit employers considerably more flexibility in compliance and will also allow sound and adequate equipment to continue to be used without the expense of replacement or retrofitting.

This proposed section does not apply to portable ladders, which are covered in another section of the proposal (§ 1918a.120); to ladders permanently affixed to vehicles of the types specified in (a)(1), which are covered by other Federal agencies; to climbing devices associated with tanks and towers, such as step bolts, which are not considered ladders; to ladders built into or attached to scaffold framing; or to certain special-purpose ladders.

Ladder defects are covered in proposed paragraph (c), which prohibits the use of ladders with defects affecting safe use, such as broken rungs or loose side rails. The second provision in this paragraph mandates that a ladder

repair, for example a rung replacement, provide a strength factor equivalent to that of the original ladder part.

The requirements in proposed paragraph (d) specify various ladder dimensions that are essential to the safety of employees using these devices. Paragraphs (d)(1)(i) and (d)(1)(ii) state the strength requirements for existing ladders (200 pounds applied over a 3½ inch width at the rung's center) and for newly built ladders (250 pounds similarly applied).

Rung spacing, from the center of one rung to the center of the next rung, is required by proposed paragraph (d)(2)(i) to fall within the 9 to 16½ inch range; however, after the effective date, newly installed ladders would be required to have spacing within the 10 to 14 inch range, which has been determined (Ex. 16) to provide maximum climbing ease and safety.

The proposal contains two requirements directed at the width of fixed ladder rungs: one for existing ladders, and one applicable to ladders installed after the effective date of the final standard. The first proposed provision, (d)(3)(i), permits ladders already installed to have a width of 10 inches between stiles (side rails), although newly installed ladders would be required by proposed paragraph (d)(3)(ii) to have a minimum rung width of 12 inches, in keeping with new research data on climbing safety (Ex. 17).

The distance between the center of the rung and the nearest physical object behind the ladder, such as a wall or building, is proposed in paragraph (d)(4) to be a minimum of 7 inches for all fixed ladders installed after the standard's effective date, but previously implaced ladders may continue to be used if this clearance is at least 4 inches. In future installations where physical limitations restrict the space available so drastically that a 7-inch clearance between the structure to which the ladder is attached and the rung cannot be achieved, the distance may be no less than 4 inches.

The proposed 7-inch clearance will allow enough distance so that the arch, rather than the ball, of the climber's foot will contact the rung, which reduces the amount of torque, and therefore effort, that must be exerted by the lower leg muscles (Ex. 17: 21). In addition, this clearance permits the climber's weight to be more evenly distributed over the arch of the climber's foot, further reducing strain and fatigue (Ex. 17: 21).

As proposed in provision (d)(5), the minimum clearance between an ascending ladder climber and any obstruction, such as a ceiling, light fixture, or wall is 24 inches, to permit passage of the climber. However, although a space of 24 inches allows enough room for the ladder user to avoid hitting hanging obstructions, the proposal requires a deflection device, such as a cone or bevel guard, to ensure that the climber is guided safely through a floor or landing opening without hitting the head.

To facilitate the climber's access to the surface above the top of the ladder, paragraph (d)(6) proposes that the ladder's stiles extend at least 3 feet above the landing surface, except where grab rails or bars provide a secure grip to aid in climbing off the ladder.

The proposed requirement addressed to ladder pitch ((d)(7)) prohibits the use of ladders positioned at a greater-than-90-degree backward slant to the horizontal, which would require a climber to climb with the back of his body, rather than the front, closer to the ground. This posture would require the climber to hang from the rungs of the ladder instead of being supported by the rungs.

Fall protection for climbers of fixed ladders is addressed in proposed paragraph (e). Although there are few ladders of great height in marine terminals, some do exist. Ladder fall protection devices may be grouped into three categories: cages, wells, and safety devices. Cages and wells provdie protection by enclosing the climber and limiting the distance of the potential fall by means of platforms. Safety devices generally involve the use of a pole and auxiliary equipment, such as a friction or hydraulic brake device and lifebelts and lanyards. The proposal considers each of these types of fall devices effective means of fall protection, although there is some evidence that fall arrest mechanisms, such as the safety devices mentioned above, may be more effective in an emergency than cage-type restraining devices, because the action of the safety devices is entirely independent of the climber's performance under stress (Ex. 72). OSHA would appreciate receiving any information about the relative merits of these respective protective devices, to aid the Agency in developing the final rule.

In paragraph (e)(1), OSHA proposes that all fixed ladders greater than 20 feet in height be provide with fall protection devices. This height agrees with the fall protection height requirement in the general industry standards (§1910.27(d)(1)(ii)).

Proposed paragraph (e)(2) states that when a fixed ladder more than 30 feet in height is equipped with a cage or well, unless the climber is additionally protected by a ladder safety device such as a lifebelt and lanyard, the ladder must be built of sections no more than 30 feet in height. Each ladder section must be offset horizontally from the section above and below it, and must also contain at least one landing platform fitted with guardrails. These features are designed to limit the distance a climber may fall, and the platform could also be used as a rest platform, if necessary.

The proposed requirement in paragraph (e)(2)(iv) is a grandfather provision which permits existing hinged platforms to be used in lieu of offset sections and landing platforms on ladders installed before the standard's effective date. Hinged platforms are not permitted in newly installed ladder cages or wells because they require the climber to bend down both to lift them from above during descent and to replace them after use during ascent. This bending maneuver is both "awkward and hazardous," according to a recent study of ladder safety factors (Ex. 17: 112). OSHA seeks information on the hazards of hinged platforms, and the extent of their use in marine terminals.

As proposed in paragraph (e)(3), rest platforms equipped with guardrails on all open sides must be supplied at intervals of 150 feet or less on all fixed ladders which use the safety device method of fall protection. The platform as proposed would provide sufficient room for a climber to stand. However, OSHA is aware that a platform with enough room for emergency sitting (minimum platform dimensions 18 inches in depth; by 26 inches in width) would offer even greater employee protection, by permitting an exhausted climber to rest his legs and feet more effectively (Ex 17: 52). OHSA is considering increasing the minimum platform dimensions to allow for emergency sitting, and would appreciate comments and suggestions pertaining to the effectiveness and feasibility of such rest platforms.

In paragraph (e)(4), OSHA proposes requirements designed to ensure that ladder safety devices are designed, installed, and maintained to ensure their effectiveness. Installation, maintenance, and repair should be performed in accordance with the recommendations of the manufacturer of the device; the distance between the point of attachment of the climber's safety belt and the carrier must fall in the range between 8 and 12 inches, a distance recommended in a recent research report on this topic (Ex. 16).

Ladder cages or wells installed after the standard's effective date are

required by proposed paragraph (e)(5) to be made of sufficiently rigid material to prevent a falling climber from either dislodging or breaking through the enclosure. In addition, cages and wells must have inner surfaces that are free of snags or other protrusions that might injure the ladder user, and both cages and wells are required to extend high enough above landings and close enough to the ground to protect employees during any portion of the ascent and descent that might be hazardous.

In paragraph (e)(6), OHSA proposes that all ladders on radio towers, other communication and utitlity towers, and on poles and other high structures such as stacks and chimneys meet the requirements of paragraph (e) after the effective date of the final standard. At present, many of these structures are not equipped with either ladders or step bolts, and employees are often required to use the tower's sturctural members as climbing devices. The proposal would offer employees climbing these high structures the same degree of fall protection afforded to climbers of fixed ladders, by mandating that employers provide safety devices, cages, or wells when the height of the structure exceeds 20 feet. Many of these facilities do not have fixed ladders, although some are equipped with step bolts or individual rung ladders, in which case safety devices would have to be used instead of cages or wells.

In proposed paragraph (f), OSHA addresses individual rung ladders, which are cast mortared, or otherwise secured directly to walls or other vertical or inclined surfaces, and which have no side rails. The load rating and rung spacing and width requirements parallel or exceed those proposed for existing fixed ladders. For example, proposed provision (f)(3) stipulates that the ends of the rungs of these ladders be offset, enclosed, or equipped with stops, to prevent the climber's foot from slipping from the rung. Since individual rung ladders have no stiles (side rails), these additional precautions against slipping are essential for safe ascent and descent. The final proposed requirement in this paragraph states that the rungs of ladders of this type must be free of sharp edges, which might injure or perhaps even trip a climber.

Section 1918a.120 Portable ladders. In § 1918a.120, OHSA proposes requirements for portable ladders, whether of wood, metal, or reinforced plastic construction, and including job-made ladders (ladders made on the site to the specific requirements of a job and not intended for use elsewhere). This section of the proposal also makes use of the phase-in concept, by specifying more stringent criteria for ladders obtained or built after the standard's effective date.

The load rating and rung spacing provisions are identical to those for existing fixed ladders, except that proprosed paragraph (b)(4) requires that rung width increase in proportion to the ladder's length of climb, a construction feature designed to impart greater strength and stability to long portable ladders.

Proposed paragraph (c) requires all manufactured portable ladders to bear lables indicating that they meet the construction requirements of the appropriate ANSI portable ladder consensus standard, which specifies load ratings, strength factors, spacing, and other requirements.

Job-made portable ladders used after the effective date of the final standard are required by proposed paragraph (d) to meet the ANSI A14.1–1975 spacing and loading specifications for manufactured portable ladders.

In paragraph (e), OSHA proposes maintenance and inspection requirements for all portable ladders, whether manufactured or job made. The defects outlined in paragraph(e)(1) are all sufficiently damaging to interfere with the structural integrity of the ladder, and the presence of any such defect would be cause to remove the ladder from the worksite or to lable is as unusable by tagging if stored on the premises. The inspection required by proposed paragraph (e)(2) would consist of a brief visual inspection to ensure that the ladder has no significant defect. The proposed provision would also require such an inspection after a ladder had been subjected to impact or other unusual stress.

Procedures for safe use of ladders are covered in proposed paragraph (f). The proposed requirements appearing at paragraphs (f)(1) through (f)(6) prohibit using ladders in unsafe ways; they may not be formed by securing a rung (cleat) across a single rail, which cannot provide adequate strength or support, nor may ladders be used in a horizontal position as a walking or working surface. Proposed paragraph (f)(3) is designed to protect climbers on ladders that are made of materials that would conduct electricity from being injured by electric shock, and proposed requirement (f)(4) prohibits tying, bolting, or otherwise securing separate sections from different multi-sectional ladders together or attaching single ladders to each other to achieve greater height. No temporary or improvised method of securing such separate climbing devices together can be guaranteed to provide adequate employee protection.

Proposed paragraph (f)(5) prohibits using self-supporting (free standing) portable ladders as straight ladders. Self-supporting ladders are not designed to be used at the pitch that would be necessary if they were leaned against a building.

The provision proposed in paragraph (f)(6) prohibits portable ladders that are not self supporting, i.e., those that depend on a structure for support, from being used as climbing devices at heights beyond the highest support point, even though the ladder may extend beyond that point. Climbing on and upsupported section of such a ladder could cause the ladder to slip or tip.

The requirement that ladders extend at least 3 feet above the upper level supporting the ladder (proposed paragraph (f)(7)) will ensure that employees climbing on or off the ladder have a secure rail to grasp, unless other handholds are available to offer equivalent gripping surfaces.

In paragraphs (f)(8) and (f)(9), OSHA is proposing that all ladders used be positioned on a level and secure surface and be equipped with slip-resistant bases, e.g., safety "shoes" or spikes. Further, ladders must be secured at top and bottom to prevent slipping. In addition, proposed paragraph (f)(10) requires ladders to be positioned out of the way of doors opening out toward the ladder, which could cause the ladder to slip and fall; in addition, ladders would have to be placed clear of projecting objects, such as window sills and protruding nails, which could injure an employee on the ladder.

Section 1918a.121 Fixed stairways. In proposed § 1918a.121, OSHA specifies requirements for fixed stairways. The term fixed stairway includes all stairs, indoors and out, except fire escape stairways, articulated stairways, or stairs built into a piece of machinery, such as a crane.

The dimensional characteristics specified in proposed paragraph (b) confrom to dimensions for stairways recommended in recent research on this topic (Ex. 17:150–176; Ex. 16). There is evidence that irregular spacing of stairway treads, risers and nosings "correlated highly with accident incidence" (Ex. 17:150). For this reason, the proposal requires uniform spacing of these features for fixed stairs installed after the standard's effective date.

Hand railings are required by proposed paragraph (b)(3) for all fixed stairs with length of climb greater that four steps. The absence of railings on

stairways also correlates highly with accident incidence, according to recent research (Ex. 17:150). Railings are required to have the strength characteristics and design features of permanently installed guardrails, since both types of railings perform essentially the same protective function.

Proposed paragraph (c) addresses stairways built in restricted spaces; these are required to have performance capabilties that will ensure adequate employee protection, but are permitted greater flexibility than that for fixed stairways in less restricted spaces. For example, tread depth may be as narrow as 4 inches because the stairs are without risers and therefore permit the climber's foot to extend into the open space behind the back of the tread. The final proposed requirement in the fixed stairway section states that employers must maintain such stairways in safe condition. For example, stairs must be kept free of tripping and slipping hazards, and railings must be kept free of sharp edges and be properly secured.

Section 1918a.122 Spiral stairways Spiral stairways, found frequently aboard ship and occasionally in marine terminals, are covered in proposed § 1918a.122. There is no coverage of this topic in either the general industry standards or the ANSI marine terminal consensus standard. The minimum requirements for spiral stairways are shown in Figure F–1; they conform to those for existing or restricted fixed stairways in proposed § 1918a.121(c), except for allowances made for the triangular form of spiral staircase treads. Since these stairways are open on at least one side, proposed paragraph (b)(4) stipulates that at least one baluster be provided for each step (if balusters are used), to protect against a user slipping through between the railing and the step.

Clearance above the uppermost step must be a minimum of 6 feet 6 inches, to allow a person to stand after ascending, according to proposed paragraph (b)(5); the requirement proposed in paragraph (c) requires employers to keep stairways of this type in sound condition and free of all hazards.

Section 1918a.123 Employee exits. In general, marine terminals are liberally equipped with exits, such as cargo doors, because they are used for vehicle and cargo traffic. However, to ensure that adequate and well-marked employee exits are available, particularly for emergency use, OSHA proposes the requirements in § 1918a.123. The proposed individual provisions address such matters as exit signs, market exit paths, and good housekeeping, all essential to protect employees in emergencies requiring escape. The minimum width specified in proposed paragraph (d) is sufficient to use of the exit by one person at a time. OSHA believes this minimum exit width is adequate because terminals have so many doors and windows that could be used for emergency egress; information demonstrating support or lack of support for this proposed requirement would be appreciated.

Section 1918a.124 Illumination. In § 1918a.124, OSHA proposes a minimum average light level of 10 foot-candles for active work areas in marine terminals. Although most terminals have light levels at or above this value, at least in cargo-handling areas, some do not. OSHA is considering increasing the required light level in the final rule to 20 foot-candles for active work areas, to conform to the level recommended both for active storage yards and for freight piers in the ANSI standard for illumination, ANSI A11.1–1973, Practice for Industrial Lighting.

OSHA believes this illumination level may be necessary to permit employees in cargo handling and other particularly hazardous work operations to see, and thus avoid, serious hazards. These hazards include tripping and falling over obstructions and being struck by falling objects. Since OSHA believes that areas where the work being performed is less hazardous, such as storage areas and transit sheds, require a lesser illumination level to protect employees, these areas are required in the proposal to have a minimum average light intensity of 5 foot-candles. This latter figure also accords with ANSIs recommendation for active shipping area surrounds (Ex. 61).

The proposed requirement states that illumination levels must be measured at the working or walking surface; as in other measurements of occupational exposure, for example, air samples, the place at which the measurement is taken is of the utmost importance to its validity. Since it is crucial to safety that employees be able to see the walking and working surface in use, the proposal requires that the assessment of light intensity be made at that level.The ANSI MH9.1 (section 3.15) also links amount of light required to degree of hazard involved. Its illumination requirement states:

> . . . all places where persons are employed, including regular passageways to or through a wharf, pier, or any other part of a marine terminal facility, or to and from a vessel, shall be lighted with such adequacy that employees are able to perform assigned duties safely; the amount of light being dependent on and suitable for the type and degree of activity in the specific area.

OSHA is interested in receiving comments about safe illumination levels in various terminal areas and operations. For example, are there work situations other than cargo-handling that require an average light intensity of 10 foot-candles to be performed safely? Do all walking areas, including parking lots, require an illumination level of 5 foot-candles? Are there specific jobs that require a lighting level greater than the proposed requirement for active work areas?

Section 1918a.125 Passage between levels and across openings. In § 1918a.125, OSHA proposes coverage for devices such as ramps, dockboards (car or bridge plates), or other temporary forms of surfacing, such as steel plates. These work surfaces are particularly hazardous because they are not a permanent part of any structure, and because they are subjected to heavy loads and rough use.

Proposed paragraph (a) provides that employees whose work requires them to drive or carry material across an opening or to move from one level to another have a safe means of crossing from one level or surface to another. Dockboards, also known as car or bridge plates, are used primarily to load or discharge cargo from the terminal's loading dock to a trailer or other vehicle by means of fork lift trucks, which go back and forth across the dockboard from the loading dock into the trailer. Ramps are used principally to provide vehicle access to vessels.

The provisions proposed in paragraph (b) address significant hazards associated with these temporary work surfaces. As with other equipment designed for material handling, these devices must be plainly marked with their rated capacities, to prevent collapse caused by overloading. If the rating is not marked directly on the device, which is sometimes the case with dockboards, the rating must be available at the terminal. The adequacy of the means by which these devices are secured to the loading dock, vessel, or other surface is critical to the safe transit of vehicles across them. Accidents involving slipping dockboards are common; a frequent accident sequence involves a fork lift being thrown into the open space between platform and trailer because the dockboard has slipped and fallen into the void. There are several kinds of anchoring and anti-slip devices for securing dockboards in place. In addition, sufficient overlap must be provided to ensure proper contact between the two edges; if the platform or loading surface slopes or is not level,

the edges cannot be lined up and the dockboard cannot be adequately secured.

The means of safe handling addressed in proposed paragraph (b)(5) would vary according to the surface in question and the equipment available. For example, ramps can be safely handled by fork lifts if the ramps are equipped with fork loops or lugs, and dockboards are often equipped with handles or handholds for carrying. The proposed requirements for ramps and dockboards are compatible with those in the general industry standards (§ 1910.30) and the longshoring regulations (§§ 1918.23 and 1918.24).

Guardrails to protect employees from falling are proposed in the requirement at (b)(7) for situations where the dockboard or ramp slopes or where employees might fall more than 4 feet. Fall protection for vehicles using these temporary surfaces is addressed in proposed paragraph (b)(8), which states that dockboards and ramps must have sideboards or, for example, be turned up at right angles on their open sides so that trucks cannot fall over the edge.

In proposed paragraph (c), steel plates or other temporary surfaces used to facilitate vehicle movement are required to be secured so that vehicles or other objects cannot dislodge the plate, which could cause the truck to overturn or the load to topple.

Section 1918a.126 Guarding temporary hazards. Areas in the terminal that may present tripping and falling hazards are addressed in proposed § 1918a.126. Examples of such areas are broken pavement, ditches, holes in the surface of the pier, and chuck holes in traffic areas. Employers may use any effective means of protecting employees from being injured by tripping or falling over or into these hazardous areas; ropes, barricades and temporary railings are examples of appropriate protection. In addition to providing a physical barrier, employers must ensure that such areas are adequately lighted so that employees can avoid the hazard. The ANSI MH9.1 (section 3.1.7) also addresses temporary surface conditions that may be hazardous to employees.

Section 1918a.127 River banks. The proposed provision in § 1918a.127 is intended to apply to conditions on the inland waterways rather than at ocean ports. Along rivers where the water level changes drastically, such as along the Ohio and Mississippi rivers, it is not uncommon for cargo-handling operations to be conducted directly from the bank of the river, without a pier or apron to use as a working surface.

Employees working at such sites need to be protected from falling or being pulled into the water, particularly since these rivers flow very swiftly. There have been several incidents of cargo handlers drowning in these circumstances (Ex. 76). The proposed requirement calls for two types of protection: personal flotation devices for each employee, and guarding of the perimeter of the working area, between the land and the water. Employers might use temporary railings, roping off, or other physical barricades to accomplish the goal of employee protection. The related ANSI provision (section 3.1.8) only requires temporary guarding of the work area perimeter. OSHA believes that requiring flotation devices in these situations is justified by the number of drownings that have occurred.

Section 1918a.128 Sanitation. The requirements proposed in § 1918a.128 address washing and toilet facilities, drinking water, safe eating areas, and garbage disposal, all matters which affect employee health and comfort. The proposal provides coverage for temporary sanitary facilities as well as permanent installations, because cargo is occasionally handled directly from a river bank, and temporary facilities would be used in such a situation.

The requirement proposed at paragraph (c) prohibits employees from eating or drinking in storage or handling areas used for hazardous materials. It is not uncommon for employees, for example, to sit on a pile of hazardous cargo while eating lunch, a practice that might lead to ingestion of some of the hazardous material. The general industry standard contains similar coverage to protect employees against ingestion of toxic materials (§ 1910.141(g)(4)).

The longshoring regulations have rules similar to those in this section (§ 1918.94(a) and (b)) covering drinking water and garbage disposal, and ANSI MH9.1 (section 8.11.2) also addresses requirements for drinking water.

Section 1918a.129 Signs and marking. Signs to alert employees of hazards and to provide essential information are addressed in § 1918a.129. To achieve their purpose, signs are required to be legible and easy to understand, containing either a key word or a more detailed description of the hazard, such as "Railroad Crossing" or "High Voltage."

All marine terminals would be required to have, as a minimum, signs identifying the location of first aid facilities, telephones, fire exits, firefighting and emergency equipment (such as respiratory protective equipment), and a sign listing telephone numbers of the nearest hospital and other sources of emergency aid.

In addition, employers would be required to post danger signs to warn employees of imminent danger, such as electric shock, and to provide caution signs to warn employees of the presence of a potentially hazardous situation. Other sections of the proposal also require employers to post safety instruction signs, such as those designating smoking areas, and traffic signs. The ANSI standard also contains provisions concerning signs (section 8.12).

Subpart G—Related Terminal Operations and Equipment

The material in this proposed subpart addresses certain equipment, such as saws, abrasive wheels, and other fixed machinery, and specialized operations, such as welding and spray painting, that are used or performed in marine terminals. The equipment and operations involve support functions conducted principally to maintain or repair equipment used in connection with the terminal's primary purpose, cargo handling. Many types of machines found in general industry are not used in terminals, and the proposal's guarding and protection requirements are therefore much less extensive than those of OSHA's general industry standards.

Section 1918a.151 Machine guarding. Guarding of fixed machinery is addressed in § 1918a.151. Guarding may involve physical barriers used at the point of operation, or guarding by location, which means positioning the hazardous area, for example a nip point, beyond the reach of employees. The could be done either by using equipment designed so that the nip point is completely enclosed, for example by casting, or located beyond the reach of any employee's work station.

Proposed requirements for all fixed machines are covered in paragraph (b). The first provision proposes that all danger zones (§ 1918a.2(g)) be guarded; this requirement is stated in performance terms, to allow employers flexibility in choosing a method of guarding that is appropriate for the machine in question and the conditions of use.

Proposed paragraph (b)(2) requires a local exhaust system to protect employees performing tasks that produce dangerous quantities of dust or flying chips, as would occur, for example, in fixed saw operations.

The requirement proposed at paragraph (b)(3) to secure fixed machinery is designed to protect employees both from being hurt by a blade or other part of the machine when

the machine shifts, and from being hit by the machine itself as it falls.

The power cut-off device required by proposed paragraph (b)(4) would permit the operator to turn off the machine in a potentially hazardous or emergency situation.

Machines designed to operate at different speeds could seriously injure the operator if they shift speeds without warning during machine operation; the belt-locking device required by proposed paragraph (b)(5) would prevent any unintentional change in speed.

In proposed paragraph (b)(6), motors are required to be constructed so that any loss of power will automatically turn the machine off, to prevent operator injury caused by unexpected restart when the power supply comes back on.

The lockout requirement in proposed paragraph (b)(7) is designed to prevent the severe and frequent injuries caused by the accidental reactivation of machines that have not been properly turned off and locked out before employees work on them. OSHA is presently developing a general lockout standard for machines and equipment used in general industry, and preliminary data indicate that injuries related to the failure to lock out machines may account for as many as one percent of all occupational injuries. Although these statistics pertain to general industry cases, there is no reasonable basis to conclude that marine terminal experience with the same types of machines would be significantly different.

The provisions proposed at paragraphs (b)(8) and (b)(9) would ensure that machines and equipment used in the terminal are maintained in accordance with the manufacturer's instructions, and that maintenance and repair are performed only by designated employees. Maintenance is perhaps even more important in the harsh weather conditions of the terminal environment than in less severe conditions, although it is essential to the safe operation of all industrial machinery.

The final requirement proposed in paragraph (b) prohibits use of any equipment with a defect that would interfere with safe operation; the intent of this provision is to protect operators of machinery and employees working near equipment from being injured by machine malfunction or failure.

In paragraphs (c), (d), (e), and (f), OSHA proposes coverage for the hazards associated with the operation of industrial saws. These hazards include being cut by the saw's blade, and being hit by flying pieces of the material being cut. Accordingly, most of the requirements in these paragraphs relate to machine guarding. For example, proposed requirements (c)(1), (d)(1), (d)(4), (e)(1), and (f)(1) all pertain to guarding of the blades of the type of saw involved.

The provision proposed in paragraph (c)(2) requires spreaders on handfed ripsaws and table saws; these devices hold the cut in the material open, and thus prevent the feedstock from squeezing and jamming the blade.

Non-kickback fingers or dogs are required by proposed paragraphs (c)(3) and (e)(2); these devices hold the material being cut so that it will not be picked up by the saw's action and thrown at the operator. The work practice proposed in paragraph (e)(5) is also intended to ensure that the saw is used in a manner that will offer resistance to the saw's action, to prevent the operator's hands from being caught in the blade.

The devices required in proposed paragraphs (d)(2) and (e)(4) would prevent the saw from rebounding abruptly after use, which might break the blade, and would also ensure that the blade returns to the rest position, away from the operator's hands. Steps to prevent the saw from swinging into the operator's range are proposed in paragraphs (d)(3) and (e)(3), and brakes which would stop the saw are covered in proposed requirement (f)(2). The final proposed provision for saws requires band saws to have a tension control device to maintain the proper tension on the blade, so that material will not catch and be thrown at the operator.

In paragraph (g), OSHA proposes requirements for abrasive wheels and equipment used to grind and sharpen tools and other objects.

The most common accident associated with abrasive wheels is one in which the operator is struck by a piece of the wheel when the wheel breaks. For this reason, most of the requirements proposed in this paragraph deal with guarding or are related to guarding. For example, proposed provision (g)(4) requires that work rests be used; these devices are designed to hold the tool being ground so that the operator's hand will not contact the wheel. Similarly, the requirements proposed in paragraphs (g)(5), (g)(6), and (g)(7) are intended to prevent conditions that might cause the wheel to shatter, thus injuring the operator or others in the vicinity.

Proposed paragraph (h) contains guarding provisions for moving machine parts, such as gears, sprockets, and belt chains; whether the guarding is point of operation guarding or guarding by location is left to the employer's discretion.

Section 1918a.152 Welding, cutting, and heating (hot work). The provisions in this section of the proposal are compatible both with the hot work requirements in OSHA's shipyard regulations (29 CFR Part 1915) and with the Agency's general industry hot work requirements (§ 1910.252). Fire and electric shock are the principal hazards associated with any type of hot work. Hot work is used in the marine terminal principally to perform routine maintenance and repair tasks, such as rebuilding a damaged intermodal container or repairing a chassis that is no longer properly aligned.

In paragraph (c), OSHA proposes requirements to protect employees from the hazards associated with unwanted fires in the workplace. Unless hot work is performed in designated areas without fire hazards, proposed requirement (c)(2) would require that additional precautions, such as using a fire-proof slag curtain, be taken.

Proposed paragraph (c)(3) ensures that fire extinguishing equipment is at hand wherever hot work is being performed. This equipment must be fully charged and ready for use at all times.

The fire watch proposed in paragraph (c)(4), which is standard industry practice, and is necessary to ensure that no sparks or other fire hazards are left unattended.

Drums and other containers presenting a fire or explosion hazard are required in proposed paragraph (c)(5) to be closed to prevent the escape of dangerous fumes, and empty containers must be removed from the hot work area. The proposed requirements in paragraph (c)(6) are intended to prevent flying slag from starting a fire on the floor below the hot work area or outside the structure in which hot work is being carried on.

Hot work is prohibited in the areas specified in proposed paragraph (c)(7); these areas present extreme fire hazards. For example, bulk sulphur may ignite spontaneously during handling. OSHA also has received many reports of fatal accidents caused by employers welding on tanks containing combustible liquids (ref).

Before heating, proposed paragraph (c)(8)(i) requires inerting or cleaning of tanks or drums that have contained a flammable or combustible substance. These structures must then be tested by the employer to ensure that the atmosphere is free of fire hazards. A relief valve to release the gas built up by heating the drum or tank is required in proposed paragraph (c)(8)(ii), to prevent explosion.

In paragraph (d), OSHA proposes requirements for gas welding and cutting operations, such as hell-arc or oxy-arc welding. The proposed requirements of paragraph (d)(1) specify work practices to be followed to prevent damage to the compressed gas cylinders used to supply the welder's torch. Compressed gas cylinders must be protected from impact, which may cause the pressurized cylinder to explode or to become a lethal projectile.

The requirements in paragraph (d)(2) are addressed to hazards associated with fuel gas use. For example, proposed paragraph (d)(2)(i) is intended to prohibit blocking of cylinder valves, which would interfere with the proper flow of gas.

Cylinder valve regulators, which are spring-loaded and therefore delicate, are addressed by the provisions proposed in paragraphs (d)(2)(ii) through (d)(2)(iv); these work practices are essential to maintaining regulators, which control the pressure level, in safe condition.

The proposed requirements in paragraphs (d)(2) (v) and (vi) are intended to prevent leaking cylinders from presenting a fire hazard to employees near the cylinder.

Hazards associated with fuel gas and oxygen are addressed in proposed paragraph (d)(3). Hoses used to convey these substances must be maintained in optimum condition, to ensure that they do not leak, which would present a fire and explosion hazard. It is essential that hoses supplying oxygen and those supplying fuel gas not be taped together more than is necessary for ease of handling, to reduce the likelihood of fire; however, as proposed provision (d)(3)(ii) notes, they may be taped together for a distance of no more than 4 inches for handling purposes.

Welding torches are addressed in proposed paragraph (d)(4); torches must be carefully maintained to ensure proper flow control. Proposed paragraphs (d)(5) and (d)(6) stipulate additional work practices to be followed to prevent explosions and fires.

Proposed paragraph (e) contains requirements for arc welding and cutting. As with other forms of welding, the primary hazards of arc welding and cutting are fire and explosion. However, arc welders and cutters are also subject to electric shock and to vision impairment caused by exposure to the blinding rays of the arc. The requirements in this paragraph are therefore directed at protecting workers from these dangers. For example, the proposed provisions appearing at paragraphs (e)(1)(ii), (e)(2)(i), and (e)(2)(iv) are designed to ensure that electrode holders, welding cables and connectors, and metal parts are properly insulated to protect against fire and electric shock.

The requirements proposed in paragraphs (e)(1)(i), (e)(2)(i), and (e)(3)(vi) are primarily concerned with the current-carrying capacity of electrode holders, welding cables, and ground connections. If such equipment is not electrically adequate to carry the current required in the welding or cutting operation, employees could be exposed to fire and electric shock.

In paragraphs (e)(2)(ii), (e)(2)(iii), (e)(9), and (e)(10), OSHA is proposing coverage directed largely to the hazard of electric shock. Proposed provision (e)(3)(ii) is intended to prevent explosions, which might occur if, for example, a pipeline carrying fuel gas was used as a ground return circuit. Grounding, which must be adequate to protect employees using electrical tools from being shocked or electrocuted, is addressed in the requirements proposed in paragraphs (e)(3)(iii), (e)(3)(iv), and (e)(3)(v).

The work practices and requirements in proposed provisions (e)(4), (e)(5), (e)(6), (e)(7), (e)(9), and (e)(11) are also directed at protecting the welder or cutter from electric shock and burns. The proposed requirements in paragraphs (e)(8)(i) and (ii) will provide employee protection against blinding by the arc and being burned by the sparks of the arc.

The final provision proposed in this paragraph, (e)(11), requires employers to provide additional protection against the increased risk of electric shock when arc welders and cutters must work in wet or humid conditions. This additional protection could take the form of rubber boots, rubber pads for employees to stand on, or rubber gloves.

The proposed requirements in paragraph (f) are directed to the atmospheric hazards associated with welding, cutting, and heating, processes which liberate fumes that may be harmful to the welder or cutter or to other employees in the vicinity of the hot work. The composition of the fumes liberated depends on the types of fluxes, filler materials, base materials and coatings involved in the process.

Proposed paragraph (f)(1) specifies the types of ventilation required to maintain breathing zone concentrations of atmospheric contaminants below hazardous levels. Either local exhaust ventilation, in the form of hoods that can be positioned near the point of operation, or general ventilation may be used to maintain non-hazardous levels of fumes, vapors, or smoke. The proposed requirement in paragraph (f)(1)(v) prohibits using pure oxygen to cool or ventilate the atmosphere, or to clean clothing to the work area. The provision is directed at the hazard of fire associated with oxygen levels above 23% of the atmosphere; since the oxygen used for welding is pure oxygen, it may cause a serious fire hazard. If it were used to clean a welder's clothing, for example, some of it might collect in the seams, where it could cause the clothing to catch on fire when the welding torch was lit.

In paragraph (f)(2), OSHA proposes requirements for performing hot work in a confined space, such as a tank or boiler. The severely limited natural ventilation, small size, and restricted access typical of confined spaces all contribute to the exacerbation of the respiratory hazards associated with hot work in general. The proposed requirements therefore mandate either mechanical ventilation or the use of appropriate respiratory protective equipment, in which case a standby prepared to perform a rescue must be stationed outside the confined space.

Proposed paragraph (f)(3) addresses the hazards of exposure to the fumes liberated when toxic metals are welded, cut, or heated, or used in the flux or filler. Examples of toxic mentals are lead, cadmium, chromium, zinc, and mercury. The level of employee protection required by the proposal varies with the toxicity of the metal being heated and the ventilation characteristics of the space in which the work is being performed. For example, proposed requirement (f)(3)(iii) requires that both local point-of-operation ventilation and supplied air or self-contained breathing apparatus be used when hot work is performed indoors with a beryllium base or filler metal. Workers exposed to beryllium fumes are subjected to the risk of developing either acute or chronic respiratory beryllium disease.

The provision proposed in paragraph (f)(3)(v) will ensure that employees working in the vicinity of the hot work are also adequately protected from hazardous exposures, by requiring them to wear the same type of personal protective equipment as is worn by the welder or burner.

In paragraph (f)(4), OSHA is proposing coverage for employees exposed to the fumes liberated during inert-gas metal-arc welding. An example of this type of hot work is the use of argon to weld aluminum. The proscription directed to the use of chlorinated solvents within 200 feet of the welder's arc is necessary to protect employees from chlorine gas, which would be liberated if the solvent contacted the sparks of the arc.

The rays produced by this type of hot work are particularly intense and therefore present the risk of impairing the vision of the exposed workers. Filter lenses and filter lens goggles are required by proposed paragraph (f)(4)(ii), to protect against this hazard.

Since inert-gas metal-arc welding produces 5 to 30 times the level of ultraviolet radiation produced in shielded metal-arc welding, proposed paragraph (f)(4)(iii) requires employees to wear protective clothing and equipment to protect them from ultraviolet burns and cutaneous or visual damage.

The final proposed requirement in the inert-gas welding section mandates that employees performing inert-gas metal-arc welding on stainless steel be protected by local ventilation or by supplied air respirators, to prevent exposure to hazardous levels of nitrogen dioxide.

Performing hot work on structures coated with preservatives requires that precautions against both fire and inhalation of toxic fumes be taken. For example, the requirements proposed in paragraph (g) would protect welders required to weld a chassis or container that had been painted with a preservative such as red lead paint or a chromate-containing coating.

Tests to establish the degree of flammability of the preservative coating are required by proposed paragraph (g)(1), and precautions against fire are required by the next provision. Examples of an appropriate precaution would be stripping the coating away from the area to be heated, or applying artificial cooling to the area to reduce the temperature of the surface. Since these perservatives produce toxic fumes when heated, the final proposed provision mandates that exposed employees wear appropriate respiratory protective equipment.

The final paragraph in the proposed hot work section addresses employee protection from the radiant energy produced by any type of welding or cutting. Visual impairments caused by the blinding flashes produced by the welder's torch and the metal being welded are common occurrences among welders. The proposed requirements in paragraphs (h)(1), (2), and (3) will ensure that eye protection, with the filter lenses appropriate to the task, is worn by affected employees.

Section 1918a.153 Spray painting. Spray painting is performed at many marine terminals, although such operations are usually conducted on an infrequent and small-scale basis. Spray painting is done to protect surfaces exposed to the environment from rusting or corroding. For example, chassis and fifth wheels might be spray painted after removal of rust spots or other damage. The principal hazards of spray painting are fire and inhalation of atmospheric contaminants.

The scope of this proposed section is specified in paragraph (a), which states that major spray painting jobs, such as painting the terminal building, and portable spray painting equipment, such as the hand-held equipment used for minor "touch-ups," are not included in the proposal's coverage of spray painting. Major painting jobs are considered construction operations, and would be covered by OSHA's construction regulations (29 CFR Part 1926).

The requirements proposed in this section are grouped according to the location in which the spray painting operation occurs. The requirements appearing in proposed paragraph (c) apply to any painting area, including spray booths, spraying areas, and outdoor spraying operations, while those in proposed paragraph (d) apply only to spraying booths and spraying areas. The provisions in proposed paragraph (e) apply to spray booths exclusively. This "tiering" of requirements corresponds to the degree of hazard associated with spray painting in the various locations. For example, electrical equipment used in an outdoor area would not have to be approved for use in a hazardous location because the natural ventilation outdoors is adequate to keep the atmosphere below flammable or explosive levels. However, electrical equipment in an indoor spraying area would be required by the proposal to be approved for use in a Class I, Division 2 hazardous location, while that used in the enclosed space of a spray booth would have to be approved for a Class I, Division 1 (explosive) atmosphere.

The proposed requirements in paragraph (c) are primarily directed to fire and explosion hazards in all spraying areas, whether indoor or out. For example, paragraph (c)(1) requires that the shut-off valves on spray painting containers or piping be closed when the equipment is not in use, to relieve the pressure on the hoses. Since equipment under pressure may burst, releasing flammable materials into the atmosphere, several proposed provisions are aimed at preventing this hazard (c)(1), (c)(2), and (c)(3). These preventive measures are necessary to ensure that materials used in spray painting operations which have low flash points, such as paints and thinners, do not create fire hazards.

Several paragraphs proposed in paragraph (c) are designed to prevent sparks or static electricity from igniting fumes from the operation; paragraphs (c)(4) and (c)(5) are examples of such provisions. Special precautions for the use of organic peroxides and other dual-component coatings, which are subject to spontaneous combustion, are addressed in proposed paragraph (c)(7).

The requirements in paragraph (d) would apply to indoor spraying areas and spray booths, but do not apply to outdoor spray areas because such areas do not have the equipment covered in this paragraph. For example, outdoor spray areas do not have exhaust ducts and ventilation fans.

Proposed paragraph (d)(1) requires distribution or baffle plates, which are used to ensure an even flow of air and to catch oversprays, to be of non-combustible material and to be so located and designed that accumulations of paint that might be hazardous can be removed frequently and easily.

Filters, used to filter out paint mist to keep atmospheric paint concentration below a hazardous level, are addressed by proposed paragraphs (d)(2), (d)(3), and (d)(4). These requirements are all directed at prevention of fire. Mechanical ventilation of spraying areas is covered in several proposed requirements (d)(5), (d)(6), (d)(7), and (d)(9)). Ventilation is used to maintain the concentration of flammable and combustible vapors and mist from spray painting below flammable levels.

The risk of an electrical spark igniting the atmosphere in a spraying area is substantial unless safeguards are used against sparking. In paragraphs (d)(8), (d)(10) and (d)(12), OSHA proposes requirements to prevent this hazard.

The final paragraph in the spray painting section contains provisions that apply to spray booths, enclosed spaces in which the concentration of fumes and therefore the danger of fire is greater than in a spraying area. Although spray booths are not common in marine terminals, several terminals do have them, and the requirements proposed in paragraph (e) are directed to employee protection in these situations. The proposed requirements mandate that the booths themselves be constructed largely of noncombustible material (e)(1), be separated from other marine terminal operations either by a partition or by a clearance space (e)(2) and (e)(3), and have conductive objects, such as ducts or piping, grounded, to prevent sparking or fire (e)(4)). Spontaneous ignition caused by successively applying materials that are flammable when combined would be prevented by

compliance with proposed paragraph (e)(8).

Section 1918a.154 Compressed air Many industrial processes use compressed air to clean the work area of debris, dust, and chips after work has been completed. Unless employees in the vicinity are properly protected, however, they may be hit by flying chips or debris that is thrown up by the cleaning process. In § 1918a.154, OSHA proposes that exposed employees be protected by chip guarding and by the appropriate personal protective equipment, such as goggles or face shields. This section also prohibits the use of compressed air to clean employees, a practice that can cause an air embolism if air under pressure is forced into the bloodstream through the skin.

Section 1918a.155 Air receivers. Air receivers, tanks used to store compressed air from a compressor, are addressed in proposed § 1918a.155. The hazard associated with this equipment is explosion caused by the excessive buildup of pressure in the receiver. The proposed provisions would guard against this hazard by requiring pressure guages and pressure-relief valves. The proposal would also prohibit the placement of any valves other than relief valves between the receiver and its safety valves, which would prevent the relief device from functioning properly.

Section 1918a.156 Fuel handling and storage. Although the Coast Guard exercises general statutory authority in matters related to fuel handling and storage in marine terminals, the working conditions covered by the provisions proposed in this section are not addressed in the Coast Guard regulations (33 CFR Part 126, 46 CFR Part 146).

The requirements in proposed paragraph (b) concern diesel and gasoline fuel handled at terminals which have their own dispensing pumps to supply industrial tructs and other vehicles used at the terminal. All of the proposed provisions are directed at preventing fires and explosions, the principal hazards associated with liquid fuel handling and storage.

In paragraph (c), OSHA proposes coverage for the safe handling and use of liquefied gas fuels, such as liquefied petroleum gases (LPG) (propane, butane, propylene, and butylene). These gases liquefy under moderate pressure, but convert to the gaseous state when the pressure is relieved. Adequate ventilation is an even greater problem with these fuels than with flammable natural gases, because LP-gas vapors are heavier than air and are therefore more difficult to disperse. Accordingly, two of the proposed provisions are directed at preventing these vapors from accumulating in low-lying areas such as tunnels and pits ((c)(1)(iii), (c)(5)(iii)).

The requirements proposed in paragraph (c)(2) are intended to ensure that LP cylinders and their valves are handled in a manner that will avoid damage to the containers and their fittings. The final provisions in this paragraph, (c)(3), (c)(4), and (c)(5), cover fueling operations, fuel storage, and storage and servicing of LP-powered vehicles, respectively.

Section 1918a.157 Battery charging and changing. The hazards associated with charging and changing electric storage batteries are dealt with in proposed § 1918a.157. Employees performing these tasks are exposed to acid burns from spilled electrolyte, slips and falls caused by spilled battery fluids, electric shock from the charging equipment, and fire and explosion caused by ignition of hydrogen released during the charging process. In addition, employees may overexert themselves if they attempt to lift the batteries or large quantities of electrolyte.

The proposed requirements are directed at the prevention of fire and explosion ((a), (b), (c), (f), (g), (h), (m), (n)); protecting employees from acid burns ((d), (e), (i), and (j)); avoiding electric shock ((k), (l), (n), and (o)); and preventing strains and overexertion injuries ((j)).

Section 1918a.158 Prohibited operations. The proposed standard's final section prohibits certain operations from being conducted during, or in the vicinity of, cargo-handling operations. Spray painting and abrasive blasting both produce exessive levels of noise, which would interfere with the communication of signals necessary to ensure close cooperation during the loading or discharging of cargo. Further, if a draft or part of a draft were to fall and hit the spray painting equipment, hazardous fumes might be released.

Proposed paragraph (b) is intended to protect cargo handlers from the fire hazards associated with welding and burning operations. Unless hot work is necessary to repair equipment being used in the hoisting operation, it should be performed in an area designated for that purpose and distant from the hoisting area, which would provide the requisite level of employee protection.

VI. Regulatory Assessment

The proposed standard covering the operation of marine terminals is not a "major" action as defined by Executive Order No. 12044 (43 FR 12661, March 24, 1978) and by the economic identification criteria contained in Department of Labor Guidelines for improving Government regulations (44 FR 5575, January 26, 1979).

The marine terminal facilities covered by the proposed standard include other industries in addition to those in Standard Industrial Classification (SIC) 4463, Marine Cargo Handling. For example, firms in such industries as petroleum refining, steel production, iron ore and coal mining, cement manufacturing, and others frequently have their own port facilities to serve their shipping needs; these firms would be classified under other SIC's. The economic analysis of the proposed standard therefore includes estimates of compliance costs that are not entirely attributable to SIC 4463.

Centaur Associates, Inc., has prepared an economic assessment for OSHA entitled "Economic Impact Statement/Assessment for the Proposed Marine Terminals Standard" (Ex. 78). This study includes assessments of the technological feasibility of compliance, of the estimated costs of compliance, of the estimated effects upon the prices of goods shipped through marine terminals, of the estimated effects upon labor productivity and employment, and of the expected changes in market structure that can be anticipated upon implementation of the proposed standard.

According to the study, the costs of compliance for the marine cargo handling industry—based upon a "worst case" criterion—is estimated to be no greater than $40.3 million during the first year of compliance and no more than $18.5 million during any succeding year. This falls well short of the Department of Labor's Guidelines establishing criteria for major actions of $50 million in one year in any one industry and $80 million in any two years. With respect to the economy-wide costs of compliance, the total is estimated to be less than $63.8 million during the first year and no greater than $28 million during any succeeding year. These values also clearly fall short of the E.O. guidelines setting a "major" action level of $100 million in one year for the economy as a whole, and $180 million for any two years. The Centaur study concludes that compliance with the proposed standard is both technologically and economically feasible.

With respect to the other general economic assessments of the proposed standard, the study concludes that the effects on prices and the quantity of goods shipped through marine terminals is, in the worst case, only about $0.05 a ton—a negligible charge equal to approximately 0.06 percent of the

average water transportation shipping charges. It also concludes that there would be some minor negative effects upon labor productivity due to the required safety training and the probable changes in certain work practices. However, this productivity loss may be more than offset by the decline in lost work days attributable to the reduction of occupational injuries in marine terminals. The study also concludes that the proposed standard would not have any effect upon employment because of its limited impact on costs, prices, quantities shipped, and labor productivity.

In addition, pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-353, 94 Stat. 1164 (5 U.S.C. 601 et seq.)) the study assessed the impact of the proposed standard upon small businesses. The Centaur study concluded that this proposed standard would not create any new competitive disadvantages in small firms relative to larger firms because the bulk of the costs are directly dependent upon the firm's size and upon the number of its employees. For example, the amount and costs of new lighting required by the proposal would be determined by the size of the marine terminal. The cost of providing safety shoes, the cost of providing supervisory safety instruction, and the cost of per-worker productivity reductions are all determined by the number of employees. Since these items account for the major cost (accounting for about 75% of the total estimated cost of the proposal), the per-ton costs of the proposed standard are expected to be the same for both smaller and larger firms. Thus, the basic market structures of the marine cargo handling and other affected industries would not be changed, and smaller firms would not lose business as a result of promulgation of the standard.

Further, the proposed safety standard is not expected to have environmental effects because the standard is concerned only with working conditions at marine terminals. The proposed standard provides coverage only for matters such as the types of slings to be used, the positioning of safety ladders, and the type of headgear and protective shoes to be worn. These provisions would not have an impact on the quality of the environment, and consequently, there is no need to perform an environmental impact statement for this proposed safety standard.

The economic impact assessment has identified several benefits which will be realized as a result of promulgation of a proposed safety standard for marine terminals. As the Hazard section of the preamble points out, workers at marine terminals are exposed to serious risk of injury. The Bureau of Labor Statistics has found that the Water Transportation Services industry (SIC 446) has the highest hazard index rating of any 3-digit SIC industry. Further it reports the greatest number of workdays lost per 100 workers for any 3-digit SIC industry. The extent and severity of the injury problem in marine terminals are reflected in compensation and medical payments made under the Longshoremen's and Harbor Worker's Compensation Act, which totaled about $200 million in fiscal year 1980. This figure does not include workmen's compensation paid to workers injured at marine terminals owned, for example, by a steel company, an oil refinery firm, or other facility not principally devoted to cargo handling.

Clearly, there is a pervasive injury problem in the shoreside marine cargo handling industry, which the provisions of this standard are designed to ameliorate. The proposed illumination requirement should limit the number of injuries caused by lack of light. The requirement that workers wear safety shoes which meet the ANSI 41.1-1967 specification for a class 75 safety shoe which, according to a Canadian study on the effectiveness of safety shoes (Ex. 79) will prevent 55% of all toe injuries and also substantially lessen the severity of many other toe injuries. Another proposed provision requiring safety training of supervisors should also reduce the level and severity of injuries caused by careless work practices.

Based upon a review of the Centaur study and the proposed standard as a whole, OSHA has determined that this proposed standard is not a "major" action under E.O. 12044 and the Secretary's Guidelines (44 FR 5575, January 26, 1979), and it is not expected to have any adverse effects upon small businesses as set forth in the Regulatory Flexibility Act of 1980.

VII. Public Participation

Interested persons are invited to submit written data, views and arguments with respect to this proposal. These comments must be postmarked on or before May 15, 1981, and submitted in quadruplicate to the Docket Officer, Docket S-506, Room S-6212, Frances Perkins Building, 200 Constitution Avenue, N.W., U.S. Department of Labor, Washington, D.C. 20210 (202) 523-7894. Written submissions must clearly identify the specific provisions of the proposal which are addressed and the position taken with respect to each issue.

The regulatory assessment and the exhibits cited in this document will be available for public inspection and copying at the above address. OSHA invites comment concerning the conclusions reached in the economic impact assessment.

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.

To assist interested persons in submitting their written comments and data OSHA is scheduling a public meeting during the comment period. The meeting will be held on April 28, 29, and 30, 1981, in the Auditorium, Frances Perkins Building, 200 Constitution Avenue, N.W., U.S. Department of Labor, Washington, D.C. 20210. It will begin at 9:00 A.M. will recess from 12 Noon to 1:00 P.M., and will continue until 5:00 P.M.

The public meeting is intended as an informal forum for interested persons to present their concern orally and to seek clarification of the proposal from representatives of OSHA who will conduct the public meeting.

OSHA requests that any person wishing to make an oral presentation at the meeting notify OSHA in advance. Please identify the person and/or organization intending to make a presentation, telephone number, the amount of time requested for that presentation, and the subject matter and a brief summary of the intended presentation, if possible. This written notice should be sent to Thomas Hall, Room N-3635, OSHA Division of Consumer Affairs, Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 postmarked no later than April 15, 1981. For further information concerning participation at the meeting, please contact Thomas Hall or Richard Terry at (202) 523-8024. All persons giving advance notice will have time reserved for their oral presentations. Persons wishing to speak who have not filed advance notices are requested to register from 8:30 A.M. to 9:00 A.M. on the morning of the public meeting.

As long as time permits, all persons who wish to be heard will be allowed to speak. However, in the interest of time, persons who have provided advance notice will be given priority.

Detailed minutes of the meeting will be prepared and will be made a part of the record of this rulemaking. Copies of the minutes will be available for inspection at the OSHA Docket Office, Room S-6212, U.S. Department of Labor,

200 Constitution Avenue, N.W., Washington, D.C. 20210.

Pursuant to 29 CFR 1911.11(b) and (c), interested persons may, in addition to filing written submissions and attending the public meeting as provided above, file objections to the proposal and request an informal public hearing with respect thereto in accordance with the following conditions:

(1) The objections must include the name and address of the objector;

(2) The objections must be postmarked on or before May 15, 1981 and submitted to the Docket Office at the above address;

(3) The objections must specify with particularity the provisions of the proposed rule to which objection is taken, and must state the ground therefor;

(4) Each objection must be separatelystated and numbered; and

(5) The objections must be accompanied by a detailed summary of the evidence proposed to be adduced at the requested hearing.

VIII. Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Third Street and Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, under sections 4(b)(2), 6(b) and 8(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1592, 1593, 1599, 29 U.S.C. 653, 655, 657, and Section 41 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1444 as amended; 33 U.S.C. 941), Secretary of Labor's Order No. 8–76 (41 FR 25059), and 29 CFR Part 1911, it is proposed to add Part 1918a to Title 29, Code of Federal Regulations, 29 CFR, and to amend 29 CFR Part 1910.16(a) and (b).

Signed at Washington, D.C. this 9th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

1. By amending the title of § 1910.16 to read "Longshoring and Marine Terminals," and by revising paragraph (a) of § 1910.16 and by adding a new paragraph (b)(4) to § 1910.16 as follows:

§ 1910.16 Longshoring and marine terminals

(a) *Adoption and extension of safety and health standards for longshoring* (1) The standards prescribed by Part 1918, Subparts A through J of this title and in effect on April 28, 1971 are adopted as occupational safety and health standards under Section 6(a) of the Act and shall apply, according to the provisions thereof, to any employment and place of employment of every employee engaged in longshoring operations or a related employment aboard a vessel on the navigable waters of the United States.

(2) Part 1918a of this title shall apply exclusively according to the provisions thereof, to employment within a marine terminal, except as provided in paragraph (a)(4) of this section.

(3) The provisions of Part 1918a do not apply to the following:

(i) Facilities used for bulk storage, handling and transfer of flammable and combustible liquids, gases and hazardous cargo to the extent that specific working conditions are regulated by the United States Coast Guard; and

(ii) Facilities subject to the regulations of the Office of Pipeline Safety Regulation of the Materials Transportation Bureau, Department of Transportation, to the extent such regulations apply to specific working conditions.

(4) Part 1910 does not apply to marine terminals except for the following:

(i) Electrical. Subpart S;

(ii) Toxic and hazardous substances. Subpart Z applies where specifically referenced in Part 1918a, except that the requirements of Subpart Z do not apply when a substance or cargo is contained within a sealed, intact means of packaging or containment complying with Department of Transportation or Intergovernmental Maritime Consultative Organization requirements;

(iii) Noise. Subpart G, § 1910.95;

(iv) Commercial diving operations. Subpart T;

(v) Safety requirements for scaffolding. Subpart D, § 1910.28;

(vi) Abrasive blasting. Subpart G, § 1910.94(a); and

(vii) Access to employee exposure and medical records. Subpart C, § 1910.20.

(b) *Definition.* . . .

(4) "Marine terminal" means wharves, bulkheads, quays, piers, docks or other berthing locations and adjacent storage or contiguous areas and structures devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments. The term does not include production or manufacturing areas having their own docking facilities and located at a marine terminal.

2. By adding a new Part 1918a, Marine Terminal Code to 29 CFR as follows:

PART 1918a—MARINE TERMINALS

Subpart A—Scope and Definitions

Sec.

1918a.1 Scope and applicability.
1918a.2 Definitions.

Subpart B—Marine Terminal Operations

1918a.11 Housekeeping.
1918a.12 Slippery conditions.
1918a.13 Slinging.
1918a.14 Stacking of cargo and pallets.
1918a.15 Coopering.
1918a.16 Line handling.
1918a.17 Railroad facilities.
1918a.18 Log handling.
1918a.19 Movement of barges and rail cars.
1918a.20 Interference with communications.
1918a.21 Open fires.
1918a.22 Hazardous cargo.
1918a.23 Hazardous atmospheres, substances.
1918a.24 Carbon monoxide.
1918a.25 Fumigants, pesticides, insecticides and hazardous preservatives.
1918a.26 First aid and lifesaving facilities.
1918a.27 Personnel.

Subpart C—Cargo Handling Gear and Equipment

1918a.41 House falls.
1918a.42 Miscellaneous auxiliary gear.
1918a.43 Powered industrial trucks.
1918a.44 General rules applicable to vehicles.
1918a.45 Cranes and derricks.
1918a.46 Crane load and limit devices.
1918a.47 Winches.
1918a.48 Conveyors.
1918a.49 Spouts, chutes, hoppers, bins, and associated equipment.
1918a.50 Certification of marine terminal material handling devices.
1918a.51 Hand tools.

Subpart D—Specialized Terminals

1918a.71 Terminals handling intermodal container or roll on roll off operations.
1918a.72 Grain elevator terminals.
1918a.73 Terminal facilities handling menhaden and similar species of fish.

Subpart E—Personal Protection

1918a.91 Eye protection.
1918a.92 Respiratory protection.
1918a.93 Head protection.
1918a.94 Foot protection.
1918a.95 Other protective measures.

Subpart F—Terminal Facilities

1918a.111 Maintenance and load limits.
1918a.112 Guarding of edges.
1918a.113 Clearance heights.
1918a.114 Cargo doors.
1918a.115 Cargo landing surfaces.
1918a.116 Platforms and skids.
1918a.117 Elevators and escalators.
1918a.118 Manlifts.
1918a.119 Fixed ladders.
1918a.120 Portable ladders.
1918a.121 Fixed stairways.
1918a.122 Spiral stairways.
1918a.123 Employee exits.
1918a.124 Illumination.
1918a.125 Passage between levels and across openings.
1918a.126 Guarding temporary hazards.
1918a.127 River banks.
1918a.128 Sanitation.
1918a.129 Signs and marking.

Subpart G—Related Terminal Operations and Equipment

1918a.151 Machine guarding.

1918a.152 Welding, cutting and heating (hot work).
1918a.153 Spray painting.
1918a.154 Compressed air.
1918a.155 Air receivers.
1918a.156 Fuel handling and storage.
1918a.157 Battery charging and changing.
1918a.158 Prohibited operations.

Authority: Sec. 6(b), 8(c), 84 Stat. 1593, 1594 (29 U.S.C. 655, 657), Sec. 41, 44 Stat. 1444 (33 U.S.C. 941), Secretary of Labor's Order No. 8, 76 (41 FR 25091), 29 CFR Part 1911.

Subpart A—Scope and Definitions

§ 1918a.1 Scope and applicability.

(a) The regulations of this part apply to employment within a marine terminal as defined in § 1918a.2(u), including the loading, unloading movement or other handling of cargo, ship's stores or gear within the terminal or into or out of any land carrier, holding or consolidation area, or any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment.

(1) The provisions of Part 1918a do not apply to the following:

(i) Facilities used for bulk storage, handling and transfer of flammable and combustible liquids, gases and hazardous cargo to the extent that specific working conditions are regulated by the United States Coast Guard; and

(ii) Facilities subject to the regulations of the Office of Pipeline Safety Regulation of the Materials Transportation Bureau, Department of Transportation, to the extent such regulations apply.

(2) Part 1910 of this Chapter does not apply to marine terminals except for the following provisions:

(i) Electrical. Subpart S;

(ii) Toxic and hazardous substances. Subpart Z applies where specifically referenced in Part 1918a, except that the requirements of Subpart Z do not apply when a substance or cargo is contained within a sealed, intact means of packaging or containment complying with Department of Transportation or Intergovernmental Maritime Consultative Organization requirements;[A-1]

(iii) Noise. Subpart G, § 1910.95;

(iv) Commercial diving operations. Subpart T;

(v) Safety requirements for scaffolding. Subpart D, § 1910.28; and

(vi) Abrasive blasting. Subpart G, § 1910.94(a).

[A-1] The Intergovernmental Martime Consultative Organization publishes the International Maritime Dangerous Goods Code to aid compliance with the international legal requirements of the International Convention for the Safety of Life at Sea, 1960.

§ 1918a.2 Definitions.

(a) "Apron" means that open portion of a marine terminal immediately adjacent to a vessel berth and used in the direct transfer of cargo between the terminal and a vessel.

(b) "Authorized," in reference to an employee's assignment, means authorized by the employer for that purpose.

(c) "Cargo door" (transit shed door) means a door designed to permit transfer of cargo to and from a marine terminal structure.

(d) "Cargo packaging" means any method of containment for shipment, including cases, cartons, crates and sacks, but excluding large units such as intermodal containers, vans or similar devices.

(e) "Confined space" means a space having all of the following characteristics:

(1) Small size;

(2) Severely limited natural ventilation;

(3) Capability to accumulate or contain a hazardous atmosphere;

(4) Exits that are not readily accessible; and

(5) Not designed for continuous human occupancy.

Examples of confined spaces are intermodal tank containers, brailwater tanks and portable tanks.

(f) "Conveyor" means a device designed exclusively for transporting bulk materials, packages or objects in a predetermined path and having fixed or selective points of loading or discharge. The term does not include such devices as industrial trucks, tractors, trailers, tiering machines, cranes, hoists, monorails, power and hand shovels, power scoops, bucket drag lines, platform elevators, moving stairways (escalators) and highway or rail vehicles.

(g) "Danger zone" means any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock. Examples of danger zones are nip and shear points, shear lines, drive mechanisms, and areas beneath counterweights.

(h) "Designated person" means a person who is recognized by the employer to possess specialized abilities in a specific area and is assigned by the employer to perform a specific task in that area.

(i) "Dock" means a wharf or pier forming all or part of a waterfront facility, including marginal or quayside berthing facilities; not to be confused with "loading dock" as at a transit shed or container freight station, or with the body of water between piers or wharves.

(j) "Dockboard" (bridge plate or car plate) means a device utilized to span the gap between railroad cars, or between railroad cars or highway vehicles and the loading dock or platform. A car plate may be fixed, adjustable, portable, powered or unpowered.

(k) "Enclosed space" means an indoor space, other than a confined space, that may contain or accumulate a hazardous atmosphere due to inadequate natural ventilation. Examples of enclosed spaces are trailers, railcars, and storage rooms.

(l) "Examination," as applied to material handling devices required by this Part to be certificated, means a thorough visual inspection, supplemented by other tests and procedures appropriate to the type of gear or device. For example, crane examinations include testing of all normal operations, such as slewing, topping, and hoisting, followed by inspection of accessory gear such as sheaves and blocks, which are disassembled to ensure that they are in good operating condition.

(m) "Flammable atmosphere" means an atmosphere containing more than 10 percent of the lower flammable limit of a flammable or combustible vapor or dust mixed with air.

(n) "Front-end attachments." (1) As applied to power-operated industrial trucks, means the various devices, such as roll clamps, rotating and sideshifting carriages, magnets, rams, crane arms or booms, load stabilizers, scoops, buckets and dumping bins, attached to the load end for handling lifts as single or multiple units.

(2) As applied to cranes, means various attachments applied to the basic machine for the performance of functions such as lifting, clamshell or magnet services.

(o) "Fumigant" is a substance or mixture of substances which is a gas or is rapidly or progressively transformed to the gaseous state, even though some nogaseous or particulate matter may remain and be dispersed in the treatment space.

(p) "Hazardous cargo, material, substance or atmosphere" means:

(1) Any substance listed in 29 CFR Part 1910, Subpart Z;

(2) Any material in the Hazardous Materials Table and Hazardous Materials Communications Regulations

of the Department of Transportation, 49 CFR Part 172;

(3) Any article not properly described by a name in the Hazardous Materials Table and Hazardous Materials Communications Regulations of the Department of Transportation, 49 CFR Part 172 but which is properly classified under the definition of those categories of dangerous articles given in 49 CFR Part 173; or

(4) Any atmosphere with an oxygen content of less than 19.5%.

(q) "House falls" means spans and supporting members, winches, blocks, and standing and running rigging forming part of a marine terminal and used with a vessel's cargo gear to load or unload by means of married falls.

(r) "Inspection," as applied to material handling devices required by this Part to be certificated, means a complete visual examination of all visible parts of the device.

(s) "Intermodal container" means a reusable cargo container of rigid construction and rectangular configuration, intended to contain one or more articles of cargo or bulk commodities for transportation by water and one or more other transport modes without intermediate cargo handling. The term includes completely enclosed units, open top units, fractional height units, units incorporating liquid or gas tanks and other variations fitting into the container system, remountable or with attached wheels. It does not include cylinders, drums, crates, cases, cartons, packages, sacks, unitized loads or any other form of packaging.

(t) "Loose gear" means removable and replaceable components of equipment or devices which may be used with or as a part of assembled material handling units for purposes such as making connections, changing line direction and multiplying mechanical advantage. Examples are shackles and snatch blocks.

(u) "Marine terminal" means wharves, bulkheads, quays, piers, docks, and other berthing locations and adjacent storage or contiguous areas and structures which are devoted to receiving, handling, holding, consolidation, and loading or delivery of waterborne shipments, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas having their own docking facilities and located at a marine terminal.

Subpart B—Marine Terminal Operations

§ 1918a.11 Housekeeping.

(a) The employer shall ensure that work areas are kept free of equipment and materials not in use, and clear of debris, projecting nails, strapping and other sharp objects not directly associated with the work in progress.

(b) Hatch beams and covers placed in terminal working areas shall either be stowed in stable piles with beams secured against tipping or falling, or be laid on their sides.

(c) Cargo and material shall not obstruct access to vessels, cranes, vehicles, or buildings.

§ 1918a.12 Slippery conditions.

The employer shall eliminate, to the extent possible, slippery working and walking surfaces in areas used by employees.

§ 1918a.13 Slinging.

(a) The employer shall ensure that drafts are safely slung before hoisting to prevent cargo from falling from the draft. Loose dunnage and debris hanging or protruding from drafts shall be removed.

(b) Bales of cotton, wool, cork, wood pulp, gunny bags or similar articles shall be hoisted only by straps strong enough to support the weight of the bale. At least two hooks, each in a separate strap, shall be used.

(c) When bundles of cargo such as ingots, steel and dunnage are hoisted by bands, strapping or ties, the bands, strapping, or ties shall be strong enough to support the load.

(d) Unitized loads bound by bands or straps may be hoisted by the banding or strapping only if the banding or strapping is designed for hoisting and is strong enough to support the weight of the load. The menans of handling shall not damage the bands or straps.

(e) The employer shall establish by testing in accordance with Part 1919 of this Chapter that the method of handling unitized loads by banding or strapping is suitable for hoisting.

(f) Unitized loads having damaged banding or strapping shall be handled by additional means that will ensure safe handling of the draft.

(g) Case hooks shall be used only with cases designed to be hoisted by these hooks.

(h) Loads requiring continuous manual guidance during handling shall be guided by guide ropes (tag lines) that are long enough to control the load.

(i) Intermodal containers shall be handled in accordance with § 1918a71(g).

§ 1918a.14 Stacking of cargo and pallets.

The employer shall ensure that cargo and pallets stored intiers are stacked to provide stability against sliding and collapse.

§ 1918a.15 Coopering.

The employer shall ensure that the repair or reconditioning of damaged or leaking cargo packaging (coopering) is so located and performed as not to endanger employees.

§ 1918a.16 Line handling. (See also § 1918a.95(c)).

(a) The employer shall ensure that areas used to handle mooring lines are kept free of obstructions.

(b) When stringpiece or apron width is insufficient for safe footing, grab lines or rails shall be installed on the sides of permanent structures. ("Stringpiece" means a narrow walkway between the water edge of a berth and a shed or other structure.)

§ 1918a.17 Railroad facilities.

(a) The employer shall ensure that work is performed in railcars only if floors of the railcars are in safe condition.

(b) A route shall be established to allow employees to pass to and from places of employment without passing under, over or through railcars, or between cars less than 10 feet (3 m) apart on the same track.

(c) The employer shall ensure that no employees remain in railcars after work.

(d) Railcars shall be chocked or otherwise prevented from moving:

(1) While dockboards or carplates are in position; or

(2) While employees are working within railcars or near the tracks at the ends of the cars.

(e) When employees are working in, on, or under a railcar, the employer shall ensure that flags or signs warning that work is in progress are placed no less than 50 feet from any end of the railcar exposed to impact from moving railcars.

(f) Before cars are moved, unsecured and overhanging stakes, wire straps, banding and similar objects shall be removed or placed so as not to create hazards.

(g) Railcars shall be moved only when attached to an engine or other powered vehicle. Free rolling movement of railcars is prohibited.

(h) Only freight car doors in safe condition shall be opened. Before being opened fully, doors shall be opened slightly to ensure that the load has not shifted during transit.

(i) If power trucks are used to open freight car doors, the trucks shall be equipped with door opening

attachments. The employer shall ensure that truck drivers stand clear of the railcar door while it is being opened or closed.

(j) Only railcar door openers or power trucks equipped with door opening attachments shall be used to open jammed doors.

(k) The employer shall ensure that employees do not remain in or on gondolas or flat cars when drafts are being hoisted over the car or landed in the car. End gates, if raised, shall be secured.

(l) Operators of railcar dumps shall have an unrestricted view of dumping operations and shall have emergency means of stopping dump movement.

(m) Recessed railroad switches shall be enclosed to provide a level surface.

(n) Warning signs shall be posted where doorways open onto tracks, at blind corners and at similar places where vision may be restricted.

(o) Warning signs shall be posted if a clearance of less than 24 inches (.61 m) exists between railcars and structures, cargo or waterside edges.

§ 1918a.18 Log handling.

(a) The employer shall ensure that structures (bunks) used to contain logs have rounded corners and structural parts to avoid sling damage.

(b) Two or more binders or equivalently safe means of containment shall remain on logging trucks and railcars to secure logs during movement of the truck or car within the terminal. During unloading, logs shall be prevented from moving while binders are being removed.

(c) Logs shall be hoisted by two slings or by other gear designed for safe hoisting.

(d) Logs placed adjacent to vehicle curbs on the dock shall not be over one tier high unless they are contained in bunks or are stacked or unitized to prevent spreading.

(e) Before logs are slung up from the dock, they shall be stably supported to prevent spreading and to allow passage of slings beneath the load. When bunks or similar retaining devices are used, no log shall be higher than the stanchions or retaining members of the device.

§ 1918a.19 Movement of barges and railcars.

The employer shall ensure that barges and railcars are not moved by cargo runners (running rigging) from vessel cargo booms, cranes or other equipment not suitable for the purpose.

§ 1918a.20 Interference with communications.

The employer shall ensure that noise does not inferfere with the communication of warnings or instructions during cargo-handling operations.

§ 1918a.21 Open fires.

The employer shall ensure that open fires and fires in drums or similar containers are prohibited.

§ 1918a.22 Hazardous cargo.[a-1]

(a) Before cargo handling operations begin, the employer shall ascertain whether any hazardous cargo is to be handled and shall determine the nature of the hazard. The employer shall inform employees of the nature of any hazard and any special precautions to be taken to prevent employee exposure, and shall instruct employees to notify him of any leaks or spills.

(b) Hazardous cargo shall be handled by means such as netting or restraining ropes to prevent damage to the cargo packaging during handling.

(c) If hazardous cargo is spilled or if its packaging leaks, employees shall be removed from the affected area until the employer has ascertained the specific hazards, provided any equipment, clothing and ventilation and fire protection equipment necessary to eliminate or protect against the hazard, and has instructed cleanup employees in a safe method of cleaning up and disposing of a spill and handling and disposing of leaking containers. Actual cleanup or disposal work shall be conducted under the supervision of a designated person.

§ 1918a.23 Hazardous atmospheres and substances.

(a) *Purpose and scope.* This section covers areas in which a hazardous atmosphere or substance may exist, except where one or more of the following sections apply: § 1918a.22 *Hazardous cargo;* § 1918a.24 *Carbon monoxide;* § 1918a.25 *Fumigants, pesticides, insecticides, and hazardous preservatives;* § 1918a.73 *Menhaden terminals;* § 1918a.152 *Welding, cutting, and heating (hot work);* and § 1918a.153 *Spray painting.*.

(b) *Determination of hazard.* (1) When a room, building, vehicle, railcar, or other space contains or has contained a hazardous atmosphere, the employer shall ensure that a designated and appropriately equipped person tests the atmosphere before employee entry to determine whether a hazardous atmosphere exists.

(2) Records of results of any tests required by this section shall be maintained at the terminal for at least thirty (30) days.

(c) *Testing during ventilation.* When mechanical ventilation is used to maintain a safe atmosphere, tests shall be made to ensure that the atmosphere is not hazardous.

(d) *Entry into hazardous atmospheres.* The employer shall ensure that only designated persons enter hazardous atmospheres, in which case the following provisions shall apply:

(1) Persons entering a space containing a hazardous atmosphere shall be protected by respiratory and emergency protective equipment meeting the requirements of Subpart E of this Part;

(2) Persons entering a space containing a hazardous atmosphere shall be instructed in the nature of the hazard, precautions to be taken, and the use of protective and emergency equipment. Standby observers shall be similarly equipped and instructed and shall continuously monitor the activity of employees within such space;

(3) No ignition source shall be permitted in spaces containing flammable atmospheres; and

(4) Persons required to enter flammable atmospheres or those containing less than 19.5% oxygen shall use self-contained breathing apparatus or supplied air respirators drawing air from an uncontaminated source.

(e) *Cleaning of asbestos spills.* When the packaging of asbestos cargo leaks, the employer shall ensure that the spillage is cleaned up by designated employees protected from the harmful effects of asbestos as required by § 1910.1001 of this Chapter.

§ 1918a.24 Carbon monoxide.

(a) *Exposure limits.* The employer shall ensure that the carbon monoxide content of the atmosphere in a room, building, vehicle, railcar, or other enclosed space does not exceed 50 parts per million (0.005%) as an 8-hour time-weighted average (TWA) or 75 parts per million (0.0075%) at any time. Areas with concentrations above these levels shall be considered hazardous and employees entering these areas shall be protected as provided in § 1918a.23(d).

(b) *Testing.* Tests to determine carbon monoxide concentration shall be made when necessary to ensure that employee exposure does not exceed the limits specified in paragraph (a) of this section.

(c) *Instrumentation.* Tests for carbon monoxide concentration shall be made by designated persons using gas detector tube units or other measuring instruments certified by the National

[a-1] The Department of Transportation and the United States Coast Guard apply requirements related to handling, storing and transportation of hazardous cargo (see 33 CFR Part 126, 46 CFR, 49 CFR).

Institute for Occupational Safety and Health under 30 CFR Part 11.

(d) *Records.* A record of the date, time, location and results of carbon monoxide tests shall be available at the terminal for at least thirty (30) days.

§ 1918a.25 Fumigants, pesticides, insecticides and hazardous preservatives.

(a) When cargo in a space is or has been stowed, handled, or treated with a fumigant, pesticide, insecticide, or hazardous preservative, the employer shall determine whether a hazardous atmosphere is present in the space, and shall ensure that only designated employees protected as required in paragraph (e) of this section enter the space if it is hazardous.

(b) Tests to determine the atmospheric concentration of chemicals used to treat cargo shall be:

(1) Appropriate for the hazard involved;

(2) Conducted by designated persons; and

(3) Performed at the intervals necessary to ensure that employee exposure does not exceed the permissible exposure limit for the chemical involved.

(c) Results of any tests shall be available at the terminal for at least thirty (30) days.

(d) Chemicals shall be applied to cargoes only by designated persons.

(e) The employer shall ensure that only designated persons enter hazardous atmospheres, in which case the following provisions apply:

(1) Persons entering a space containing a hazardous atmosphere shall be protected by respiratory and emergency protective equipment meeting the requirements of Subpart E of this part; and

(2) Persons entering a space containing a hazardous atmosphere shall be instructed in the nature of the hazard, precautions to be taken, and the use of protective and emergency equipment. Standby observers shall be similarly equipped and instructed and shall continuously monitor the activity of employees within such a space.

(f) Signs shall be clearly posted where fumigants, pesticides or hazardous preservatives have created a hazardous atmosphere. These signs shall note the danger, identify specific chemical hazards, and give appropriate information and precautions, including instructions for the emergency treatment of employees affected by any chemical in use.

§ 1918a.26 First aid and lifesaving facilities.

(a) Employers shall instruct employees to report every injury, regardless of severity, to the employer.

(b) A first aid kit shall be available at the terminal, and at least one person holding a valid first aid certificate shall be at the terminal when work is in progress.

(c) First aid kits shall be weatherproof and contain individual sealed packages for each item that must be kept sterile. Each kit shall include at least the following items:

Gauze roller bandages, 1 inch and 2 inch (25.4 mm and 50.8 mm);
Gauze compress bandages, 4 inch (101.6 mm);
Adhesive bandage, 1 inch (25.4 mm);
Triangular bandage, 40 inch (101.6 cm);
Ammonia inhalants and ampules;
Antiseptic applicators or swabs;
Eye dressing;
Wire or thin board splints;
Forceps and tourniquet; and
First aid dressing.

(d) Stretchers permanently equipped with bridles for hoisting shall be readily accessible. A blanket shall be available.

(e) Telephone or equivalent means of communication shall be readily available.

(f) A U.S. Coast Guard approved 30-inch (76.2 cm) life ring, with at least 90 feet (27.42 m) of line attached, shall be available at readily accessible points within 200 feet (61 m) of each waterside work area. Employees working on any bridge or structure leading to a detached vessel berthing installation shall wear work vests provided by the employer at no cost to the employee. A readily available portable or permanent ladder giving access to the water shall also be provided within 200 feet (61 m) of such work areas.

§ 1918a.27 Personnel.

(a) *Qualifications of machinery operators.* (1) The employer shall ensure that only trained and experienced employees who understand the signs, notices, operating instructions and signal codes in use operate crains, winches, other power-operated hoisting apparatus, power conveyors or similar devices, or any other power-operated vehicle, or give signals to operators of any hoisting apparatus. Exception: Employees being trained and supervised by a designated person may operate such machinery and give signals to operators during training.

(2) Operators assigned after (*effective date of final standard*) shall pass a practical operating examination and be instructed in established operating practices.

(3) Employees with medical conditions that may impair their ability to operate powered machinery shall not operate a crane, winch, or other power-operated hoisting apparatus or a power-operated vehicle.

(b) *Supervisory accident prevention proficiency.* (1) After (two years after promulgation), supervisors of more than five persons shall possess documentary evidence of satisfactory completion of a course in accident prevention. Employees newly assigned to supervisory duties after that date shall be required to meet the provisions of this paragraph within ninety (90) days of such assignment.

(2) The course shall consist of classroom instruction suited to the particular operations involved and shall include at least the following:

(i) Safety responsibility and authority;

(ii) Elements of accident prevention;

(iii) Attitudes, leadership and motivation;

(iv) Hazards of longshoring, including peculiar local circumstances;

(v) Hazard identification and elimination;

(vi) Applicable regulations; and

(vii) Accident investigation.

Subpart C—Cargo Handling Gear and Equipment

§ 1918a.41 House falls.

(a) The employer shall ensure that span beams are secured to prevent accidental dislodgement.

(b) A safe means of access shall be provided for employees working with house fall blocks.

(c) The employer shall ensure that designated employees inspect chains, links, shackles, swivels, blocks and other loose gear used in house fall operations before each day's use. Defective gear shall not be used.

§ 1918a.42 Miscellaneous auxiliary gear.

(a) *Routine inspection.* (1) At the completion of each use, the employer shall ensure that loose gear such as slings, chains, bridles, blocks and hooks is placed to avoid damage to the gear. Loose gear shall be inspected and any defects corrected before reuse.

(2) Loose stevedoring gear shall be inspected for defects during use.

(3) Defective gear shall not be used. Distorted hooks, shackles or similar gear shall be discarded.

(b) *Wire rope and wire rope slings.* (1) The employer shall ascertain and adhere to the manufacturer's recommended ratings for wire rope and wire rope slings used for hoisting and shall have such ratings available at the terminal. A design safety factor of at least five shall be maintained for the

common sizes of running wire used as falls, in purchases or in such uses as light load slings. Wire rope with a safety factor of less than five may be used only:

(i) In specialized equipment, such as but not limited to cranes, designed to be used with lesser wire rope safety factors;

(ii) In accordance with design factors in standing rigging applications; or

(iii) For heavy lifts or other purposes for which a safety factor of five is impracticable and for which the employer can demonstrate that equivalent safety is ensured.

(2) Wire rope or wire rope slings having any of the following conditions shall not be used:

(i) Ten randomly distributed broken wires in one rope lay or three or more broken wires in one strand in one rope lay;

(ii) Kinking, crushing, bird caging or other damage resulting in distortion of the wire rope structure;

(iii) Evidence of heat damage;

(iv) Excessive wear or corrosion, deformation or other defect in the wire or attachments, including cracks in attachments;

(v) Any indication of strand or wire slippage in end attachments; or

(vi) More than one broken wire in the close vicinity of a socket or swaged fitting.

(3) Protruding ends of strands in splices on slings and bridles shall be covered or blunted. Coverings shall be removable so that splices can be examined. Means used to cover or blunt ends shall not damage the wire.

(4) Where wire rope clips (other than U-bolt clips) are used to form eyes, the employer shall adhere to the manufacturer's recommendations, which shall be available at the terminal. If "U" bolt clips are used and the manufacturer's recommendations are not available, Table C–1 shall be used to determine the number and spacing of clips. "U" bolts shall be applied with the "U" section in contact with the dead end of the rope.

Table C–1

[Number and spacing of u-bolt wire rope clips]

Improved plow steel, rope diameter		Minimum number of clips		Minimum spacing	
Inches	Centimeters	Drop forged	Other material	Inches	Centimeters
½ or less	(1.3)	3	4	3	(7.6)
⅝	(1.6)	3	4	3¾	(9.5)
¾	(1.9)	4	5	4½	(11.4)
⅞	(2.2)	4	5	5¼	(13.3)
1	(2.5)	5	7	6	(15.2)
1⅛	(2.7)	6	7	6¾	(17.1)
1¼	(3.2)	6	8	7½	(18.1)
1⅜	(3.5)	7	8	8¼	(21.0)

Table C–1—Continued

[Number and spacing of u-bolt wire rope clips]

Improved plow steel, rope diameter		Minimum number of clips		Minimum spacing	
Inches	Centimeters	Drop forged	Other material	Inches	Centimeters
1½	(3.8)	7	9	9	(22.9)

(5) Wire rope shall not be secured by knots.

(6) Eyes in wire rope bridles, slings, bull wires, or in single parts used for hoisting shall not be formed by wire rope clips or knots.

(7) Eye splices in wire ropes shall have at least three tucks with a whole strand of the rope and two tucks with one-half of the wire cut from each strand. Other forms of splices or connections which can be shown to be equivalently safe may be used.

(8) Except for eye splices in the ends of wires and for endless rope slings, each wire rope used in hoisting or lowering, or in bulling cargo, shall consist of one continuous piece without knot or splice.

(c) *Natural fiber rope.* (1) The employer shall ascertain the manufacturer's ratings for the specific natural fiber rope used and have such ratings available at the terminal. The manufacturer's ratings shall be adhered to and a minimum design safety factor of five maintained.

(2) Eye splices shall consist of at least three full tucks. Short splices shall consist of at least six full tucks, three on each side of the center line.

(d) *Synthetic rope.* (1) The employer shall adhere to the manufacturer's ratings and use recommendations for the specific synthetic fiber rope use and shall have such ratings available at the terminal.

(2) Unless otherwise recommended by the manufacturer, when synthetic fiber ropes are substituted for manila ropes of less than three inches (7.62 cm) in circumference, the substitute shall be of equal size. Where substituted for manila rope of three inches or more in circumference, the size of the synthetic rope shall be determined from the formula:

$$C = \sqrt{0.6C_s^2 + 0.4C_m^2}$$

where C = the required circumference of the synthetic rope in inches, C_s = the circumference to the nearest one-quarter inch of a synthetic rope having a breaking strength not less than that of the size manila rope that would be required by paragraph (c) of this section, and C_m = the circumference of manila rope in inches which would be required by paragraph (c) of this section. In making such substitution, it shall be ascertained that the inherent characteristics of the synthetic fiber are suitable for hoisting.

(e) *Removal of natural and synthetic rope from service.* Natural and synthetic rope having any of the following defects shall be removed from service:

(1) Abnormal wear;

(2) Powdered fiber between strands;

(3) Sufficient cut or broken fibers to affect the capability of the rope;

(4) Variations in the size or roundness of strands;

(5) Discolorations other than stains not associated with rope damage;

(6) Rotting; or

(7) Distortion or other damage to attached hardware.

(f) *Thimbles.* Properly fitting thimbles shall be used where any rope is secured permanently to a ring, shackle or attachment.

(g) *Synthetic web slings.* (1) Slings and nets or other combinations of more than one piece of synthetic webbing assembled and used as a single unit (synthetic web slings) shall not be used to hoist loads in excess of the sling's rated capacity.

(2) Synthetic web slings shall be removed from service if they exhibit any of the following defects:

(i) Acid or caustic burns;

(ii) Melting or charring of any part of the sling surface;

(iii) Snags, punctures, tears or cuts;

(iv) Borken or worn stitches; or

(v) Distortion or damage to fittings.

(3) Defective synthetic web slings removed from service shall not be repaired and returned to service.

(4) Synthetic web slings shall be used in accordance with the manufacturer's use recommendations, which shall be available at the terminal.

(5) Fittings shall have a breaking strength at least equal to that of the sling to which they are attached and shall be free of sharp edges.

(h) *Chains and chain slings used for hoisting.* (1) The employer shall adhere to the manufacturer's recommended ratings for safe working loads for the sizes of wrought iron and alloy steel chains and chain slings used and shall have such ratings available at the terminal.

(2) Proof coil steel chain, also known as common or hardware chain, and other chain not recommended by the

manufacturer for slinging or hoisting shall not be used for slinging or hoisting.

(3)(i) The employer shall ensure that only designated persons inspect chains used for slinging or hoisting.

(ii) Sling chains, including end fastenings, shall be inspected for visible defects before each day's use and as often as necessary during use to ensure integrity of the sling.

(iii) Thorough inspections of chains in use shall be made quarterly to detect wear, defective welds, deformation or increase in length or stretch. The month of inspection shall be indicated on each chain by color of paint on a link or by other equally effective means.

(iv) Chains shall be removed from service when maximum allowable wear, as indicated in Table C-2, is reached at any point of link.

Table C-2.—*Maximum Allowable Wear at any Point of Link*

Chain size		Maximum allowable wear	
Inches	(cm)	Inches	(cm)
¼ (5/32)	(0.6)	3/64	(0.1)
3/8	(1.0)	3/64	(0.2)
½	(1.3)	5/64	(0.3)
5/8	(1.6)	5/64	(0.4)
¾	(1.9)	3/32	(0.4)
7/8	(2.2)	3 1/64	(0.4)
1	(2.5)	3/32	(0.5)
1 1/8	(2.9)	7/32	(0.6)
1 ¼	(3.2)	¼	(0.6)
1 3/8	(3.5)	9/32	(0.7)
1 ½	(3.8)	5/16	(0.8)
1 5/8	(4.4)	1 1/32	(0.9)

(v) Chain slings shall be removed from service when stretch has increased the length of a measured section by more than five percent; when a link is bent, twisted or otherwise damaged; or when a link has a raised scarf or defective weld.

(4) Chains shall only be repaired under qualified supervision. Links or portions of chain defective under any of the criteria of paragraph (h)(3)(v) of this section shall be replaced with properly dimensioned links or connections of material similar to that of the original chain. Before repaired chains are returned to service, they shall be tested to the proof test load recommended by the manufacturer for the original chain. Tests shall be performed by the manufacturer or shall be certified by an agency accredited for the purpose under Part 1919 of this Chapter. Test certificates shall be available at the terminal.

(5) Wrought iron chains in constant use shall be annealed or normalized at intervals not exceeding six months. Heat treatment certificates shall be available at the terminal. Alloy chains shall not be annealed.

(6) Kinked or knotted chains shall not be used for lifting. Chains shall not be shortened by bolting, wiring or knotting. Makeshift links or fasteners such as wire, bolts or rods shall not be used.

(7) Hooks, rings, links and attachments affixed to sling chains shall have rated capacities at least equal to that of the chains to which they are attached.

(8) Chain slings shall bear identification of size, grade and rated capacity.

(i) *Shackles.* (1) If available, the manufacturer's recommended safe working loads for shackles shall not be exceeded. In the absence of manufacturer's recommendations, Table C-3 shall apply.

Table C-3.—*Safe Working Loads for Shackles*

Material size		Pin diameter		Safe working load in 2,000 lb. tons
Inches	(cm)	Inches	(cm)	
½	(1.3)	5/8	(1.6)	1.4
5/8	(1.6)	¾	(1.9)	2.2
¾	(1.9)	7/8	(2.2)	3.2
7/8	(2.2)	1	(2.5)	4.3
1	(2.5)	1 1/8	(2.9)	5.6
1 1/8	(2.9)	1 ¼	(3.2)	6.7
1 ¼	(3.2)	1 3/8	(3.5)	8.2
1 3/8	(3.5)	1 ½	(3.8)	10.0
1 ½	(3.8)	1 5/8	(4.1)	11.9
1 5/8	(4.4)	2	(5.0)	16.2
2	(5.0)	2 ¼	(5.7)	21.2

(2) Screw pin shackles used aloft in house fall or other gear, except in cargo hook assemblies, shall have their pins moused or be otherwise effectively secured.

(j) *Hooks other than hand books.* (1) The manufacturer's recommended safe working loads for hooks shall not be exceeded. After (*effective date of final standard*) hooks other than hand books shall be tested in accordance with § 1918a.51(c)(6).

(2) Bent or sprung hooks shall be discarded.

(3) Teeth of case hooks shall be maintained in safe condition.

(4) Jaws of patent clamp-type plate hooks shall be maintained in condition to grip plates securely.

(5) Loads shall be applied to the throat of the hook only.

(k) *Pallets.* (1) Pallets shall be made and maintained to safely support and carry loads being handled. Fastenings of reusable pallets shall be bolts and nuts, drive screws (helically threaded nails), annular threaded nails or fastenings of equivalent holding strength.

(2) Damaged pallets shall be removed from active work areas, identified as damaged and stored away from the work area.

(3) Reusable wing or lip-type pallets shall be hoisted by bar bridles or other suitable gear and shall have an overhanging wing or lip of at least three inches (76.2 mm). They shall not be hoisted by wire slings alone.

(4) Loaded pallets that on visual examination do not meet the requirements of this section shall be hoisted only after being placed on pallets meeting such requirements or shall be handled by other means providing equivalent safety.

(5) Bridles for handling flush end or box-type pallets shall be designed to prevent disengagement from the pallet under load.

(6) Pallets shall be stacked or placed to prevent falling, collapsing or otherwise causing a hazard under standard operating conditions.

(7) Disposable pallets intended only for one use shall not be reused for hoisting.

§ 1918a.43 Powered industrial trucks.

(a) *Applicability.* This section applies to every type of powered industrial truck used for material or equipment handling within a marine terminal. It does not apply to over-the-road vehicles.

(b) *General.* (1) The employer shall ensure that modifications, such as adding counterweights, that might affect the vehicle's capacity or safety are not performed without either the manufacturer's prior written approval or the written approval of a professional engineer experienced with the equipment and who has consulted the manufacturer. Capacity, operation and maintenance instruction plates, tags or decals shall be changed to conform to the equipment as modified.

(2) Unauthorized personnel shall not ride on powered industrial trucks. A safe place to ride shall be provided when riding is authorized.

(3) When a powered industrial truck is left unattended, load-engaging means shall be fully lowered, controls neutralized and brakes set. Unless the truck is in view and within 25 feet (7.6 m) of the operator, power shall be shut off. Wheels shall be blocked or curbed if the truck is on an incline.

(4) Powered industrial trucks shall not be operated inside highway vehicles or

railcars having damage which could affect operational safety.

(5) Powered industrial trucks shall be marked with their rated capacities, which shall be visible to the operator.

(6) Only stable and safely arranged loads within the rated capacity of the truck shall be handled.

(7) The employer shall ensure that drivers ascend and descend grades slowly.

(8) The employer shall ensure that drivers slow down and sound the horn at cross aisles and other locations where visibility is obstructed.

(9) If the load obstructs the forward view, the employer shall ensure that the driver travels with the load trailing.

(10) Steering knobs shall not be used.

(11) When powered industrial trucks use cargo lifting devices that have a means of engagement hidden from the operator, mirrors or other means shall be provided to enable the driver to see that the cargo has been engaged.

(c) *Maintenance.* (1) The employer shall ensure that only designated persons perform maintenance and repair.

(2) Batteries shall be disconnected during repairs to the primary electrical system unless power is necessary for testing or repair.

(3) Replacement parts whose performance may affect the vehicle's safety shall be at least equivalent in performance capability to the original parts.

(4) Braking systems or other mechanisms used for braking shall be operable and in safe condition.

(5) Powered industrial trucks shall be maintained in safe working order and shall be inspected by an authorized person on each day of use. Safety devices shall not be removed or made inoperative except as otherwise provided in this section. Trucks with a fuel system leak or any other operational defect shall not be operated.

(6) Records of the daily inspections required in (c)(5) shall be maintained at the terminal for at least thirty (30) days.

(7) Repairs to the fuel or ignition systems of powered industrial trucks shall only be conducted in designated areas equipped to protect employees from fire hazards.

(d) *Approved trucks.* (1) "Approved power-operated industrial truck" means one listed or approved for the intended use by a nationally recognized testing laboratory, e.g., Underwriters Laboratories, Inc.; Factory Mutual Engineering Corporation.

(2) Approved trucks shall bear a label or other identification indicating testing laboratory approval.

(3) When the atmosphere in an area is hazardous and the provisions of United States Coast Guard regulations at 33 CFR 126.15(e) do not apply, only power-operated industrial trucks approved for such locations shall be used.

(e) *Fork lift trucks.* (1) Overhead guards. (i) When operators are exposed to overhead falling hazards, the employer shall ensure that fork lift trucks are equipped with securely attached overhead guards. Guards shall be constructed to protect the operator from being injured by falling boxes, cartons, packages, or similar objects.

(ii) Overhead guards shall not obstruct the operator's view, and openings in the top of the guard shall not exceed six inches (15.2 cm) in one of the two directions, width or length. Larger openings are permitted if no opening allows the smallest unit of cargo being handled to fall through the guard.

(iii) Overhead guards shall be built so that failure of the vehicle's mast tilting mechanism will not displace the guard.

(iv) An overhead guard, otherwise required by this paragraph, may be removed only when it would prevent a truck from entering a work space and if the operator is not exposed to low overhead obstructions in the work space.

(v) Overhead guards shall be large enough to extend over the operator during all truck operations, including forward tilt.

(2) Load backrest extensions. Where necessary to protect the operator, fork lift trucks shall be fitted with a vertical load backrest extension to prevent the load from hitting the mast when the mast is positioned at maximum backward tilt. For this purpose, a "load backrest extension" means a device extending vertically from the fork carriage frame to prevent raised loads from falling backward.

(3) Forks. (i) Forks, fork extensions and other attachments shall be secured so that they cannot be accidentally dislodged, and they shall be used only in accordance with the manufacturer's recommendations.

(ii) The employer shall ensure that employees do not ride on lift truck forks.

(4) Counterweights. Counterweights shall be affixed so that they cannot be dislodged.

(5) Capacities and weights. (i) Fork lift truck rated capacities, with and without removable counterweights, shall not be exceeded. Rated capacities shall be marked on the vehicle and shall be visible to the operator. The vehicle weight, with and without counterweight, shall be similarly marked.

(ii) If loads are lifted by two or more trucks working in unison, the total weight of the load shall not exceed the combined rated lifting capacity of all trucks involved.

(6) Lifting of employees. (i) The employer shall ensure that employees do not stand on the forks of a lift truck or on a pallet or load being lifted on the forks.

(ii) Employees may only be elevated by fork lift trucks when a platform is secured to the lifting carriage or forks. The platform shall meet the following requirements:

(A) The platform shall have a railing complying with § 1918a.112(c).

(B) The platform shall have toeboards complying with § 1918a.112(d) if tools or other objects could fall on employees below.

(C) When the truck has controls which are elevated with the lifting carriage, means shall be provided for employees on the platform to shut off power.

(D) The employer shall ensure that employees on the platform are protected from exposure to moving truck parts.

(E) The employer shall provide overhead protection for employees on the platform when there is danger of falling objects.

(F) The platform floor shall be skid resistant.

(G) The employer shall ensure that the truck operator is at the truck's controls when employees are elevated unless the truck's controls are elevated with the lifting carriage.

(H) While employees are elevated, the truck may be moved only to make minor placement adjustments.

(f) *Bulk cargo-moving vehicles.* (1) Where a seated operator may come into contact with projecting overheads, crawler-type bulk-cargo-moving vehicles that are rider operated shall be equipped with operator's guards.

(2) Guards and their attachment points shall be designed to withstand a load equal to the load that will bend the machine's draw bar.

(g) *Straddle trucks.* (1) Accessibility. Straddle trucks shall have a permanent means of access, including any handholds necessary to ensure safe access to the operator's platform.

(2) *Guarding.* (i) Main sprockets and chains to the wheels shall be guarded as follows:

(A) The upper sprocket shall be enclosed;

(B) The upper half of the lower sprocket shall be enclosed; and

(C) The drive chain shall be enclosed to a height of eight feet (2.6 m) except for that portion at the lower half of the lower sprocket.

(ii) Gears shall be enclosed and revolving parts which may be contacted by the operator shall be guarded.

(iii) When straddle trucks are used in the vicinity of employees, personnel-deflecting guards shall be provided around leading edges of front and rear wheels.

(3) Visibility. Operator visibility shall be provided in all directions by mirrors or equivalent means.

(h) *Trailer-spotting tractors.* (1) Trailer-spotting tractors (fifth wheels) shall be fitted with any hand grabs and footing necessary for safe access to the fifth wheel.

(2) Rear cab windows shall be protected by safety glass or by equivalent means.

§ 1918a.44 General rules applicable to vehicles.[C-1]

(a) The requirements of this section apply to general vehicle use within marine terminals except in cases where the provisions of paragraphs (c) and (m) of this section are preempted by applicable regulations of the Department of Transportation.[C-2]

(b) The employer shall ensure that private vehicle parking in marine terminals is allowed only in designated areas, which shall not be used concurrently for storage.

(c) Trailers shall not be disconnected from tractors at loading docks until the road wheels have been immobilized. The road wheels shall be immobilized from the time the brake system is disconnected until braking is again provided. Supplementary front end support shall be employed as necessary to prevent tipping when a trailer is entered by a material handling vehicle. Rear end support shall be employed if rear wheels are so far forward as to allow tipping when the trailer is entered.

(d) The employer shall ensure that motor vehicle operators comply with any posted speed limits and other traffic control signs or signals, and written traffic instructions.

(e) Stop signs shall be posted at main entrances and exits of structures where visibility is impaired, and at blind intersections, unless direct traffic control or warning mirror systems or equivalent are provided.

(f) Vehicular routes, traffic rules, and parking areas shall be established, identified, and used.

(g) The employer shall ensure that vehicle drivers warn employees in traffic lanes of the vehicle's approach.

(h) Where pedestrians use or cross traffic lanes, pedestrian crossing signs shall be posted to warn vehicle drivers.

(i) Signs indicating pedestrian traffic shall be clearly posted at vehicular check-in and check-out lines and similar locations where employees may be working.

(j) The employer shall ensure that a distance of at least 20 feet (4.6 m) is maintained between any two vehicles in a check-in, check-out, roadability, or vessel loading/discharging line.

(k) The employer shall ensure that no unattended vehicle is left with its engine running.

(l)(1) When the rear of a vehicle is elevated to facilitate loading or discharging, a ramp shall be provided and secured. The employer shall ensure that the vehicle is secured against accidental movement during loading or discharging.

(2) The ramp shall have a safety factor of four for the load being carried.

(m) Only highway vehicle floors in safe condition shall be use.

(n) When flatbed trucks, platform containers or similar conveyances are loaded or discharged and the cargo consists of pipe or other products which could spread or roll to endanger employees, the cargo shall be contained to prevent movement.

(o) Vehicles used to transport employees within a terminal shall be maintained in safe working order and safety devices shall not be removed or made inoperative.

(p) Multi-piece rim wheels. (1) *Scope.* This paragraph applies to the servicing of vehicle wheels containing tube-type tires mounted on multi-piece rims.

(2) *Definition.* "Multi-piece rim" means a vehicle wheel rim consisting of two or more parts, one of which is a (side) locking ring designed to hold the tire on the rim by tension on interlocking components when the tire is inflated, regardless of the relative sizes of the component parts.

(3) *Employee training.* (i) The employer shall ensure that only employees trained in the procedures required in paragraph (p)(4) and who have demonstrated their ability to service multi-piece rim wheels shall be assigned such duties.

(ii) The employer shall ensure that each employee demonstrates his ability to service multi-piece rim wheels, including performance of the following tasks:

(A) Tire demounting (including deflation);

(B) Inspection of wheel components;

(C) Mounting of tires;

(D) Inflation of tires, including use of a restraining device;

(E) Handling of wheels;

(F) Inflation of tires when a wheel is mounted on the vehicle; and

(G) Installation and removal of wheels.

(4) *Servicing procedures.* The employer shall ensure that the following procedures are followed:

(i) Tires shall be completely deflated before demounting by removal of the valve core;

(ii) The valve core shall be removed before the wheel is removed from the axle when:

(A) The tire has been operated underinflated at 80% or less of its recommended pressure; or

(B) There is discernible or suspected damage to the tire or wheel components;

(iii) Mating surfaces shall be free of dirt, surface rust, scale and rubber buildup before mounting;

(iv) Rubber lubricant shall be applied to bead and rim mating surfaces upon wheel assembly and inflation of the tire;

(v) Air pressure shall not exceed 3 psig (0.21 kg/cm^2)when seating the locking ring or rounding out the tube when a tire is being partially inflated without a restraining device;

(vi) While the tire is pressurized, components shall not be struck or forced to correct the seating of side or lock rings;

(vii) There shall not be any contact between an employee or unit of equipment and a restraining device during tire inflation;

(viii) After inflation, tires, rims and rings shall be inspected while within the restraining device to ensure proper seating and locking. If adjustment is necessary the tire shall first be deflated by valve core removal; and

(ix) Before assembly, wheel components shall be inspected, and damaged rim components shall not be reused.

(5) *Charts and manuals.* (i) The employer shall provide a chart containing as a minimum the instructions provided in the United States Department of Transportation, National Highway Traffic Safety Administration (NHTSA) publication "Safety Precautions for Mounting and Demounting Tube-Type Truck/Bus Tires" and "Multi-Piece Rim Wheel Matching Chart," and pertinent to the type(s) of multi-piece rim wheels being serviced. The chart shall be available in the terminal's service area.[C-3]

(ii) A current rim manual containing the manufacturer's instructions for mounting, demounting, maintenance and safety precautions relating to the multi-piece rim wheels being serviced shall be available in the terminal's service area.

(6) *Restraining devices.* (i) Except as otherwise noted, inflation shall be done within a restraining device such as a

[C-1] The United States Coast Guard at 33 CFR 126.15(d) and (e) has additional regulations applicable to vehicles in terminals.

[C-2] Department of Transportation regulations in 49 CFR Part 393, Subpart C-Brakes, address the immobilization of trailer road wheels prior to disconnection of the trailer and until braking is again provided. 49 CFR 393.84 addresses the condition of flooring. These rules apply when the motor carrier is engaged in interstate commerce or in the transport of certain hazardous items wholly within a municipality or the commercial zone thereof....

[C-3] NHTSA charts are available free from General Services Division, National Highway Traffic Safety Administration, Attention: N48-51, 400 Seventh Street, S.W., Washington, D.C. 20590. Industry charts are available upon request from the manufacturer.

cage, rack or other device capable of withstanding the maximum force that would be transferred to it during an explosive wheel separation occurring at 150% of maximum tire specification pressure for the wheels being serviced. The restraining device shall be capable of preventing rim components from being thrown outside the frame of the device for any wheel position within the device. When the wheel assembly is mounted on a vehicle, tires may be inflated without a restraining device only if they have more than 80% of the recommended pressure and if remote control inflation equipment is used and employees are clear of the danger area.

(ii) Restraining devices shall be kept in good repair and be capable of preventing rim components from being thrown outside the device.

(7) *Inflation hoses.* Inflation hoses shall have a manual clip-on chuck with sufficient hose to permit an employee to be clear of the danger area. An in-line, manually operated valve with gauge or a preset pressure regulator shall be used to inflate tires.

(8) *Other equipment.* (i) Only tools recommended in the rim manual for the type of wheel being serviced shall be used to service multi-piece rim wheels.

(ii) Wheel components shall not be interchanged except as provided in the applicable chart or manual.

§ 1918a.45 Cranes and derricks (See also § 1918a.51).

(a) *Coverage.* (1) This section applies to every kind of crane and derrick such as but not limited to:

(i) Crawler, locomotive and truck cranes;

(ii) Overhead and bridge cranes of all types, including steeple-towers, container bridge cranes, ore and coal bridges and other specialized versions;

(iv) Hammerhead tower cranes;

(v) Any crane or derrick used to handle intermodal containers in containerized operations;

(vi) Any mobile straddle-type crane capable of straddling two or more intermodal containers (sixteen feet (4.88 m) in width);

(vii) Any other type of equipment not listed here but performing the functions of a crane or derrick, except as noted in paragraph (a)(2) of this section.

(2) This section does not apply to small industrial truck-type cranes and chain hoists.

(b) *Ratings.* (1) Except for bridge cranes covered by paragraph (g) of this section, the employer shall ensure that cranes and derricks having ratings that vary with boom length, radius (outreach) or other variables are equipped with a durable rating chart visible to the operator, covering the complete range of the manufacturer's (or design) capacity ratings. The rating chart shall include all operating radii (outreach) for all permissible boom lengths and jib lengths as applicable, with and without outriggers, and alternate ratings for optional equipment affecting such ratings. Precautions or warnings specified by the owner or manufacturer shall be included along with the chart.

(2) The manufacturer's (or design) rated loads for the conditions of use shall not be exceeded.

(3) Designated working loads shall not be increased beyond the manufacturer's ratings or original design limitations unless such increase meets with the manufacture's approval. When the manufacturer's services are not available or where the equipment is of foreign manufacture, engineering design analysis performed or approved by the agency certificating the equipment under Part 1919 of this Chapter is required. Any structural changes necessitated by the change in rating shall be carried out.

(c) *Radius indicator.* When the rated load varies with the boom radius, the crane or derrick shall be fitted with a boom angle or radius indicator visible to the operator.

(d) *Prohibited usage.* (1) The employer shall ensure that equipment is not used in a manner that exerts sideloading stresses upon the crane or derrick boom.

(2) No crane or derrick having an operational defect shall be used.

(e) *Protective devices.* (1) The employer shall ensure that guards protect employees from exposed moving parts such as gears, chains and chain sprockets during crane and derrick operations. These guards shall be securely fastened.

(2) Crane hooks shall be latched or otherwise secured to prevent accidental load disengagement.

(f) *General.* (1) Operating controls. (i) Crane and derrick operating controls shall be clearly marked or a chart indicating their function shall be posted at the operator's position.

(ii) After *(one year after effective date),* crane and derrick controls shall be self-centering so that they will automatically move to the "off" position when the operator releases the control.

(2) Booms. (i) Cranes with elevatable booms and without operable automatic limiting devices shall be provided with boom stops if boom elevation can exceed maximum design angles from the horizontal.

(ii) The main purchase block of cranes with extendable booms shall be secured when a whip line is in use.

(3) Foot pedals. Foot pedals shall have a non-skid surface.

(4) Access. Ladders, stairways, stanchions, grab irons, foot steps or equivalent means shall be provided as necessary to ensure safe access to footwalks, cab platforms, the cab and any portion of the superstructure which employees must reach.

(i) Footwalks shall be of rigid construction, and shall be capable of supporting a load of 100 pounds (4.79 kPa) per square foot.

(ii) If more than 20 feet (6.1 m) in height, vertical ladders shall comply with § 1918a.119 (d), (e)(1), (e)(2)(iii), and (e)(2)(iv).

(iii) Stairways on cranes shall be equipped with rigid handrails meeting the requirements of § 1918a.112(c)(1).

(iv) If the top of a ladder or stairway or any portion thereof is located where a moving part of a crane, such as a revolving house, could strike an employee ascending or descending the ladder or stairway, a prominent warning sign shall be posted at the hazardous location on the ladder or stairway.

(5) Operator's station. The cab, controls and mechanisms of the equipment shall be so arranged that the operator has a clear view of the load or signal man, when one is used. Cab glass, when used, shall be safety plate glass or equivalent and good visibility shall be maintained through the glass. Clothing, tools and equipment shall be stored so as not to interfere with access, operation, and the operator's view.

(6) Counterweights or ballast. Cranes shall be operated only with the specified type and amount of ballast or counterweight. Ballast or counterweight shall be located and secured only as provided in the manufacturer's or design specifications, which shall be available at the terminal.

(7) Outriggers. Outriggers shall be used according to the manufacturer's specifications or design data, which shall be available at the terminal. Floats, when used, shall be securely attached to the outriggers. Wood blocks or other support shall be of sufficient size to support the outrigger, free of defects that may affect safety and of sufficient width and length to prevent the crane from shifting or toppling under load.

(8) Exhaust gases. Engine exhaust gases shall be discharged away from areas in which employees are working.

(9) The employer shall ensure that electrical equipment is guarded or maintained to prevent employees from contacting live parts. Designated persons may work on energized equipment if necessary during inspection, maintenance, or repair.

(10) Fire extinguisher. (i) At least one portable fire extinguisher of at least

5-BC rating or equivalent shall be accessible in the cab of the crane or derrick.

(ii) No portable fire extinguisher using carbon tetrachloride or chlorobromomethane extinguishing agents shall be used.

(11) Rope on drums. At least three full turns of rope shall remain on ungrooved drums, and two turns on grooved drums, under all operating conditions. Wire rope shall be secured to drums by clamps, U-bolts, shackles or equivalent means. Fiber rope fastenings are prohibited.

(12) Assembly or disassembly of boom sections. Mobile crane booms being assembled or disassembled on the ground with or without the support of the boom harness shall be blocked to prevent dropping of the boom or boom sections.

(13) Brakes. (i) Each independent hoisting unit of a crane or derrick shall be equipped with two means of braking, one of which shall work directly on the drive shaft or other part of the reducing gear.

(ii) Each brake shall be capable of sustaining 1½ times the crane's rated load.

(g) *Rail-mounted cranes (excluding locomotive types).* (1) For the purposes of this section, rail-mounted cranes include bridge cranes and portal cranes.

(2) Rated load marking. The employer shall ensure that the rated loads of bridge cranes are plainly marked on each side of the crane and in the cab. If there is more than one hoisting unit, each hoist shall have its rated load marked on it or on its load block. Marking shall be legible from the ground level.

(3) Wind-indicating devices. (i) After *(effective date of final standard)* each rail-mounted crane shall be fitted with an operable wind-indicating device.

(ii) Indications. Wind-indicating devices shall provide a visible indication of wind velocity at all time. They shall also provide distinctive visible and audible alerts:

(A) When wind velocity reaches that speed (the warning speed), not exceeding the crane manufacturer's recommendations, at which a warning is to be provided or partial shutdown (such as stopping of crane movement on the rails) is to be accomplished; and

(B) When wind velocity reaches that speed (the shutdown speed), not exceeding the crane manufacturer's recommendations, at which work is to be stopped and the crane secured.

(iii) Location of indications. The indications required by paragraph (g)(3)(ii) of this section shall read out directly in the operator's cab.

(iv) Instructions. The employer shall post operating instructions for wind-indicating devices, including warning and shutdown velocities and the actions to be taken on their indications, in the operator's cab of each crane. The employer shall ensure that operators comply with these instructions. The instructions shall include directions for any coordination necessary when two or more affected cranes are located at the same terminal.

(4) Securing of cranes in high winds. (i) When the wind reaches the crane's warning speed, the employer shall ensure that:

(A) Gantry travel is stopped;

(B) Any portion of the crane spanning or partially spanning a vessel is moved clear of the vessel; and

(C) The crane is positioned for shutdown.

(ii) When the wind reaches the crane's shutdown speed, the employer shall ensure that the crane is secured against travel, using all available means of securing.

(5) The employer shall monitor local weather conditions by subscribing to a weather service or using equally effective means.

(6) Stops and bumpers. (i) The ends of all tracks shall be equipped with stops or bumpers. If a stop engages the tread of the wheel, it shall be of a height not less than the radius of the wheel.

(ii) When more than one crane operates on the same runway or more than one trolley on the same bridge, each crane or trolley shall be equipped with bumpers or equivalent devices at adjacent ends.

(7) Employee exposure to crane movement. When employees may be in the vicinity of the tracks, crane trucks shall be equipped with personnel-deflecting guards.

(8) Pedestrian clearance. If the area is used for employee passage or for work, a minimum clearance of three feet (0.9 m) shall be provided between trucks or the structures of rail-mounted cranes and any other structure or obstruction. When the required clearance is not available on at least one side of the crane's trucks, the area shall not be used and shall be marked and identified.

(9) Warning devices. Rail-mounted cranes shall be equipped with an effective travel warning device which shall be used when employees are in the way of the moving crane.

(10) Communications. Means of communication shall be provided between the operator's cab and the base of the gantry of all rail-mounted cranes. This requirement may be met by telephone, radio, sound-signalling system or other effective method, but not by a hand-signalling system.

(h) *Stabilizing of locomotive cranes.* Loads shall be hoisted by locomotive cranes only if outriggers are in place, unless means are taken to prevent the load being carried by the truck springs of the crane.

(i) *Operations.* (1) Use of cranes together. When two or more cranes hoist a load in unison, the employer shall designate a person to direct the operation and instruct personnel in positioning, rigging of the load and movements to be made.

(2) Guarding of swing radius. Accessible areas within the swing radius of the body of a revolving crane shall be physically guarded during operations to prevent an employee from being caught between the body of the crane and any fixed structure or between parts of the crane.

(3) Securing mobile crane components in transit. The crane's superstructure and boom shall be secured against rotation and carried in line with the direction of travel except when negotiating turns with an operator in the cab or when the boom is supported on a dolly. The empty hook or other attachment shall be secured.

(4) Unattended cranes. The following steps shall be taken before leaving a crane unattended between work periods:

(i) Suspended loads, such as those hoisted by lifting magnets or clamshell buckets, shall be landed unless the storage position or maximum hoisting of the suspended device will provide equivalent safety;

(ii) Clutches shall be disengaged;

(iii) The power supply shall be shut off;

(iv) The crane shall be secured against accidental travel; and

(v) The boom shall be lowered or secured against movement.

(5) Operating near electric power lines. (i) Clearance. Unless electrical distribution and transmitting lines are deenergized and visibly grounded at point of work, or unless insulating barriers not a part of or attachment to the crane have been erected to prevent physical contact with lines, cranes shall be operated near power lines only in accordance with the following:

(A) For lines rated 50 kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet (3 m);

(B) For lines rated over 50 kV, minimum clearance between the lines and any part of the crane or load shall be either 10 feet (3 m) plus 0.4 inch (10 mm) for each 1 kV over 50 kV, or twice

the length of the line insulator, but never less than 10 feet; and

(C) In transit with no load and boom lowered, the clearance shall be a minimum of 4 feet (1.2 m).

(ii) Boom guards. Cage-type boom guards, insulating links or proximity warning devices may be used on cranes, but they shall not be used in place of the clearances required by paragraph (i)(5)(i) of this section.

(iii) Determination of energized lines. Any overhead line shall be presumed to be energized until the owner of the line indicates that it is not energized.

(j) *Protection for employees being hoisted.* (1) Except as provided in paragraph (j)(9) of this section, the employer shall ensure that no employee is hoisted by the load hoisting apparatus of a crane or derrick except:

(i) In a boatswain's chair rigged to prevent it from accidental disengagement from the hook or supporting member; or

(ii) On a platform meeting the following requirements:

(A) Enclosed by a railing or other means providing protection equivalent to that described in § 1918a.112(c). If equipped with open railings, the platform shall be fitted with toe boards;

(B) Having a safety factor of four based on ultimate strength;

(C) Bearing a plate or permanent marking indicating maximum load rating, which shall not be exceeded, and the weight of the platform itself;

(D) Equipped with a device to prevent access doors, when used, from opening accidentally;

(E) Equipped with an overhead guard to protect employees from falling objects or other overhead hazards; and

(F) Secured to the load line by means other than wedge and socket attachments, unless the free (bitter) end of the line is secured back to itself by a clamp placed as close above the wedge as possible.

(2) Except in an emergency, the hoisting mechanism of a crane or derrick used to hoist personnel shall operate in power up and power down, with automatic brake application when not hoisting or lowering.

(3) Variable radius booms of a crane or derrick used to hoist personnel shall be so constructed or secured as to prevent accidental boom movement.

(4) Unless the platform used to hoist employees is completely surrounded by a net approximately five feet (1.52 m) in height, each employee hoisted shall be secured by safety belt or harness and lifeline or equivalent device attached to the source of suspension or to the platform used.

(5) Platforms or devices used to hoist employees shall be inspected for defects before each day's use and shall be removed from service if defective.

(6) The employer shall ensure that employees being hoisted remain in continuous sight of and communication with the operator or signalman, if a signalman is used.

(7) The employer shall ensure that the operator remains at the controls when employees are hoisted.

(8) Cranes shall not travel while employees are hoisted, except in an emergency.

(9) When intermodal container spreaders are used to transfer employees to or from the tops of containers, the spreaders shall be equipped with a personnel platform equipped with fixed railings, provided that the railings have one or more openings for access. The openings shall be fitted with a means of closure, such as chains with hooks. Existing railings shall be at least 36 inches (0.91 m) in height. New railings installed after (*effective date of final standard*) shall be 42 inches (1.07 m), plus or minus 3 inches (7.6 cm), in height. The provisions of paragraphs (j)(1)(i), (j)(1)(ii)(A), (j)(1)(ii)(B), (j)(1)(ii)(E), (j)(4), and (j)(8) of this section do not apply when such container spreaders are used.

(k) *Routine inspection.* (1) The employer shall ensure that only designated persons inspect each crane and derrick on each day of use for defects in functional operating components and that any defect found is reported to the employer. The employer shall inform the operator of these findings.

(2) A designated person shall thoroughly inspect all functional components and accessible structural features of each crane or device at monthly intervals.

(3) Any defects found during such inspections shall be corrected before further equipment use. Repairs shall be done only by designated persons.

(4) A record of monthly inspections shall be maintained for six months in or on the crane or derrick or at the terminal.

§ 1918a.46 Crane load and limit devices.

(a) After (*one year after effective date*), the employer shall ensure that every crane has a load-indicating device or a limiting device, except in the following situations:

(1) When handling bulk commodities by means of clamshell or bucket, or in other service not using a hook, spreader or sling to engage the load to be hoisted;

(2) When handling or holding hoses for hose-handled products;

(3) When it can be documented that the crane never handles loads which exceed the crane's load ratings at all actual working radii; or

(4) When trolley-equipped bridge cranes handle:

(i) Containers identified on the manifest as empty or loaded and the lift is in compliance with the provisions of § 1918a.71 (b), (c), (d), and (e); or

(ii) Other lifts by means of a lifting beam supplied by the crane manufacturer.

(b) Crane load or limiting devices shall:

(1) Provide direct indications, by means other than a hook scale or dynamometer, of actual loads hoisted, to be used in conjunction with posted crane ratings;

(2) Automatically indicate in the cab the approach to, reaching, and exceeding or rated loads; or

(3) Prevent an overload by means of a device such as a limit switch or equivalent installation.

(c) *Performance requirements.* (1) Crane load or limiting devices shall have a range compatible with the range of the crane to which they are attached.

(2) For devices other than limit switches or equivalent devices, load indications shall fall in the range between 97% and 110% of actual loads, the 97% value establishing a 3% limit over rated loads. If accuracy requirements cannot be met over a narrow range at the extremes of the rating of the crane, labeling or other visible or audible means shall indicate to the operator the ranges in which accuracy requirements cannot be met.

(3) Accuracy of limit switches or equivalent devices shall be within plus or minus 10% of activating loads.

(4) Load-indicating or limiting devices shall meet required accuracies over ambient temperatures from −22° to +122°F (−30° to +50°C) without external adjustment.

(d) For devices other than limit switches or equivalent devices, it shall be determined before each day's use that the device is operable, unless the device has been certified by the manufacturer to remain operable within the limits specified in paragraph (c) of this section for a specified time, which has not expired.

(e) When elements of the load-indicating or limiting device are located so that their failure could cuase a load to be dropped, the strength of the elements shall not be the limiting strength factor of the crane.

(f)(1) Readout and labeling shall be provided, and shall be compatible or convertible for use with the crane rating

chart. Readout and labeling shall provide:

(i) Units and form of measure;

(ii) Indicating device capacity;

(iii) Operating range within which accuracy requirements are met; and

(iv) Basic operating instructions and precautions.

(2) If the load or limiting device does not measure the load hoisted but affords warning when the load rating is approached or reached, or if it automatically stops the crane when the limit is reached, the crane shall be clearly marked with an identification and description of the device, its operating instructions, and any necessary precautions.

(g) For cranes with load indicating or limiting devices, maintenance, use and installation of the device and maintenance of the crane shall be performed in accordance with manufacturers' recommendations, which shall be available at the terminal.

(h) In installations using radius (in feet or meters) as a factor in operation, the indicated radius or boom angle (in degrees) shall satisfy the following:

(1) If displaying radius, the indications shall be in the range from 97% to 110% of actual radius, establishing allowable "under" indications of 3% of actual radius (overload condition) and allowable "over" indications of 10% of actual radius (underload condition).

(2) If displaying or using boom angle, indications shall be as follows:

(i) For boom angles, measured as the angle between the boom base section's longitudinal axis and the horizontal plane, of 65° or more, indicated angles shall be between ½° more and 1½° less than actual angles.

(ii) For boom angles under 65°, indicated angles shall be from 1° more to 2° less than actual angles.

(iii) When radius is presented in degrees, and feet or meters are required, conversion charts shall be provided.

(i) *Performance tests.* (1). The employer shall ensure that load-indicating devices and limit switches are performance tested, using known weight or fixed anchor procedures, at installation, at manufacturer's recommended intervals, when there are indications of inaccuracy, and at certification surveys.

(2) Tests shall be in accordance with manufacturer's instructions, which shall be available at the terminal, and shall include all functions.

(3) Tests shall use an appropriately configured crane and load rating chart. Tests of limit switches or equivalent devices shall include activation of the limit switch or device.

(j) *Test records.* Signed and dated records of the most recently conducted performance tests shall be available at the terminal and shall include the following:

(1) Crane owner;

(2) Crane manufacturer, model, serial number;

(3) Device manufacturer, model, serial number;

(4) Crane configuration, method of test and test load data; and

(5) Accuracy calculations and whether recalibration was necessary to achieve accuracy.

§ 1918a.47 Winches.

(a) The employer shall ensure that moving winch parts which present caught-in hazardous to employees are guarded.

(b) Winches shall have clearly identifiable and readily accessible stop controls.

(c) Portable winches shall be secured against accidental shifting while in use.

(d) Portable winches shall be fitted with limit switches if employees have access to areas from which it is possible to be drawn into the winch.

(e) The provisions of § 1918a.45(f)(11) shall apply to winches.

§ 1918a.48 Conveyors.

(a) *Guards.* (1) The employer shall ensure that danger zones at or adjacent to conveyors are guarded to protect employees.

(2) An elevated walkway with guardrail or equivalent means of protection shall be provided where employees cross over moving conveyors, and suitable guarding shall be provided when employees pass under moving conveyors.

(b) *Moving parts.* Conveyor rollers and wheels shall be secured in position.

(c) *Positioning.* Gravity conveyor sections shall be firmly placed and secured to prevent them from falling.

(d) *Braking.* (1) Brakes or equivalent means of stopping objects at the delivery end of the conveyor shall be provided.

(2) Conveyors using electrically released brakes shall be constructed so that the brakes cannot be released until power is applied and the brakes are automatically engaged if the power fails or the operating control is returned to the "stop" position.

(e) *Stability.* Portable conveyors shall be stable within their operating ranges. When used at variable fixed levels, the unit shall be secured at the operating level.

(f) *Emergency stop devices.* Emergency stop devices shall be readily accessible to employees at fixed loading, unloading and other conveyor work stations.

(g) *Starting powered conveyors.* The employer shall ensure that powered conveyors are not started until all employees are clear of the conveyor or have been warned that the conveyor is about to start.

(h) *Loading and unloading.* The area around conveyor loading and unloading points shall be kept clear of obstructions during conveyor operations.

(i) *Lockout.* (1) The employer shall ensure that conveyors are stopped and their power sources locked out during maintenance, repair, and servicing, unless power is necessary for testing.

(2) The starting device shall be locked in the stop position before an attempt is made to remove the cause of a jam or overload that has stopped the conveying medium.

(j) *Safe practices.* (1) Only designated persons shall operate, repair or service powered conveyors.

(2) Employers shall ensure that employees stay off operating conveyors.

(3) Conveyors shall be operated only with all overload devices, guards and safety devices in place and operable.

§ 1918a.49 Spouts, chutes, hoppers, bins, and associated equipment.

(a) The employer shall ensure that standing and running rigging and associated gear used as a permanent part of spouts, chutes or similar devices is inspected before each use and is not used if it has any functional defects. (See also § 1918a.51(c)(2) for certification requirements.)

(b) Instantaneous and direct communication shall be provided between the discharge or shipboard control end of loading spouts and chutes and the point in the terminal from which the flow of cargo is controlled.

(c) Chute and hopper openings shall be guarded to prevent employees from falling through them.

(d) When employees are working on hoppers, the hopper shall be equipped with a safe walkway and means of access, and guardrails if required by § 1918a.112.

(e) Chutes shall be equipped with sideboards to protect employees from falling objects.

(f) Chutes shall be firmly placed and secured to prevent them from falling.

(g) Brakes or equivalent means of stopping objects at the delivery end of chutes shall be provided.

(h) Before an employee enters an empty bin, the employer shall ensure that:

(1) Personnel controlling the flow of cargo into the bin have been notified of the entry; and

(2) The power supply to the equipment carrying the cargo to the bin has been turned off and locked out.

(i) Before an employee enters a bin containing a bulk commodity such as coal or sugar, the employer shall ensure that:

(1) Personnel controlling the flow of cargo into the bin have been notified of the entry;

(2) The power supply to the equipment carrying the cargo to the bin has been turned off and locked out;

(3) The employee entering the bin is wearing a lifeline and safety harness; and

(4) A standby attendant equipped to perform a rescue is continuously stationed outside the bin until the employee has left the bin.

(j) Bin top openings shall be covered with gratings or other means of preventing employees from falling into the bin when the cover is removed.

(k) Chutes and hoppers shall be repaired only by designated persons.

(l)(1) Before power shoveling operations begin, the employer shall ensure that a designated person inspects the equipment to be used. The inspection shall include at least the eye bolts, wires, and sheaves.

(2) Power shovels and associated equipment with operational defects shall not be used.

(3) Before adjustments are made to a power shovel, wire, or associated equipment, the power supply to the shovel shall be turned off and locked out, the belt stopped, and the hopper closed.

§ 1918a.50 Certification of marine terminal material handling devices.

(a) Employers shall not use any material handling device listed in paragraph (c) of this section until they have ascertained that the device has been certificated, as evidenced by current and valid documents attesting to compliance with the requirements of paragraph (b) of this section.

(b) The certifications required by paragraph (a) of this section, and further described in paragraph (c) of this section, shall be performed:

(1) In accordance with the standards of Part 1919 of this Chapter, by persons then currently accredited by the Occupational Safety and Health Administration as provided in that Part; or

(2) In accordance with standards established and enforced by the state in which the device is located or by a political subdivision thereof, which have been found by the Secretary to be compatible with the standards of Part 1919 of this Chapter, by persons designated as competent to perform such certification by competent state authority and recognized as such by the Secretary.

(c) The marine terminal material handling devices listed below shall be certificated in the following manner:

(1) Each crane and derrick shall be tested as a unit annually and quadrennially, and shall be inspected annually and examined quadrennially. Certificates of tests, inspections, and examinations shall be available for inspection on the equipment or at the terminal.

(2) Bulk cargo spouts and suckers, together with any portable extensions and rigging or outriggers supporting them vertically, shall be inspected annually. Certificates attesting to the required examination shall be available at the terminal.

(3) Vertical pocket or bucket conveyors such as banana, sugar and grain marine legs (other than those within a grain elevator structure) used within a marine terminal facility shall be inspected annually and examined quadrennially. The quadrennial examination shall include all supporting structures, rigging and mechanical components and observation of all steps of operation. Certificates attesting to the required inspections and examinations shall be available at the terminal.

(4) (i) House fall cargo-handling gear in use shall be tested as a unit and subjected to an examination upon initial certification and every fourth year, and shall be subjected to annual inspections in other years. The unit test shall consist of a proof load to 25% in excess of the rated safe working load. Inspections and examinations shall include all supporting structures and components. Certificates attesting to the required tests, inspections and examinations shall be available at the terminal.

(ii) House fall span beams or other house fall block supports shall be marked with the safe working load, which shall not be exceeded.

(5) Special gear. (i) Special stevedoring gear provided by the employer, the strength of which depends upon components other than commonly used stock items such as shackles, ropes or chains, shall be tested as a unit in accordance with the following table before initially being put into use.

Safe working load	Proof load
Up to 20 short tons	25 percent in excess.
Over 20 to 50 short tons	5 short tons in excess.
Over 50 short tons	10 percent in excess.

(ii) Every spreader not a part of ship's gear and used for hoisting intermodal containers shall be tested to a proof load equal to 25% in excess of its rated capacity. Additionally, any spreader which suffers damage necessitating structural repair shall be retested after repair and before being returned to service.

(iii) Certificates attesting to the required tests shall be available at the terminal.

(6) Wire rope and loose gear obtained after *(effective date of final standard)* and used for material handling shall have been tested and certificated before being placed into use in accordance with the provisions of paragraphs (a), (c) and (d) of § 1919.31 and §§1919.32 through 1919.34 of this Chapter as applicable. Certificates attesting to the required tests, inspections and examinations shall be available at the terminal.

(d) Disassembly and reassembly of equipment necessary for movement from job to job or which does not affect the equipment's ratings will not nullify the validity of the equipment's existing certification.

(e) For equipment certificated in accordance with paragraph (b)(2) of this section and transferred to a job site in another state, the current certification shall remain valid until the next inspection or examination becomes due.

(f) In addition to certification procedures, all certified equipment shall be maintained in accordance with the manufacturer's maintenance procedures.

(g) (1) Every unit of equipment requiring quadrennial certification shall have had such quadrennial certification within the previous 48 months. Equipment requiring annual certification shall have had such annual certification within the previous 12 months, except that no annual certification is required within 12 months after any required quadrennial certification. Annual surveys, inspections or examinations for certification may be accomplished up to one month early without effect on subsequent due dates.

(2) When certificated equipment is out of service for 6 months or more beyond the due date of a certification inspection, an examination equivalent to an initial certification, including unit proof load test, shall be performed before the equipment re-enters service.

(h) The employer shall ensure that loose gear obtained after *(effective date of final standard)* bears a legible mark indicating that it has been tested (see paragraph (c)(6) of this section). Signal sheave blocks shall be marked with safe working loads and proof test loads. Marks relating to testing shall be

identifiable on the related certificates, which shall be available at the terminal.

(i) The certification requirements of this section do not apply to the following equipment:

(1) Industrial trucks and small industrial crane trucks; and

(2) Any straddle truck not capable of straddling two or more intermodal containers (16 feet (4.88m)) in width.

§ 1918a.51 Hand tools.

(a) The employer shall ensure that hand tools used by employees are maintained in safe operating condition.

(b) (1) Hand-held portable electric tools shall be equipped with switches that must be manually held in a closed position to operate the tool.

(2) Portable power-driven circular saws shall be equipped with guards above and below the base plate or shoe. The upper guard shall cover the saw to the depth of the teeth, except for the minimum arc required to permit the base to be tilted for bevel cuts. The lower guard shall cover the saw to the depth of the teeth, except for the minimum arc required to allow proper retraction and contact with the work. When the tool is withdrawn from the work, the lower guard shall automatically and instantly return to the covering position.

(c) Only cutting tools shall be used to cut metal strapping or banding used to secure cargo.

Subpart D—Specialized Terminals

§ 1918a.71 Terminals handling intermodal containers or roll-on roll-off vehicles.

(a) This section shall apply in addition to any applicable requirements of this Part.

(b) The employer shall ensure that every intermodal container is legibly and permanently marked with:

(1) The weight of the container when empty, in pounds;

(2) The maximum cargo weight the container is designed to carry, in pounds; and

(3) The sum of the weight of the container and the cargo, in pounds.

(c) Containers loaded aboard or discharged from any vessel by a shore crane or derrick shall:

(1) If empty, be identified by shipping documents as empty and be so marked; and

(2) If loaded, be marked with their actual gross weight to be legible to the crane or other hoist operator.

(d) Each outbound loaded container, except open vehicle-carrying containers and those designed and used exclusively to carry compressed gases, shall be weighed to determine its actual gross weight. If the terminal has no scales, the actual gross weight may be calculated on the basis of the container's contents and the container's empty weight. The weights used in the calculation shall be posted conspicuously on the container, with the name of the person making the calculation and the date.

(e) The weight of loaded inbound containers from foreign ports shall be determined by weighing, by the method of calculation described in paragraph (d), or by shipping documents.

(f) No container shall be hoisted whose actual gross weight exceeds either the sum of the container's empty weight and the maximum cargo weight the container is designed to carry or the capacity of the crane or device used for hoisting.

(g) (1) Marked and designated areas shall be set aside within a container or roll-on roll-off terminal for passage of employees to and from work areas.

(2) The employer shall ensure that employees stay clear of the area beneath a suspended container.

(h) The employer shall ensure that employees working with container-handling equipment or in the terminal's traffic lanes wear high-visibility vests or equivalent protection.

(i) Except when damage to an intermodal container makes special means of handling necessary, containers shall be handled using lifting fittings or other arrangements suitable and intended for the purpose as set forth in paragraphs (i)(1) through (i)(3):

(1) Intermodal containers of 20 feet (6.1 m) or more in length shall be hoisted as follows:

(i) If hoisted by the top lifting fittings, the lifting forces shall be applied vertically from at least four such fittings.

(ii) If hoisted from bottom fittings, the hoisting connections shall bear on the fittings only, making no other contact with the container. The angles of the four bridle legs shall not be less than 30° to the horizontal in the case of 40 foot (12.2 m) containers, 37° in the case of 30 foot (9.1 m) containers, and 45° in the case of 20 foot (6.1 m) containers.

(iii) Lifting containers by fork lift trucks or by grappling arms from above or from one side shall be done only if the container is designed for this type of handling.

(iv) Other means of hoisting may be used only if the containers and hoisting means are designed for such use.

(2) (i) Intermodal container spreaders using lanyards for activation of releasing devices shall not be used except when there is no possibility of the lanyards accidentally releasing a suspended intermodal container.

(ii) Intermodal container spreader twistlock systems shall be designed and used so that a suspended load cannot accidentally be released.

(3) Intermodal containers moved by flat bed trucks or container chassis shall be secured to prevent dislodgement in transit.

(j) (1) Intermodal containers received shall be inspected for defects in structural members or fittings before further handling.

(2) Any intermodal container found to be unsafe shall be identified as such, promptly removed from service and repaired before being returned to service.

§ 1918a.72 Grain elevator terminals. [Reserved]

§ 1918a.73 Terminal facilities handling menhaden and similar species of fish.

(a) This section shall apply in addition to any applicable requirements of this Part.

(b) (1) The employer shall ensure that tanks in terminal areas used for receiving or storing brailwater for recirculating into vessel holds in discharging operations are open or ventilated to minimize contamination of water circulated to the vessel. Brailwater tanks shall be thoroughly drained upon completion of each day's operations and shall be left open to the air. Drainage is unnecessary when brailwater has been treated to remove hydrogen sulfide-producing contaminants and the efficiency of such treatment has been established.

(2) Before employees enter a dock tank, it shall first be drained, rinsed and tested for hydrogen sulfide and oxygen deficiency. Employees shall not enter the tank when the hydrogen sulfide level exceeds 20 ppm or oxygen content is less that 19.5%.

(3) Tests shall be conducted by designated personnel with suitable test equipment and respiratory protective equipment complying with the provisions of § 1918a.92 of this Part.

(c) Pipelines and hoses on the dock or terminal used for receiving and circulating used brailwater shall be completely drained upon completion of each day's operation and left open to the air.

(d) At least four units of respiratory protective equipment consisting of supplied-air respirators or self-contained breathing apparatus complying with the requirements of § 1918a.92 of this Part shall be available in a suitably labeled cabinet for immediate use in case of emergency caused by oxygen deficiency or hydrogen sulfide. Any employee entering a tank in an emergency shall, in addition to repiratory protective

equipment, wear a lifeline and safety harness to facilitate rescue. At least two other employees, similarly equipped, shall be continuously stationed outside the tank to observe and to provide rescue services.

(e) The plant superintendent and foremen shall be trained and knowledgeable about the hazards of hydrogen sulfide and oxygen deficiency. They shall be trained in the use of appropriate respiratory and other protective equipment, and in rescue procedures. Other supervisory plant personnel shall be informed of these hazards and instructed in the necessary safety measures, including use of respiratory and rescue equipment.

(f) Supervisory personnel shall be on hand at dockside to supervise discharging of brailwater from vessels.

Subpart E—Personal Protection

§ 1918a.91 Eye protection.

(a) (1) When employees perform work hazardous to the eyes, the employer shall provide, at no cost to the employee, eye protection equipment marked or labeled as meeting the manufacturing specifications of American National Standards Practice for Occupational and Educational Eye and Face Protection, ANSI Z87.1–1968, and shall ensure its use.

(2) For employees wearing corrective spectacles, eye protection equipment required by paragraph (a)(1) of this section must be of a type which can be worn over spectacles. Prescription ground safety lenses may be substituted if they provide equivalent protection.

(3) For additional requirements covering eye protection against radiant energy, see § 1918a.152(h).

(b) Eye protection equipment shall be maintained in good condition.

(c) Used eye protection equipment shall be cleaned and disinfected before reissuance to another employee.

§ 1918a.92 Respiratory protection.

(a) The employer shall provide, at no cost to the employee, approved respiratory protective equipment meeting the requirements of 30 CFR Part 11 and shall ensure its use in hazardous atmospheres as defined in § 1918a.2(p).

(b) Respirators are approved for use in hazardous atmospheres only when they are maintained and used in accordance with the requirements for performance and respiratory protection set forth in 30 CFR Part 11.

(c) For protection against nuisance dusts, the employer shall provide, at no cost to the employee, respirators with particulate filters or dust masks meeting the requirements of 30 CFR Part 11, and shall ensure their use.

(d) For protection against pneumoconiosis-producing or toxic dusts, the employer shall provide, at no cost to the employee, respirators meeting the requirements of 30 CFR Part 11, and shall ensure their use.

(e) Respiratory protective equipment shall not be modified.

(f) Respiratory protective equipment shall be inspected before each use. Gas mask canisters and chemical cartidges shall be replaced before the end of their service life. Mechanical filters shall be cleaned and replaced as often as necessary to prevent excessive breathing resistance.

(g) Previously used respiratory protective equipment shall be cleaned and disinfected before reissuance.

(h) Respiratory protective equipment shall be stored in a convenient and clean location.

(i) Employers shall instruct employees using respiratory protective equipment in its uses and limitations.

(j) When an employee enters a hazardous atmosphere, at least one attendant shall stand by with rescue equipment and with respiratory protection approved for the hazard involved.

§ 1918a.93 Head protection.

(a) The employer shall ensure that employees exposed to impact, falling or flying objects, or electric shocks or burns shall wear protective hats, which shall be provided at no cost to the employee.

(b) Protective hats shall bear identifying marks or labels indicating compliance with the manufacturing provisions of American National Standard Safety Requirements for Industrial Head Protection, ANSI Z89.1–1969.

(c) Protective hats previously worn shall be cleaned and disinfected before issuance by the employer to another employee.

§ 1918a.94 Foot protection.

(a) The employer shall ensure that employees exposed to impact, falling objects, or puncture hazards wear safety shoes, which shall be provided by the employer at no cost to the employee.

(b) Protective shoes shall bear identifying marks or labels indicating compliance with the manufacturing provisions of American National Standard for Men's Safety Toe Footwear, ANSI Z41.1–1967.

§ 1918a.95 Other protective measures.

(a) *Protective clothing.* (1) The employer shall provide, at no cost to the employee, protective clothing when ordinary clothing is unsuitable and circumstances necessitate special protective clothing, and shall ensure its use.

(2) Protective clothing previously worn shall be cleaned and disinfected before issuance by the employer to another employee.

(b) *Protective creams or ointments.* The employer shall ensure that employees use protective creams or ointments when skin exposure to a particular substance requires their use.

(c) *Protection against drowning.* (1) the employer shall provide, at no cost to the employee, and shall ensure that employees wear, personal flotation devices for those employees, such as line handlers, who are engaged in work in which they may be pulled into the water.

(2) Personal flotation devices shall be United States Coast Guard approved Type I PFD, Type II PFD, Type III PFD, or Type V PFD, or equivalent, in accordance with 46 CFR 160 (Coast Guard Lifesaving Equipment Specifications) and 33 CFR 175.23 (Coast Guard table of devices equivalent to personal flotation devices).

(3) Personal flotation devices shall be maintained in safe condition and shall be considered unserviceable when damaged so as to affect buoyancy or fastening capability.

(d) *Emergency facilties.* When employees are exposed to hazardous substances which may require emergency bathing, eye washing or other facilities, the employer shall provide such facilities and maintain them in good working order.

Subpart F—Terminal Facilities

§ 1918a.111 Maintenance and load limits.

(a) The employer shall ensure that the structural integrity of docks, piers, wharves, terminals and working surfaces is maintained.

(b) Maximum safe load limits, in pounds per square foot (kilograms per square meter), of floors within buildings and structures shall be conspicuously posted in all cargo areas.

(c) Maximum safe load limits shall not be exceeded.

(d) All walking and working surfaces in the terminal area shall be maintained in good repair.

§ 1918a.112 Guarding of edges.

(a) *Vehicle protection.* (1) The employer shall ensure that vehicle curbs and bull rails at least 10 inches (22.9 cm) in height are provided at the water side of aprons and bulkheads, except where vehicles are prohibited.

(2) The provisions of paragraph (a)(1) of this section also apply at the edge of any fixed level above the common floor area from which vehicles may fall, except at loading docks, platforms and skids where cargo is moved by vehicles.

(b) *Employee protection.* (1) Except as specified in paragraph (b)(2) of this section, guardrails shall be provided at locations where employees are exposed to floor or wall openings or waterside edges, including bridges or gangway-like structures leading to pilings or vessel mooring or berthing installations, which present a hazard of falling more than 4 feet (1.22 m) or into the water.

(2) Guardrails are not required:

(i) At loading platforms and docks;

(ii) At waterside edges used for cargo handling;

(iii) On the working sides of work platforms, skids or similar workplaces; or

(iv) On railroad rolling stock, highway vehicles, intermodal containers or similar equipment.

(3) Where guardrails are impracticable due to machinery requirements or work processes, other equivalently safe means of protecting employees from falling, such as nets, shall be used.

(c) *Criteria for guardrails.* Guardrails shall meet the following criteria:

(1) They shall be capable of withstanding a force of at least 200 pounds (890 N) applied in any direction at mid-span of the top rail (when used), or at the uppermost point if there is no top rail.

(2) If not of solid, baluster, grillwork, slattered or similar construction, guardrails shall consist of top rails and midrails. When used, midrails shall be positioned at approximately half the height of the top rail.

(3) The top surface of guardrails installed before *(effective date of final standard)* shall be at least 36 inches (0.91 m) high. Those installed after *(effective date of final standard)* shall be 42 inches (1.07 m), plus or minus 2 inches (5.1 cm), high.

(4) Any non-rigid railing such as chain or wire rope shall have a maximum sag limit at the mid-point between posts of not more than 6 inches (15.2 cm).

(5) Top rails shall be free of puncture and laceration hazards.

(6) Rail ends shall not overhang to constitute a hazard, but this does not prohibit scrollwork, boxed ends or similar non-hazardous projections.

(d) *Toeboards.* Toeboards shall be provided when employees below could be exposed to falling objects such as tools. Toeboards shall be at least 3½ inches (8.9 cm) in height from top edge to floor level, and be capable of withstanding a force of 50 pounds (220 N) applied in any direction. Drainage clearance under toeboards is permitted.

(e) *Stair railings.* (1) Stair railings shall be capable of withstanding a force of at least 200 pounds (890 N) applied in any direction, and shall be not more than 36 inches (0.9 m) nor less than 32 inches (0.8 m) in height from the upper top rail surface to the tread surface in line with the leading edge of the tread. Railings shall be provided at any stairway having four or more risers, as follows:

(i) For stairways less thanb 44 inches (1.12 m) wide at least one railing; and

(ii) For stairways more than 44 inches (1.12 m) but less than 88 inches (2.24 m) wide, a stair rail or handrail on each side, and if 88 or more inches wide, an additional intermediate handrail.

(f) *Condition.* Railings shall be maintained free of sharp edges and in good repair.

§ 1918a.113 Clearance heights.

The employer shall ensure that the clearance height is prominently posted where the height is insufficient for vehicles and equipment.

§ 1918a.114 Cargo doors.

(a) *Mechanically operated.* (1) The employer shall ensure that cargo door counterweights are guarded.

(2) Lift trucks and cranes shall not be used to move mechanically operated doors except during repair on the doors, in which case ropes or other guarding shall be provided to prevent entry into the area where the door may fall or slide.

(3) Vertically operated doors partially opened for work or ventilation shall be secured to prevent accidental closing.

(b) *Tackle operated.* (1) The door shall be connected to its lifting tackle with shackles or equally secure means.

(2) Lifting bridles and tackles shall have a safety factor of five, based upon maximum anticipated static loading conditions.

(3) Devices shall be provided to hold overhead doors in the open position and to secure them when closed.

(4) Lifting gear and hardware shall be maintained in safe condition.

(5) Lifting ropes, when used, shall be placed out of the work area and off the floor.

(c) *Horizontal sliding.* (1) Horizontal sliding door rollers shall be constructed to prevent the door from jumping from overhead tracks.

(2) The employer shall ensure that sliding doors are secured to prevent them from swinging.

§ 1918a.115 Cargo-landing surfaces.

The employer shall ensure that the working area of an apron used to load or discharge vessels is large enough to permit unobstructed cargo handling.

§ 1918a.116 Platforms and skids.

(a) The employer shall ensure that platforms and skids extending from piers, transit sheds or lofts and used for landing or hooking on drafts shall be provided at the side edges with guardrails meeting the requirements of § 1918a.112(c) or equivalent means, such as nets, to protect employees against falls.

(b) The employer shall ensure that any employee working below a second story platform or skid is protected from falling objects by a net stretched from the platform or skid to the vessel.

(c) The employer shall ensure that platforms and skids are strong enough to bear the loads handled and are maintained in safe condition. Safe working loads, which shall be posted or marked on or adjecent to platforms and skids, shall have a miminum safety factor of five for any part, based upon maximum anticipated static loading conditions and the ultimate strength of the construction material.

(d) The employer shall provide and maintain platform and skid attachments that will prevent accidental movement of the skid or platform.

§ 1918a.117 Elevators and escalators.

(a) "Elevator" means a permanent hoisting and lowering mechanism with a car or platform moving vertically in guides and serving two or more floors of a structure. The term excludes such devices as conveyors, tiering or piling machines, material hoists, skip or furnace hoists, wharf ramps, lift bridges, car lifts and dumpers.

(b) "Escalator" means a power-driven continuous moving stairway principally intended for the use of persons.

(c) The employer shall ensure that no elevator or escalator with any operational defect is used.

(d) Elevator safey devices shall not be overridden or made inoperable.

(e) The employer shall ensure that elavators and escalators are thoroughly inspected at intervals not exceeding one year, and that additional monthly inspections for satisfactory operation are carried out by designated persons. Records of the results of the latest annual and monthly elevator inspections shall be posted in elevators. Records of escalator inspections shall be posted in the vicinity of the escalator or be available at the terminal.

(f) Elevator landing openings shall be provided with doors, gates or equivalent

protection which shall be in place when the elevator is not at that landing. The door, gate, or equivalent device shall prevent employees from falling into the shaft.

(g) The elevator's or escalator's maximum load limits shall be posted and not exceeded. Elevator load limits shall be posted conspicuously both inside and outside of the car.

(h) Elevators shall be operated only by designated persons except for automatic or door interlocking elevators which provide full shaft door closing and automatic car leveling.

§ 1918a.118 Manlifts.

(a) *Inspection.* The employer shall ensure that manlifts are inspected monthly by a designated person. Safety switches shall be checked weekly. Manlifts found to be unsafe shall not be operated until repaired. Inspections shall include at least the following:

Step fastenings;
Rails;
Rail supports and fastenings;
Roller and slides;
Belt and belt tension;
Handholds and fastenings;
Floor landings;
Guardrails;
Lubrication;
Safety switches;
Warning signs and lights;
Illumination;
Drive pulley;
Bottom (boot) pulley and clearance;
Pulley supports;
Motor;
Drive mechanism;
Brake;
Electrical switches;
Vibration and misalignment;
"Skip" on up or down run when mounting the step (indicating worn gears); and
Emergency exit ladders.

(b) *Inspection records.* Inspection records shall be kept for at least one year. The record of the most recent inspection shall be posted in the vicinity of the manlift or in the terminal.

(c) *Emergency stop.* An emergency stop device shall be available within easy reach from any position on the belt.

(d) *Instructions.* Manlift use instructions shall be conspicuously posted.

(e) *Top floor warning sign and light.* An illuminated sign and red light that are visible to the user shall be provided under the top floor opening of the manlift to warn the user to get off at that floor.

(f) *Bottom floor warning sign.* A sign visible to descending passengers shall be provided to warn them to get off at the bottom floor.

(g) *Upper limit stop.* An automatic stop device shall be provided to stop the manlift when a loaded step passes the top landing, except that manlifts installed after *(Effective date of the final standard)* shall have two such devices.

(h) *Handholds and steps.* Each step shall be provided with a corresponding handhold.

(i) *Emergency ladder.* A fixed emergency ladder accessible from any position on the lift and in accordance with the requirements of § 1918a.119(d) shall be provided for the entire run of the manlift.

(j) *Landings.* (1) Clear and unobstructed landing spaces shall be provided at each level. Manlifts constructed after *(effective date of the standard)* and that have a distance of 50 feet (15.24 m) or more between floor landings shall have an emergency landing every 25 feet (7.62 m) or less of manlift travel.

(2) Open sides of emergency landings shall be protected by guardrails.

(3) Floor landing entrances and exits shall be guarded by mazes, self-closing gates, or equivalent devices.

(4) Landings shall be of sufficient size and strength to support 250 pounds (1120 N).

(k) *Floor opening guards.* The ascending sides of manlift floor openings shall be provided with cones or bevel guards to direct the user through the openings.

(l) *Maintenance.* Manlifts shall be equipped, maintained, and used in accordance with the manufacturer's specifications, which shall be available at the terminal.

(m) *Bottom pulley.* (1) The lower pulley shall be supported by the lowest landing.

(2) Sides of the bottom pulley support shall be guarded to prevent contact with the pulley or the steps.

(n) *Top clearance.* A clearance of at least 11 feet (3.3 m) shall be provided between the top landing and the ceiling.

(o) *Brakes.* Manlifts shall be equipped with brakes that are:.

(1) Self-engaging;

(2) Electrically released; and

(3) Capable of stopping and holding the manlift when the descending side is loaded with the maximum rated load.

§ 1918a.119 Fixed ladders.

(a) *Scope and applicability.* This section applies to all fixed ladders except:

(1) Ladders forming an integral part of railway cars, highway carriers, cargo containers or other transportation carrier equipment;

(2) Climbing devices such as step bolts or structural members of tanks and towers;

(3) Ladders built into or vertically attached to tubular scaffold framing; and

(4) Special-purpose ladders, such as fruit-pickers' ladders, shelf ladders, combination step and extension ladders, and library ladders.

(b) *Definitions.* (1) "Cage" (basket guard) means a barrier enclosing or nearly enclosing a ladder's climbing space and fastened to one or both of the ladder's side rails or to another structure.

(2) "Fixed ladder" means a ladder, including individual rung ladders, permanently attached to a structure, building or piece of equipment.

(3) "Ladder safety device" means a support system limiting an employee's drop or fall from the ladder, and which may incorporate friction brakes, lifelines and lanyards, or sliding attachments.

(4) "Well" means a permanent complete enclosure around a fixed ladder, which is attached to the walls of the well.

(c) *Defects.* (1) The employer shall ensure that ladders with broken, split or missing rungs, steps or rails, broken welds or connections, corrosion or wastage or other defect which may affect safe use are removed from service.

(2) Ladder repairs shall provide strength at least equivalent to that of the original ladder.

(d) *Ladder specifications.* (1) Strength and spacing requirements. (i) Existing ladders shall be capable of withstanding without damage a minimum concentrated load, applied uniformly over a 3-½ inch (8.8 cm) width at the rung center, of 200 pounds (890 N).

(ii) Ladders installed after *(effective date of final standard)* shall be capable of withstanding 250 pounds (1120 N) applied as described in paragraph (d)(1)(i) of this section. If used by more than one employee simultaneously, the ladder is a unit shall be capable of simultaneous additional loading in 250 pounds (1120 N) increments for each additional employee, applied to a corresponding number of rungs. The unit shall have a safety factor of four, based on ultimate strength, in the designed service.

(2) (i) Existing ladders shall have rungs evenly spaced from 9 to 16-½ inches (22.9 to 41.9 cm) apart, center to center.

(ii) Ladders installed after *(effective date of final standard)* shall have rungs evenly spaced from 12±2 inches (30±5 cm) apart, center to center.

(3) (i) Existing ladders shall have a width between side rails of at least 10 inches (25.4 cm).

(ii) Ladders installed after *(effective date of final standard)* shall have a width between side rails of at least 12 inches (30.48 cm).

(4) The minimum distance between the rung center line and the nearest permanent object behind the rung shall be 4 inches (10.2 cm), except that in ladders installed after *(effective date of final standard)*, the minimum distance shall be 7 inches (17.8 cm) unless physical limitations make a lesser distance, not less than 4-½ inches (11.5 cm), necessary.

(5) When a ladder passes through an opening or past overhead obstructions, a minimum 24 inch (.61 cm) clearance shall exist between the climbing side and any obstruction. Where this distance is less than 30 inches (0.76 m), a deflection device shall be installed for guidance through the opening.

(6) The side rails of ladders shall extend at least 36 inches (0.91 m) above the top landing surface, unless grab bars or equivalent holds are provided.

(7) The employer shall ensure that ladders whose pitch exceeds 90° to the horizontal (slanting backward on the climbing side) are not used.

(e) *Protection against falls.* (1) Fixed ladders more than 20 feet (6.1 m) in height shall be provided with a cage, well, or ladder safety device.

(2) When a well or cage is used, ladders with length of climb exceeding 30 feet (9.14 cm) shall comply with the following provisions:

(i) The ladder shall consist of multiple sections not exceeding 30 feet (9.14 m) each;

(ii) Except as specified in paragraph (e)(2)(iv) of this section, each section shall be horizontally offset from adjacent sections;

(iii) Except as specified in paragraph (e)(2)(iv) of this section, a landing platform capable of supporting a load of 100 pounds per square foot (4.79 kPa) and fitted with guardrails complying with § 1918a.112(c) shall be provided at least every 30 feet; and

(iv) For ladders installed before *(effective date of standard)*, offset sections and landing platforms are not required if hinged platforms capable of supporting 100 pounds per square foot (4.79 kPa), and which are kept closed except when opened for passage, are within the cage or well at intervals not exceeding 30 feet (9.14 m).

(3) Ladders equipped with ladder safety devices shall have rest platforms:

(i) Capable of supporting a load of 100 pounds per square foot (4.79 kPa);

(ii) Located at intervals of 150 feet (46 m) or less; and

(iii) Protected by guardrails complying with § 1918a.112(c) on three sides.

(4) Where used, ladder safety devices shall:

(i) Be installed and maintained in accordance with the manufacturer's instructions, which shall be available at the terminal;

(ii) Be repaired with replacement parts having performance capability at least equal to that of the original parts;

(iii) Have a connection length between carrier centerlines and safety belts of 10±2 inches (25.4±5.08 cm); and

(iv) Be installed in a manner that does not reduce the ladder's structural capability.

(5) Ladder cages or wells installed after *(effective date of final standard)* shall:

(i) Be of rigid construction that allows unobstructed ladder use but prevents an employee from falling through or dislodging the cage or well by falling against it;

(ii) Have smooth inner surfaces;

(iii) Extend at least 36 inches (0.9 m) above landings; and

(iv) Extend to within 8 feet (2.4 m) above the ground or base.

(6) After *(effective date of final standard)*, ladders on radio, microwave communication, electrical power and similar towers, poles and structures, including stacks and chimneys, shall meet the requirements of this paragraph (e). Ladders used only for firefighting or emergency purposes are exempted from the requirements of this paragraph.

(f) *Individual rung ladders.* Ladders consisting of individual rungs that are attached to walls or conical manhole sections shall:

(1) Be capable of supporting a load of 350 pounds (1557 N) without deformation;

(2) Form a continuous ladder, uniformly spaced vertically from 12 inches to 16 inches (30.5 to 41 cm) apart, with a minimum width of 10 inches (25.4 cm), and projecting at least 4½ inches (1 cm) from the wall;

(3) Be so constructed that an employee's foot cannot slide off the ends; and

(4) Be firmly attached and without sharp edges.

§ 1918a.120 Portable ladders.

(a) *Scope and applicability.* This section applies to all portable ladders including job-made ladders for temporary use, unless otherwise specified.

(b) *Standards for existing manufactured portable ladders.* (1) The employer shall ensure that rungs of manufactured portable ladders obtained before *(effective date of final standard)* are capable of supporting a 200 pound (896 N) load without deformation.

(2) Rungs shall be evenly spaced from 9 to 16½ inches (22.9 to 41.9 cm), center to center.

(3) Rungs shall be continuous members between rails. Each rung of a double-rung ladder (two side rails and a center rail) shall extend the full width of the ladder.

(4) Width between side rails at the base of the ladder shall be at least 15 inches (38 cm) for ladders 10 feet (3.05 m) or less in overall length, and shall increase at least ¼ inch (0.6 cm) for each additional 2 feet (0.61 m) of ladder length.

(c) *Standards for manufactured portable ladders.* The employer shall ensure that portable manufactured ladders obtained after *(effective date of final standard)* bear identifying labels indicating that they meet the appropriate ladder construction requirements of the following standards.

ANSI A14.1–1975 Safety Requirements for Portable Wood Ladders

ANSI A14.2–1972 Safety Requirements for Portable Metal Ladders

ANSI A14.5–1974 Safety Requirements for Portable Reinforced Plastic Ladders

(d) *Standards for job-made portable ladders.* The employer shall ensure that job-made ladders used after *(effective date of final standard)*:

(1) Have a minimum and uniform distance between rungs of 12 inches (30 cm), center to center;

(2) Are capable of supporting a 250 pound (1100 N) load without deformation; and

(3) Have a minimum width between side rails of 15 inches (38 cm) for ladders 10 feet (3.05 m) in height. Width between rails shall increase at least ¼ inch (0.6 cm) for each additional 2 feet (0.61 m) of ladder length.

(e) *Maintenance and inspection.* (1) The employer shall maintain portable ladders in safe condition. Ladders with the following defects shall not be used and either shall be tagged as unusable if kept on the premises or shall be removed from the worksite:

(i) Broken, split or missing rungs, cleats or steps;

(ii) Broken or split side rails;

(iii) Missing or loose bolts, rivets or fastenings;

(iv) Defective ropes; or

(v) Any other structural defect.

(2) Ladders shall be inspected for defects prior to each day's use, and after any occurance, such as a fall, which could damage the ladder.

(f) *Ladder usage.* (1) Ladders made by fastening rungs or devices across a single rail are prohibited.

(2) Ladders shall not be used:
(i) As guys, braces or skids; or
(ii) As platforms, runways or scaffolds.
(3) Metal and wire-reinforced ladders with wooden side rails shall not be used when employees on the ladder might come into contact with electrical conductors.
(4) Individual sections from different multi-sectional ladders or two or more single straight ladders shall not be tied or fastened together to achieve additional length.
(5) Except for combination ladders, self-supporting ladders shall not be used as single straight ladders.
(6) Unless intended for cantilever operation, non-self-supporting ladders shall not be used to climb above the top support point.
(7) Ladders shall extend at least 36 inches (0.91 m) above the upper support level if employees are to leave or mount the ladder at that level, except that where such extension is impractical other equivalent means such as grab bars may be used to provided a hand grip.
(8) The employer shall ensure that ladders are securely positioned on a level and firm base.
(9) Ladders shall be fitted with slip-resistant bases and lashed, blocked or otherwise secured at top or bottom to prevent the ladder from slipping.
(10) Ladders shall be placed so that employees climbing are not exposed to injury from projecting objects or doors that open toward the ladder.

§ 1918a.121. Fixed stairways.

(a) *Definition.* "Fixed stairway" means interior and exterior stairs serving machinery, tanks and equipment, and stairs to or from floors, platforms or pits. The term does not apply to stairs intended for fire exit purposes, to articulated stairs (the angle of which changes with the rise and fall of the base support) or to stairs forming an integral part of machinery.
(b) *New installations.* (1) The employer shall ensure that fixed stairs installed after *(effective date of final standard)* are positioned within the range of 30° to 50° to the horizontal with uniform riser height and tread width throughout each run and be capable of a minimum loading of 100 pounds per square foot (448 N) and a minimum concentrated load of 300 pounds (1344 N) at the center of any treadspan. Riser height shall be from 6 to 7.5 inches (15.2 to 19.0 cm), stair width a minimum of 22 inches (56 cm) between vertical barriers, tread depth a minimum of 12 ±2 inches (30.48 ±5.08 cm), and tread nosing shall be straight leading edges.
(2) Stair landings shall be at least 20 inches (51 cm) in depth. Where doors or gates open on a stairway, a landing platform shall be provided. Door swing shall not reduce effective standing area on the landing to less than 18 inches (45.7 cm) in depth.
(3) Fixed stairs having four or more risers shall have stair railings or handrails complying with § 1918a.112(c)(1).
(4) Railing height from tread surface at the riser face shall be 33 ±3 inches (83.8 ±7.6 cm).
(c) *Restricted areas.* When physical features require stairs steeper than those provided for by paragraph (b)(1) of this section, stairs at angles of 50° to 75° from the horizontal may be used if they:
(1) Are capable of a single concentrated load of 200 pounds (890 N) at the tread center;
(2) Have open treads at least 4 inches (10.2 cm) in depth and 18 inches (45.7 cm) in width with a uniformly spaced vertical rise between treads of 6 to 9.5 inches (15.2 to 24.1 cm); and
(3) Have handrails that meet the requirements of § 1918a.112(c)(1) on both sides and that are not less than 30 inches (76.2 cm) in height from the tread surface at the riser face.
(d) *Maintenance.* The employer shall ensure that fixed stairways are maintained in safe condition and are not obstructed.

§ 1918a.122 Spiral stairways.

(a) *Definition.* "Spiral stairway" means one with closed circular form, uniform sector-shaped treads and a supporting column.
(b) *Requirements.* The employer shall ensure that spiral stairways meet the following requirements:
(1) Stairways shall conform to the minimum dimensions of Figure F-1;

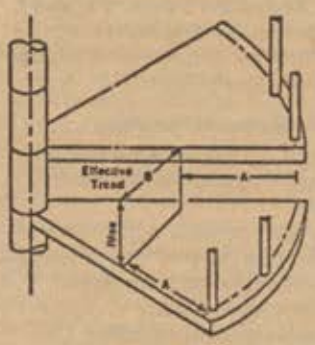

Figure F-1

Spiral Stairway—Minimum Dimensions

	A (half-tread width)	B
Normal use by employees.	11 inches (27.9 cm).	6 inches (15.2 cm).
Limited access	9 inches (22.9 cm).	5 inches (12.7 cm).

(2) Stairway risers shall be uniform and shall range from 6-½ to 10-½ inches (16.5 to 26.7 cm) in height;
(3) Minimum loading capability shall be 100 pounds per square foot (448 N), and minimum tread center concentrated loading shall be 300 pounds (1344 N);
(4) Railings shall conform to the requirements of § 1918a.112(c)(1). A minimum of one baluster, if used, shall be provided per tread. Handrails shall be a minimum of 1¼ inches (3.3 cm) in outside diameter; and
(5) Vertical clearance shall be at least 6 feet, 6 inches (1.98 m) above the top stem.
(c) *Maintenance.* Spiral stairways shall be maintained in safe condition.

§ 1918a.123 Employee exits.

(a) The employer shall ensure that employee exits are marked. Marking consisting of the word "Exit" or other appropriate description shall be clear and easily distinguishable.
(b) If an employee exit is not visible from employees' work stations, directional signs indicating routes to the exit shall be posted.
(c) Exits shall be readily accessible and sufficient in number to provide employees with a convenient means of escape in emergencies. A clear passage to the exit shall be maintained.
(d) The minimum width of any employee exit shall be 28 inches (71.1 cm).

§ 1918a.124 Illumination

Except where the regulations of the United States Coast Guard (33 CFR 126.15(l) and (n), and 33 CFR 154.570) apply, the employer shall ensure that active work areas (for example cargo transfer points) are illuminated at an average minimum light intensity of 10 foot-candles. Other work areas (for example open storage areas) shall be illuminated at an average minimum light intensity of 5 foot-candles. Light intensity shall be measured on a horizontal plane at the work or walking surface.

§ 1918a.125 Passage between levels and across openings.

(a) *Differences in levels.* The employer shall provide safe means of passage between different surface levels and across openings.

(b) *Dockboards (car and bridge plates) and ramps.* Dockboards and ramps shall:

(1) Not be subjected to loads exceeding the manufacture's recommended load rating, which shall be marked on the dockboard or ramp or available at the terminal;

(2) have sufficient edge contact with pier, dock and loading platforms and carriers or vessels to prevent rocking or sliding;

(3) Not be used when loading dock or platform surfaces slope so that substantial contact cannot be maintained;

(4) Be so secured, constructed and used as to prevent the dockboard or ramp from slipping;

(5) Have effective means for safe handling;

(6) Have a safety factor of at least four;

(7) Be equipped with a guardrail meeting the requirements of § 1918a.112(c)(1) if the slope is more than 20 degrees to the horizontal or if employees could fall more than 4 feet (1.2 m);

(8) Be equipped with sideboards or be designed so that trucks are prevented from running over the edge; and

(9) Have slip-resistant surfaces.

(c) *Other temporary surfacing.* When steel plates or similar means are used temporarily to bridge or cover uneven surfaces or tracks, such temporary surfacing shall be secured or built to prevent displacement by vehicle wheels.

§ 1918a.126 Guarding temporary hazards.

The employer shall ensure that ditches, pits, excavations, other subsidence areas, and surface areas in poor repair are guarded by barricades, railings, roping off or by other equally effective means. The employer shall provide sufficient illumination so that employees can see and avoid the hazardous area.

§ 1918a.127 River banks.

(a) This section applies to temporary installations or temporary operations near a river bank.

(b) Where working surfaces at river banks slope so steeply that an employee could slip or fall into the water, the employer shall ensure that the outer perimeter of the working surface is protected by posting or other portable protection such as roping off, and that employees wear a personal flotation device meeting the requirements of § 1918a.95(c).

§ 1918a.128 Sanitation.

(a) *Washing and toilet facilities.* (1) The employer shall provide accessible washing and toilet facilities sufficient for the sanitary requirements of employees. The facilities shall have:

(i) Running water, including hot and cold or tepid water at a minimum of one accessible location (when cargo handling is conducted at locations without permanent facilities, potable water may be provided in lieu of running water);

(ii) Soap;

(iii) Individual hand towels, clean individual sections of continuous toweling or warm air blowers; and

(iv) Fixed or portable toilets in separate compartments with latch-equipped doors. Separate toilet facilities shall be provided for male and female employees except when toilet rooms will be occupied by only one person at a time.

(2) Washing and toilet facilities shall be regularly cleaned and maintained in good order.

(b) *Drinking water.* (1) Potable drinking water shall be accessible to employees at all times.

(2) Portable drinking water containers shall be clean, containing only water and ice, and shall be fitted with covers.

(3) Common drinking cups are prohibited.

(c) *Prohibited eating areas.* The employer shall ensure that employees do not consume food or beverages in areas where hazardous materials are or have been stored or handled.

(d) *Garbage and overboard discharges.* Work shall not be conducted in the immediate vicinity of uncovered garbage or in the way of overboard discharges from the vessel's sanitary lines unless employees are protected from the garbage or discharge by a baffle or splash boards.

§ 1918a.129 Signs and marking.

(a) *General.* (1) The employer shall provide signs that are clearly worded and legible.

(2) Signs shall contain a key word or legend indicating the reason for the sign.

(i) Key words are such words as Danger, Warning, Caution.

(ii) Legends are more specific explanations such as High Voltage, Close Clearance, Pedestrian Crossing.

(b) *Specific.* (1) Every marine terminal shall have conspicuously posted signs as follows:

(i) Locations of first aid facilities;

(ii) Locations of telephones;

(iii) Telephone numbers of the closest ambulance service, hospital or other source of medical attention, police, fire department, and emergency squad (if any); and

(iv) Locations of firefighting and emergency equipment and fire exits.

(2) The employer shall ensure that any imminent danger is designated by a danger sign to warn employees of the immediate hazard.

(3) The employer shall ensure that any area in which any potential hazard is present is designated by a caution sign to warn employees of the hazard.

Subpart G—Related Terminal Operations and Equipment

§ 1918a.151 Machine guarding.

(a) *Definition.* "Guarded" means shielded, fenced, or enclosed by covers, casings, shields, troughs, spillways or railings, or guarded by position or location. Examples of guarding methods are guarding by location (positioning hazards so they are inaccessible to employees) and point of operation guarding (using barrier guards, two-hand triping devices, electronic safety devices, or other such devices).

(b) *General.* (1) The employer shall ensure that danger zones on machines and equipment used by employees are guarded.

(2) During operations that produce chips or dust, the employer shall provide an effective exhaust system at the point of origin of chips and dust.

(3) Fixed machinery shall be secured to prevent shifting.

(4) A power cut-off device for machinery and equipment shall be provided at the operator's working position.

(5) Machines driven by belts and shafting shall be fitted with a belt-locking or equivalent device if the belt can be shifted.

(6) Motors shall be wired to prevent automatic restart after loss of power.

(7) The employer shall ensure that the power supply to machines and equipment is turned off and locked out during repair, adjustment, or servicing.

(8) The employer shall maintain machines and equipment in accordance with the manufacturer's instructions, which shall be available at the terminal.

(9) The employer shall ensure that only designated employees maintain or repair machinery and equipment.

(10) Machines and equipment with operational defects shall not be used.

(c) *Hand-fed circular ripsaws and hand-fed circular crosscut table saws.* Unless fixed or manually adjustable enclosures or guarding provides equivalent protection, the employer

shall ensure that hand-fed circular ripsaws and hand-fed circular crosscut table saws are guarded as follows to keep employees clear of any danger zones:

(1) They shall be equipped with hoods completely enclosing those portions of the saw above the table and the material being cut;

(2) They shall have spreaders to prevent material from squeezing the saw. Spreaders shall be in true alignment with the saw. Spreaders may be removed only during grooving, dadoing, or rabbeting operations, but shall be replaced at the completion of such operations; and

(3) They shall have non-kickback fingers or dogs to oppose the tendency of the saw to pick up material or throw material toward the operator.

(d) *Swing cutoff saws.* (1) The employer shall ensure that swing cutoff saws have hoods completely enclosing the upper half of the saw, the arbor end and the point of operation at all saw positions to protect the operator from material thrown up by the saw. The hood shall automatically cover the lower portion of the blade, so that when the saw returns to the back of the table the hood rises on top of the fence, and when the saw is moved forward the hood drops on top, remaining in contact with the table or the material.

(2) Swing cutoff saws shall have a device to return the saw automatically to the back of the table without rebound. The device shall not be dependent upon rope, cord or springs.

(3) Devices shall be provided to prevent saws from swinging beyond the front or back edges of the table.

(4) Inverted swing cutoff saws shall have hoods covering the part of the saw protruding above the table top or the material being cut. Hoods shall automatically adjust to the thickness of, and remain in contact with, material being cut.

(e) *Radial saws.* Unless fixed or manually adjustable enclosures or guards provide equivalent protection, radial saws shall be guarded as follows:

(1) The upper hood of radial saws shall enclose the upper portion of the blade up to and including the end of the saw arbor and shall protect the operator from being struck by debris. The sides of the lower exposed portion of the blade shall be guarded to the blade diameter by a device automatically adjusting to the thickness of the stock and remaining in contact with the stock. The lower guard may be removed only when the saw is used for bevel cuts;

(2) Radial saws used for ripping shall have non-kickback fingers or dogs on both sides to oppose the thrust or tendency of the saw to pick up materials or throw material toward the operator;

(3) Adjustable stops shall be provided to prevent travel of radial saw blades beyond the table's edge;

(4) Radial saws shall be installed so that the cutting head returns to the starting position without rebound when released; and

(5) The employer shall ensure that employees perform ripping and ploughing against the saw turning direction. Rotation direction and an indication of the end of the saw to be used shall be conspicuously marked on the hood.

(f) *Band saws and band resaws.* (1) Saw blades and band saw wheels shall be enclosed or guarded, except for the working portion of the blade between the bottom of the guide rolls and the table, to protect employees from point-of-operation hazards and flying debris.

(2) The employer shall provide brakes to stop the band saw wheel if the blade breaks.

(3) Band saws shall be equipped with a tension control device to keep the blade taut.

(g) *Abrasive wheels and machinery.* (1) Except as provided in paragraphs (g)(2) and (g)(3) of this section, the employer shall ensure that abrasive wheels are used only on machines having enclosure guards to restrain pieces of grinding wheels and to protect employees if the wheels break. Guards shall be aligned with the wheel, and the strength of fastenings shall be greater than the strength of the guard.

(2) When the work provides equivalent protection, or when the machine is designed as a portable saw, guards may be constructed with the spindle end, nut and outer flange exposed. When the work entirely covers the side of the wheel, the side covers of the guard may be removed.

(3) Guarding is not required:

(i) For wheels used for internal work while the wheel is contained within the work being ground; or

(ii) For mounted wheels 2 inches (5 cm) and smaller in diameter used in portable operations.

(4) Work rests shall be used on fixed grinding machines. Work rests shall be rigidly constructed and adjustable for wheel wear. They shall be adjusted closely to the wheel with a maximum opening of ⅛-inch (3.2 mm) and shall be securely clamped. Adjustment shall not be made while the wheel is in motion.

(5) Grinding wheels shall fit freely on the spindle. The spindle nut shall be tightened only enough to hold the wheel in place.

(6) The employer shall ensure that the grinding machine turns the wheel at a speed that is compatible with the rated speed of the wheel.

(7) Flanges and blotters shall be used only with wheels designed for their use. Flanges shall be of a type ensuring retention of pieces of the wheel in case of breakage.

(8) Abrasive wheels with operational defects shall not be used.

(h) *Rotating parts, drives and connections.* (1) The employer shall ensure that rotating parts, such as gears and pulleys, that are located 8 feet (2.4 m) or less above working surfaces are guarded to prevent employee contact with moving parts.

(2) Belt, rope and chain drives shall be guarded to prevent employees from coming into contact with moving parts.

(3) Gears, sprockets and chains shall be guarded to prevent employees coming into contact with moving parts. This requirement does not apply to manually operated sprockets.

§ 1918a.152 Welding, cutting and heating (hot work).

(a) *Definition.* "Hot work" means riveting, welding, burning or other fire or spark-producing operation.

(b) *General.* (1) The employer shall ensure that welding, cutting and heating are performed only as permitted by this section and by other applicable regulations.

(2) Hot work shall not be performed in a confined space until a designated person has tested the atmosphere and determined that it is not hazardous.

(c) *Fire protection.* (1) To the extent possible, the employer shall ensure that hot work is performed only in designated locations that are free of fire hazards.

Footnote G–1: The United States Coast Guard, at 33 CFR 126.15(c), requires prior permission of the Captain of the Port if welding or other hot work is to be carried out at a facility where dangerous cargoes as defined by 33 CFR 126.07 are located or being handled.

(2) When hot work must be performed in a location that is not free of fire hazards, the employer shall ensure that all necessary precautions are taken to confine heat, sparks and slag so that they cannot contact flammable or combustible material.

(3) Fire extinguishing equipment suitable for the location shall be immediately available and shall be maintained in readiness for use at all times.

(4) Additional employees shall be assigned to guard against fire during hot work and for a sufficient time after completion of work to ensure that no fire hazard remains. The employer shall instruct all employees involved in hot

work operations as to potential fire hazards and the use of firefighting equipment.

(5) Drums and containers which contain or have contained flammable or combustible liquids shall be kept closed. Empty containers shall be removed from the hot work area.

(6) When openings or cracks in flooring cannot be closed, precautions shall be taken so that no employees or flammable or combustible materials on the floor below are exposed to sparks dropping through the floor. Similar precautions shall be taken regarding cracks or holes in walls, open doorways and open or broken windows.

(7) Hot work shall not be performed:

(i) In flammable or potentially flammable atmospheres;

(ii) On or in equipment or tanks that have contained flammable gas or liquid or combustible liquid or dust-producing material, until a designated person has tested the atmosphere and determined that it is not hazardous; or

(iii) Near any area in which exposed readily ignitable materials such as bulk sulphur, baled paper or cotton are stored.

(8)(i) Drums, containers or hollow structures that have contained flammable or combustible substances shall either be filled with water or cleaned, and shall then be ventilated. A designated person shall test the atmosphere and determine that it is not hazardous before hot work is performed on or in such structures.

(ii) Before heat is applied to a drum, container or hollow structure, an opening to release built-up pressure during heat application shall be provided.

(d) *Gas welding and cutting.* (1) Compressed gas cylinders. The employer shall ensure that compressed gas cylinders:

(i) Have valve protection caps in place except when in use, hooked up or secured for movement. Oil shall not be used to lubricate caps;

(ii) Are hoisted only while secured, as on a cradle or pallet, and shall not be hoisted by magnet, choker sling or cylinder caps;

(iii) Are moved only by tilting or rolling on their bottom edges;

(iv) Are secured when moved by vehicle;

(v) Are secured while in use;

(vi) Have valves closed when cylinders are empty, being moved or stored;

(vii) Are secured upright except when hoisted or carried;

(viii) Are not freed when frozen by prying the valves or caps with bars or by hitting the valve with a tool;

(ix) Are not thawed by boiling water;

(x) Are not exposed to sparks, hot slag or flame;

(xi) Are not permitted to become part of electrical circuits or have electrodes struck against them to strike arcs;

(xii) Are not used as rollers or supports;

(xiii) Do not have contents used for purposes not authorized by the supplier;

(xiv) Are not used if damaged or defective;

(xv) Do not have gases mixed within, except by gas suppliers;

(xvi) Are stored so that oxygen cylinders are separated from fuel gas cylinders and combustible materials by a minimum distance of 20 feet (6 m) or a barrier having a fire-resistance rating of 30 minutes; and

(xvii) Do not have objects that might either damage the safety device or obstruct the valve placed on top of the cylinder when in use.

(2) Use of fuel gas. Fuel gas shall be used only as follows:

(i) Before regulators are connected to cylinder valves, the valves shall be opened slightly and closed immediately to clear away dust or dirt. Valves shall not be cracked if gas could reach possible sources of ignition;

(ii) Cylinder valves shall be opened slowly to prevent regulator damage and shall not be opened more than 1½ turns. Any special wrench required for emergency closing shall be positioned on the valve stem during cylinder use. For manifolded or coupled cylinders, at least one wrench shall be immediately available. Nothing shall be placed on top of a cylinder or associated parts when the cylinder is in use;

(iii) Pressure-reducing regulators shall be attached to cylinder valves when cylinders are supplying torches or devices equipped with shut-off valves;

(iv) Cylinder valves shall be closed and gas released from the regulator or manifold before regulators are removed;

(v) Leaking fuel gas cylinder valves shall be closed and the gland nut tightened. If the leak continues, the cylinder shall be tagged, removed from service, and moved to a location where the leak will not be hazardous. If a regulator attached to a valve stops a leak, the cylinder need not be removed from the workplace but may not be used again before it is repaired; and

(vi) If a plug or safety device leaks, the cylinder shall be tagged, removed from service, and moved to a location where the leak will not be hazardous.

(3) Hose. (i) Fuel gas and oxygen hoses shall be easily distinguishable from each other by color or sense of touch. Oxygen and fuel hoses shall not be interchangeable. Hoses having more than one gas passage shall not be used.

(ii) When oxygen and fuel gas hoses are taped together, not more than 4 of each 12 inches (10.2 cm of each 30.5 cm) shall be taped.

(iii) Hose shall be inspected before use. Hose subjected to flashback or showing evidence of severe wear or damage shall be tested to twice the normal working pressure but not less than 200 p.s.i. (1378.96 kPa) before reuse. Defective hose shall not be used.

(iv) Hose couplings shall not unlock or disconnect without rotary motion.

(v) Hose connections shall be clamped or securely fastened to withstand twice the normal working pressure but not less than 300 p.s.i. (2068.44 kPa) without leaking.

(vi) Gas hose storage boxes shall be ventilated.

(4) Torches. (i) Torch tip openings shall only be cleaned with devices designed for that purpose.

(ii) Torches shall be inspected before each use for leaking shut-off valves, hose couplings and tip connections. Torches with such defects shall not be used.

(iii) Torches shall not be lighted from matches, cigarette lighters, other flames or hot work.

(5) Pressure regulators. Pressure regulators, including associated gauges, shall be maintained in safe working order.

(6) Operational precaution. Gas welding equipment shall be maintained free of oil and grease.

(e) *Arc welding and cutting.* (1) Manual electrode holders. (i) The employer shall ensure that only manual electrode holders intended for arc welding and cutting and capable of handling the maximum current required for such welding or cutting are used.

(ii) Current-carrying parts passing through those portions of the holder gripped by the user and through the outer surfaces of the jaws of the holder shall be insulated against the maximum voltage to ground.

(2) Welding cables and connectors. (i) Arc welding and cutting cables shall be insulated, flexible and capable of handling the maximum current required by the operation, taking into account the duty cycles.

(ii) Only cable free from repair or splice for 10 feet (3 m) from the electrode holder shall be used unless insulated connectors or splices with insulating quality equal to that of the cable are provided.

(iii) When a cable other than the lead mentioned in paragraph (e)(2)(ii) of this section wears and exposes bare conductors, the portion exposed may not

be used until it is protected by insulation equivalent in performance capability to the original.

(iv) Insulated connectors of equivalent capacity shall be used for connecting or splicing cable. Cable lugs, where used as connectors, shall provide electical contact. Exposed metal parts shall be insulated.

(3) Ground returns and machine grounding. (i) Ground return cables shall have current-carrying capacity equal to or exceeding the total maximum output capacities of the welding or cutting units served.

(ii) Structures or pipe lines, other than those containing gases or flammable liquids or conduits containing electrical circuits, may be used in the ground return circuit if their current-carrying capacity equals that required by paragraph (e)(3)(i) of this section.

(iii) Structures or pipelines forming a temporary ground return circuit shall have electrical contact at all joints. Arcs, sparks or heat at any point in the circuit shall cause rejection as a ground circuit.

(iv) Structures or pipelines acting continuously as ground return circuits shall have joints bonded and maintained to ensure that no electrolysis or fire hazards exists.

(v) Arc welding and cutting machine frames shall be grounded, either through a third wire in the cable containing the circuit coductor or through a separate wire at the source of the current. Ground circuits shall have resistance low enough to permit sufficient current to flow to cause the fuse or circuit breaker to interrupt the current.

(vi) Ground connections shall be mechanically and electrically adequate to carry the current.

(4) When electrode holders are left unattended, electrodes shall be removed and holders placed to prevent employee injury.

(5) Hot electrode holders shall not be dipped in water.

(6) The employer shall ensure that when arc welders or cutters leave or stop work or when machines are moved, the power supply switch is kept in the open position.

(7) Arc welding or cutting equipment having a functional defect shall not be used.

(8)(i) Arc welding and cutting operations shall be separated from other operations by shields, screens, or curtains to protect employees in the vicinity from the direct rays and sparks of the arc.

(ii) Employees in areas not protected from the arc by screening shall be protected by appropriate filter lenses in accordance with § 1918a.91. When welders are exposed to their own arc or to each other's arc, they shall wear filter lenses complying with the requirements of § 1918a.91.

(9) The control apparatus of arc welding machines shall be enclosed, except for operating wheels, levers, and handles.

(10) Input power terminals, top change devices and live metal parts connected to input circuits shall be enclosed and accessible only by means of insulated tools.

(11) When arc welding is performed in wet or high-humidity conditions, employees shall use additional protection, such as rubber pads or boots, against electric shock.

(f) *Ventilation and employee protection in welding, cutting and heating.* (1) Mechanical ventilation requirements. The employer shall ensure that general mechanical ventilation or local exhaust systems meet the following requirements:

(i) General mechanical ventilation shall maintain vapors, fumes and smoke below a hazardous level.

(ii) Local exhaust ventilation shall consist of movable hoods positioned close to the work and shall be of such capacity and arrangement as to keep breathing zone concentrations below hazardous levels.

(iii) Exhausts from working spaces shall be discharged into the open air, clear of intake air sources;

(iv) Replacement air shall be clean and respirable; and

(v) Oxygen shall not be used for ventilation, cooling or cleaning clothing or work areas.

(2) Hot work in confined spaces. Except as specified in paragraphs (f)(3)(ii) and (f)(3)(iii) of this section, when hot work is performed in a cofined space the employer shall ensure that:

(i) General mechanical or local exhaust ventilation meeting the requirements of paragraph (f)(1) of this section is provided; or

(ii) Employees in the space wear supplied air respirators in accordance with § 1918a.92 and a standby on the outside maintains communication with employees inside the space and is equipped and prepared to provide emergency aid.

(3) Welding, cutting or heating of toxic metals. (i) In confined or enclosed spaces, hot work involving the following metals shall only be performed with general mechanical or local exhaust ventilation that ensures that employees are not exposed to hazardous levels of fumes:

(A) Lead base metals;

(B) Cadmium-bearing filler materials; and

(C) Chromium-bearing metals or metals coated with chromium-bearing materials.

(ii) In confined or enclosed spaces, hot work involving the following metals shall only be performed with local exhaust ventilation meeting the requirements of paragraph (f)(1) of this section or by employees wearing supplied air respirators in accordance with § 1918a.92;

(A) Zinc-bearing base or filler metals or metals coated with zinc-bearing materials;

(B) Metals cotaining lead other than as an impurity, or coated with lead-bearing materials;

(C) Cadmium-bearing or cadmium-coated base metals; and

(D) Metals coated with mercury-bearing materials.

(iii) The employer shall ensure that employees performing hot work in confined or enclosed spaces involving beryllium-containing base or filler metals are protected by local exhaust ventilation and wear supplied air respirators or self-contained breathing apparatus, in accordance with the requirements of § 1918a.92.

(iv) The employer shall ensure that employees performing hot work in the open air that involves any of the metals listed in paragraphs (f)(3)(i) and (f)(3)(ii) of this section are protected by respirators in accordance with the requirements of § 1918a.92, and those working on beryllium-containing base or filler metals are protected by supplied air respirators, in accordance with the requirements of § 1918a.92.

(v) The employer shall ensure that any employee exposed to the same atmosphere as the welder or burner is protected by the same type of respiratory and other protective equipment as that worn by the welder or burner.

(4) Insert-gas metal-arc welding. The employer shall ensure that employees do not engage in and are not exposed to the inert-gas metal-arc welding process unless the following precautions are taken:

(i) Chlorinated solvents shall not be used within 200 feet (61 m) of the exposed arc. Surfaces prepared with chlorinated solvents shall be thoroughly dry before welding is performed on them.

(ii) Employees in areas not protected from the arc by screening shall be protected by appropriate filter lenses in accordance with the requirements of § 1918a.91. When welders are exposed to their own arc or to each other's arc, filter lenses complying with the requirements of § 1918a.91 shall be worn

to protect against flashes and radiant energy.

(iii) Employees exposed to radiation shall have their skin covered completely to prevent ultraviolet burns and damage. Helmets and hand shields shall not have leaks, openings or highly reflective surfaces.

(iv) Inert-gas metal-arc welding on stainless steel shall not be performed unless exposed employees are protected either by local exhaust ventilation or by wearing supplied air respirators.

(g) *Welding, cutting and heating on preservative coatings.* (1) Before hot work is commenced on surfaces covered by a preservative coating of unknown flammability, the employer shall ensure that a test is made by a designated person to determine the coating's flammability. Preservative coatings shall be considered highly flammable when scrapings burn with extreme rapidity.

(2) Appropriate precautions shall be taken to prevent ignition of highly flammable hardened preservative coatings. Highly flammable coatings shall be stripped from the area to be heated. An uncoiled fire hose with fog nozzle, under pressure, shall be immediately available in the hot work area.

(3) Surfaces covered with preservative coatings shall be stripped for at least 4 inches (10.2 cm) from the area of heat application or employees shall be protected by supplied air respirators in accordance with the requirements of § 1918a.92.

(h) *Protection against radiant energy.* (1) The employer shall ensure that employees are protected from radiant energy eye hazards by spectacles, cup goggles, helmets, hand shields or face shields with filter lenses complying with the requirements of § 1918a.91 and this paragraph.

(2) Filter lenses shall have an appropriate shade number, as indicated in Table G–1, for the work performed. Variations of one or two shade numbers are permissible to suit individual preferences.

(3) If filter lenses are used in goggles worn under the helmet, the shade number of the lens in the helmet may be reduced if the sum of the shade numbers of both lenses equals the value shown in Table G–1 for the operation.

Table G–1.—*Filter Lenses for Protection Against Radiant Energy*

Operation	Shade No.
Soldering	2.
Torch Brazing	3 or 4.
Light cutting, up to 1 inch	3 or 4.
Medium cutting, 1–6 inches	4 or 5.
Heavy cutting, over 6 inches	5 or 6.
Light gas welding, up to ⅛ inch	4 or 5.
Medium gas welding ⅛–½ inch	5 or 6.
Heavy gas welding, over ½ inch	6 or 8.
Shielded Metal-Arc Welding 1/16- to 5/32- inch electrodes	10.
Inert-gas Metal-Arc Welding (Nonferrous) 1/16- to 5/32- inch electrodes	11.
Inert-gas Metal Arc Welding (Ferrous) 1/16- to 5/32- inch electrodes	12.
Shielded Metal-Arc Welding:	
5/32- to ¼- inch eletrodes	12.
5/16- and ⅜- inch electrodes	14.
Atomic Hydrogen Welding	10 to 14.
Carbon Arc Welding	14.

Table G–1.—*Filter Lenses for Protection Against Radiant Energy*—Continued

Operation	Shade No.
Medium gas welding ⅛–½ inch	5 or 6.
Heavy gas welding, over ½ inch	6 or 8.
Shielded Metal-Arc Welding 1/16- to 5/32- inch electrodes	10.
Inert-gas Metal-Arc Welding (Nonferrous) 1/16- to 5/32- inch electrodes	11.
Inert-gas Metal Arc Welding (Ferrous) 1/16- to 5/32- inch electrodes	12.
Shielded Metal-Arc Welding:	
5/32- to ¼- inch eletrodes	12.
5/16- and ⅜- inch electrodes	14.
Atomic Hydrogen Welding	10 to 14.
Carbon Arc Welding	14.

§ 1918a.153 Spray painting

(a) *Scope.* This section covers painting operations connected with maintenance of structures, equipment and gear at the marine terminal and of transient equipment serviced at the terminal. It does not apply to overall painting of the terminal structures under construction, major repair or rebuilding of terminal structures,or portable spraying appartus not used regularly in the same location.

(b) *Definition.* "Spraying area" means any area where flammable vapors, mists or combustible residures, dusts or deposits may be present due to paint spraying operations.

"Spray booth" means a power-ventilated enclosure containing a flammable or combustible paint spraying operation and confining and limiting the escape of paint, vapor and residue by means of an exhaust system.

"Approved" means, for the purpose of this section, that the equipment has been approved for the specified use by an organization such as Factory Mutual Research Corporation or Underwriters Laboratories, Inc.

(c) *Spray painting requirements for indoor and outdoor spraying areas and booths.* (1) Shut-off valves. The employer shall ensure that containers or piping with attached hoses or flexible connections have shut-off valves closed at the connection when not in use.

(2) Pressure-relieving devices. Pumps used to transfer paint supplies shall have automatic pressure-relieving devices.

(3) Inspection before use. Hoses and couplings shall be inspected before use. Hoses showing deterioration, leakage or weakness in the carcass or at the couplings shall be removed from service.

(4) Electrical and other sources of ignition. (i) No open flame or spark producing equipment shall be within 20 feet (6 m) of a spraying area unless it is separated from the spraying area by a fire-retardant partition.

(ii) Hot surfaces shall not be located in spraying areas.

(iii) When combustible residues may accumulate on electrical installations, wiring shall be in rigid conduit or in boxes containing no taps, splices or connections.

(iv) Portable electric lights shall not be used during spraying operations. Lights used during cleaning or repairing operations shall be approved for the location in which they are used.

(5) Containers and piping systems. When transferring flammable or combustible liquids between containers, both containers shall be bonded and grounded.

(6) Operations and maintenance. (i) Spraying shall be performed only in designated spray booths or spraying areas.

(ii) Spraying areas shall be kept as free from combustible residue accumulations as practicable.

(iii) Residue scrapings, debris, rags, and waste shall be removed from the spraying area as they accumulate.

(7) Organic peroxides and other dual-component coatings. Spraying with organic peroxides and other dual-component coatings shall only be conducted in sprinkler-equipped spray booths.

(8) Storage of flammable and combustible liquids. The employer shall ensure that only the quantity of flammable or combusitble liquids required for the operation shall be allowed in the spraying area, and in no case shall the amount exceed a one-day supply.

(9) Smoking precautions. Smoking shall be prohibited and "No Smoking" signs shall be posted in spraying and paint storage areas.

(d) *Additional requirements for spraying areas and spray booths.* (1) The employer shall ensure that distribution or baffle plates are of noncombustible material and are removable or accessible for cleaning. They shall not be located in exhaust ducts.

(2) Any discarded filter shall be removed from the work area or placed in water.

(3) Filters shall not be used when the material being sprayed is highly susceptible to spontaneous heating and ignition.

(4) Filters shall be noncombustible or of an approved type. The same filter shall not be used when spraying with different coating materials if the combination of materials may spontaneously ignite.

(5) Spraying areas shall be mechanically ventilated for removal of flammable and combustible vapor and mist.

(6) Mechanical ventilation shall be in operation during spraying operations and long enough thereafter to exhaust hazardous vapor concentrations.

(7) Rotating fan elements shall be nonsparking or the casing shall consist of or be lined with nonsparking material.

(8) Piping systems conveying flammable or combustible liquids to the spraying booth or area shall be made of metal or bonded and grounded.

(9) Air exhausted from spray operations shall not contaminate makeup air or other ventilation intakes. Exhausted air shall not be recirculated unless it is first cleaned of any hazardous contaminants.

(10) Original closed containers, approved portable tanks, approved safety cans or a piping system shall be used to bring flammable or combustible liquids into spraying areas.

(11) If flammable or combustible liquids are supplied to spray nozzles by positive displacement pumps, the pump discharge line shall have a relief valve discharging either to a pump suction or detached location, or the line shall be equipped with a device to stop the prime mover when discharge pressure exceeds the system's safe operating pressure.

(12) Wiring, motors and equipment in a spray booth shall be of approved explosion-proof type for Class I, group D locations and conform to Subpart S of Part 1910 of this Chapter for Class I, Division 1, Hazardous Locations. Wiring, motors and equipment within 20 feet (6 m) of any interior spraying area and not separated by vapor-tight partitions shall not produce sparks during operation and shall otherwise conform to the requirements of Subpart S of Part 1910 of this Chapter for Class I, Division 2, Hazardous Locations.

(13) Outside electrical lights within 10 feet (3 m) of spraying areas and not separated from the areas by partitions shall be enclosed and protected from damage.

(e) *Additional requirements for spray booths.* (1) The employer shall ensure that spray booths are substantially constructed of noncombustible material and have smooth interior surfaces. Spray booth floors shall be covered with noncombustible material. As an aid to cleaning, paper may be used to cover the floor during painting operations if it is removed after the painting is completed.

(2) Spray booths shall be separated from other operations by at least 3 feet (0.91 m) or by fire-retardant partitions or walls.

(3) A space of at least 3 feet (0.91 m) on all sides of the spray booth shall be maintained free of storage or combustible materials.

(4) Metal parts of spray booths, exhaust ducts, piping and airless high-pressure spray guns and conductive objects being sprayed shall be grounded.

(5) Electric motors driving exhaust fans shall not be located inside booths or ducts.

(6) Belts shall not enter ducts or booths unless the belts are completely enclosed.

(7) Exhaust ducts shall be made of steel, shall have sufficient access doors to permit cleaning, and shall have a minimum clearance of 18 inches (0.46 m) from combustible materials. Any installed dampers shall be fully opened when the ventilating system is operating.

(8) Spray booths shall not be alternately used to spray different types of coating materials if the combination of the materials may spontaneously ignite unless deposits of the first material are removed from the booth and from exhaust ducts before spraying of the second material begins.

§ 1918a.154 Compressed air.

The employer shall ensure that employees are protected by chip guarding and personal protective equipment complying with the provisions of Subpart E of this Part during cleaning with compressed air. Compressed air used for cleaning shall not exceed a pressure of 30 psi. Compressed air shall not be used to clean employees.

§ 1918a.155 Air receivers.

(a) *Application.* This section applies to compressed air receivers and equipment used for operations such as cleaning, drilling, hoisting and chipping. It does not apply to equipment used to convey materials or in such transportation applications as railways, vehicles or cranes.

(b) *Gauges and valves.* (1) The employer shall ensure that air receivers are equipped with indicating pressure gauges and spring-loaded safety valves. Safety valves shall prevent receiver pressure from exceeding 110 percent of the maximum allowable working pressure.

(2) No other valves shall be placed between air receivers and their safety valves.

§ 1918a.156 Fuel handling and storage.

(a) *Applicability.* This section applies to those matters not covered by the Coast Guard requirements in 33 CFR Part 126 and 46 CFR Part 146.

(b) *Liquid fuel.* (1) The employer shall ensure that only designated persons conduct fueling operations. In case of spillage, filler caps shall be replaced and spillage disposed of before engines are started.

(2) Engines shall be stopped and operators shall not be on the equipment during refueling operations.

(3) Smoking and open flames are prohibited in areas used for fueling, fuel storage or enclosed storage of equipment containing fuel.

(4) Equipment shall be refueled only at designated locations.

(5) Liquid fuels not handled by pump shall be handled and transported only in portable containers or equivalent means designed for that purpose. Portable containers shall be metal, have tight closures with screw or spring covers and shall be equipped with spouts or other means to allow pouring without spilling. Leaking containers shall not be used.

(6) Flammable liquids may be dispensed in the open from a tank or from other vehicles equipped for delivering fuel to another vehicle if:

(i) Dispensing hoses do not exceed 50 feet (15.2 m) in length; and

(ii) Any powered dispensing nozzles used are of the automatic-closing type without latch-open devices.

(7) Liquid fuel dispensing devices shall be provided with an easily accessible and clearly identified shut-off device, such as a switch or circuit breaker, to shut off the power in an emergency.

(8) Liquid fuel dispensing devices, such as pumps, shall be mounted either on a concrete island or be otherwise protected against collision damage.

(c) *Liquefied gas fuels.* (1) Fueling locations. (i) The employer shall ensure that liquefied gas powered equipment is fueled only at designated locations.

(ii) Equipment with permanently mounted fuel containers shall be charged outdoors.

(iii) Equipment shall not be fueled or stored near underground entrances, elevator shafts or other places where gas or fumes might accumulate.

(2) Fuel containers. (i) When removable fuel containers are used, the escape of fuel when containers are exchanged shall be minimized by:

(A) Automatic quick-closing (closing in both directions when uncoupled) in fuel lines; or

(B) Closing fuel container valves and allowing engines to run until residual fuel is exhausted.

(ii) Pressure-relief valve openings shall be in continuous contact with the vapor space (top) of the cylinder.

(iii) Fuel containers shall be secured to prevent their being jarred loose, slipping or rotating.

(iv) Containers shall be located to prevent damage to the container. If

located within a compartment, that compartment shall be vented. Containers near the engine or exhaust system shall be shielded against direct heat radiation.

(v) Container installation shall provide the container with at least the vehicle's road clearance under maximum spring deflection, which shall be to the bottom of the container or to the lowest fitting on the container or housing, whichever is lower.

(vi) Valves and connections shall be protected from contact damage. Permanent protection shall be provided for fittings on removable containers.

(vii) Defective containers shall be removed from service.

(3) Fueling operations. (i) To the extent applicable, fueling operations for liquefied gas fuels shall comply with paragraph (b) of this section.

(ii) Using matches or flames to check for leaks is prohibited.

(iii) Containers shall be examined before recharging and again before reuse for the following:

(A) Dents, scrapes and gouges of pressure vessels;

(B) Damage to valves and liquid level gauges;

(C) Debris in relief valves;

(D) Leakage at valves or connections; and

(E) Deterioration or loss of flexible seals in filling or servicing connections.

(4) Fuel storage. (i) Stored fuel containers shall be located to minimize exposure to excessive temperatures and physical damage.

(ii) Containers shall not be stored near inside exits, stairways or areas normally used or intended for egress.

(iii) Outlet valves of containers in storage or transport shall be closed. Relief valves shall connect with vapor spaces.

(5) Vehicle storage and servicing. (i) Liquefied gas fueled vehicles may be stored or serviced inside garages or shops only if there are no fuel system leaks.

(ii) Liquefied gas fueled vehicles under repair shall have container shutoff valves closed unless engine operation is necessary for repairs.

(iii) Liquefied gas fueled vehicles shall not be parked near open flames, sources of ignition or unventilated open pits.

§ 1918a.157 Battery charging and changing.

(a) The employer shall ensure that only designated persons change or charge batteries.

(b) Battery charging and changing shall be performed only in areas designated by the employer.

(c) Smoking and other ignition sources are prohibited in charging areas.

(d) Filler caps shall be in place when batteries are being moved.

(e) Parking brakes shall be applied before batteries are charged or changed.

(f) When a jumper battery is connected to a battery in a vehicle, the ground lead shall connect to ground away from the vehicle's battery. Ignition, lights and accessories on the vehicle shall be turned off before connections are made.

(g) Batteries shall be free of corrosion buildup and cap vent holes shall be open.

(h) Ventilation shall be provided during charging.

(i) Facilites for flushing the eyes, body and work area with water shall be provided where electrolyte is handled except that this requirement does not apply when employees are only checking battery electrolyte levels or adding water.

(j) Carboy tilters or siphons shall be used to handle electrolyte in large containers.

(k) Battery handling equipment which could contact battery terminals or cell connectors shall be insulated or otherwise protected.

(l) Metallic objects shall not be placed on uncovered batteries.

(m) When charging batteries, the vent caps shall be in place.

(n) Chargers shall be turned off when leads are being connected or disconnected.

(o) Installed batteries shall be secured to avoid physical or electrical contact with compartment walls or components.

§ 1918a.158 Prohibited operations.

(a) The employer shall ensure that spray painting and abrasive blasting operations are not conducted in the vicinity of cargo handling operations.

(b) Welding and burning operations shall not be conducted in the vicinity of cargo handling operations unless such hot work is part of the cargo operation.

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Part V

Department of Labor

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor specify, in accordance with applicable law and on the basis of information available to the Department of Labor from its study of local wage conditions and from other sources, the basic hourly wage rates and fringe benefit payments which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of the character and in the localities specified therein.

The determinations in these decisions of such prevailing rates and fringe benefits have been made 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 1.1 (including the statutes listed at 36 FR 306 following Secretary of Labor's order No. 24–70) containing provisions for the payment of wages which are dependent upon determination by the Secretary of Labor under the Davis-Bacon Act; and pursuant to the provisions of part 1 of subtitle A of title 29 of Code of Federal Regulations, Procedure for Predetermination of Wage Rates (37 FR 21138) and of Secretary of Labor's Orders 12–71 and 15–71 (36 FR 8755, 8756). 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 procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in effective date as prescribed in that section, because the necessity to issue construction industry wage determination frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions are effective from their date of publication in the **Federal Register** without limitation as to time and 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 subsequent to its publication date shall 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 contained therein shall be the minimum paid under such contract by contractors and subcontractors on the work.

Modifications and Supersedeas Decisions to General Wage Determination Decisions

Modifications and supersedeas decisions to general wage determination decisions are based upon information obtained concerning changes in prevailing hourly wage rates and fringe benefit payments since the decisions were issued.

The determinations of prevailing rates and fringe benefits made in the modifications and supersedeas decisions have been made 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 1.1 (including the statutes listed at 36 FR 306 following Secretary of Labor's Order No. 24–70) containing provisions for the payment of wages which are dependent upon determination by the Secretary of Labor under the Davis-Bacon Act; and pursuant to the provisions of part 1 of subtitle A of title 29 of Code of Federal Regulations, Procedure for Predetermination of Wage Rates (37 FR 21138) and of Secretary of Labor's orders 13–71 and 15–71 (36 FR 8755, 8756). The prevailing rates and fringe benefits determined in foregoing general wage determination decisions, as hereby modified, and/or superseded 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 in contract work of the character and in the localities described therein.

Modifications and supersedeas decisions are effective from their date of publication in the **Federal Register** without limitation as to time and are to be used in accordance with the provisions of 29 CFR Parts 1 and 5.

Any person, organization, or governmental agency having an interest in the wages determined as prevailing is encouraged to submit wage rate 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, Office of Government Contract Wage Standards, Division of Government Contract Wage Determinations, Washington, D.C. 20210. The cause for not utilizing the rulemaking procedures prescribed in 5 U.S.C. 553 has been set forth in the original General Determination Decision.

New General Wage Determination Decisions

Maryland: MD81–3002

Modifications to General Wage Determination Decisions

The numbers of the decisions being modified and their dates of publication in the **Federal Register** are listed with each State.

Arkansas:	
AR80–4079	Nov. 7, 1980.
AR80–4080	Oct. 31, 1980.
AR80–4081	Nov. 7, 1980.
AR80–4082	Nov. 7, 1980.
AR80–4083	Oct. 31, 1980.
Massachusetts: MA80–3064	Oct. 31, 1980.
Minnesota: MN80–2068	Dec. 19, 1980.
New York: NY80–3064	Apr. 25, 1980.

Supersedeas Decisions to General Wage Determination Decisions

The numbers of the decisions being superseded and their dates of publication in the **Federal Register** are listed with each State. Supersedeas decision numbers are in parentheses following the numbers of the decisions being superseded.

Maine: ME80–2005 (ME81–3008)	Feb. 22, 1980.
Vermont:	
VT78–2091 (VT81–3007)	Dec. 10, 1978.
VT78–2070 (VT81–3007)	Aug. 11, 1978.

Cancellation of General Wage Determination Decisions

None.

Signed at Washington, D.C. This 9th day of January 1981.

Dorothy P. Come,

Assistant Administrator, Wage and Hour Division.

BILLING CODE 4510-27-M

NEW DECISION

STATE: Maryland COUNTIES: Baltimore, Baltimore City

DECISION NO.: MD81-3002 DATE: Date of Publication

DESCRIPTION OF WORK: Residential Construction consisting of single family houses and garden type apartments up to and including 4 stories

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
AIR CONDITIONING MECHANIC	6.00				
BRICKLAYERS	9.27				
CARPENTERS	6.78				
CARPET MECHANIC	6.00				
CEMENT MASONS	6.82				
DRY WALL FINISHERS	5.76				
DRY WALL HANGERS	6.50				
ELECTRICIANS	6.23				
INSULATION MECHANICS	7.16				
LABORERS:					
Unskilled	4.71				
Mason Tenders	5.00				
Pipelayers	4.75				
PAINTERS, BRUSH	5.77				
PLUMBERS	7.00				
ROOFERS	6.28				
SHEET METAL WORKERS	5.61				
SOFT FLOOR LAYERS	7.00				
TILE SETTERS	6.79				
TRUCK DRIVERS	5.25				
POWER EQUIPMENT OPERATORS:					
Backhoe	6.03				
Bulldozer	7.50				
Grader	5.93				
Loader	6.11				
Scraper	7.00				

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5 (a)(1)(ii)).

MODIFICATIONS P. 1

DECISION #AR80-4079-Mod. #3
45FR74344-November 7, 1980
Garland, Hot Springs and Clark Counties, Arkansas

CHANGE:	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
BRICKLAYERS-STONEMASONS:					
Garland & Clark Counties	$11.50		.50		
Hot Springs	11.25		.55		.04
IRONWORKERS	11.55	.60	1.05		.06
PAINTERS:					
Brush & roller	8.00				
Paperhanging	8.50				
Sheetrock (tape and float only)	8.50				
Stage and steel	10.00				
Spray & sandblasting	11.25				
Painters operating any kind of taping or floating machine	11.75				
PLUMBERS-PIPEFITTERS:					
ZONE-A	12.20	.90	.60		.10
ZONE-B	13.25	.90	.60		.10
TILE LAYERS:					
Garland & Clark Counties	11.50		.50		

DECISION #AR80-4080-Mod. #4
45FR72439-October 31, 1980
Jefferson County, Arkansas

CHANGE:					
PAINTERS:					
Painters, paperhangers & steam cleaners, sheet rock finishers & wall cover hangers	9.55		.50		.03
Spray gun operators and sand blasterers	10.15		.50		.03
All skelton steel and all work on stages, structural steel over 30 feet high	9.80		.50		.03
PLASTERERS	11.50		.35		.04
MARBLE, TILE & TERRAZZO WORKERS	10.00				

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
DECISION #AR80-4081-Mod. #2					
45FR74342-November 7, 1980					
Sebastian, Crawford and Washington Counties, Arkansas					
CHANGE:					
SEBASTIAN & CRAWFORD COS.					
Bricklayers-Stonemasons	$11.05	.85	.35		.14
Plasterers	11.50		.35		.04
Plumbers-Steamfitters	12.56	.55	.55		.04
Sprinkler fitters	12.53	.85	1.20		.08
DECISION #AR80-4082-Mod. #3					
45FR74345-November 7, 1980					
Union & Ouachita Counties, Arkansas					
CHANGE:					
ELECTRICAL CONTRACTS					
$20,000.00 or less:					
Electricians - Linemen	13.04		3%		1/4%
Cable splicers	13.34		3%		1/4%
ELECTRICAL CONTRACTS OVER $20,000.00:					
Electricians - Linemen	13.83		3%		1/4%
Cable splicers	14.13		3%		1/4%
PLASTERERS	11.50		.35		.04
DECISION #AR80-4083-Mod. #3					
45FR72438-October 31, 1980					
Pulaski County, Arkansas					
CHANGE:					
PAINTERS:					
Painters, paperhangers and steam cleaners, sheetrock finishers and wall cover hangers	9.55		.50		.03
Spray gun operator & sand blasterers	10.15		.50		.03
All skeleton steel and all work on stages, structural steel over 30 feet high	9.80		.50		.03
PLASTERERS	11.50		.35		.04
MARBLE, TILE & TERRAZZO WORKERS	10.00				

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
DECISION NO. MA80-3064 - MOD. #1					
(45 FR 72442 - October 31, 1980)					
Barnstable, Bristol, Dukes, Essex, Middlesex, Norfolk, Plymouth, Suffolk and Nantucket Counties, Massachusetts					
Change:					
CARPENTERS: Soft Floor Layers					
MIDDLESEX (Ashby, Ayer, Lunenburg, Shirley, Lancaster, Harvard, Groton, Pepperell, Townsend, W. Groton, and W. Townsend	12.50	.75	1.00		.07
ESSEX (Methuen, Lawrence, Andover, N. Andover)	12.10	1.00	1.00		.05
ESSEX (Ipswich, Essex, Gloucester, Rockport, Topsfield, Hamilton, Wenham, Middleton, Danvers, Beverly, Manchester, Peabody, Salem, Marblehead)	11.50	1.00	1.00		.03
SUFFOLK, MIDDLESEX (Remainder of County): Norfolk (all except Avon, Holbrook, Randolph and Stoughton); ESSEX (Remainder of County); PLYMOUTH (Duxbury, Hanover, Hingham, Hull, Marshfield, Norwell, Pembroke, Rockland and Scituate); Bristol (Attleboro, N. Attleboro, & Seekonk)	12.25	1.00	1.00		.07

DECISION NO. MA80-3064 - CONT'D	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ELECTRICIANS:					
MIDDLESEX (Bedford, Billerica, Boxboro, Burlington, Carlisle, Chelmsford, Dracut, Dunstable, Littleton, Lowell, Tewksbury, Tyngsboro, Westford, Wilmington)	12.35	1.15	1.10+3%		.02
MIDDLESEX (Ashby, Ayer, Ft. Devens, Groton, Pepperell, Shirley, Townsend)	13.20	.75	.70+3%		.02
SUFFOLK CO.; MIDDLESEX (Remainder of County); NORFOLK (all except Avon, Holbrook, Randolph, Stoughton and Plainville); ESSEX (Lynn, Lynnfield, Nahant, Saugus, Swampscott)					
PLYMOUTH (Hingham, Hull)	14.68	1.05	1.80+3%		.10
ESSEX (Remainder of County)					
Contracts over $30,000	12.65	.92	.31+3%		.02
Contracts $30,000 or less	11.75	.92	.31+3%		.02
IRONWORKERS:					
MIDDLESEX (Sherborn, Natick, Framingham, Weston, Newton, Arlington, Belmont, Cambridge, Somerville, Waltham, Medford, Malden, Stoneham, Woburn, Winchester, Burlington, Bedford, Lincoln, Lexington, Sudburg, Maynard, Concord, Everett	13.25	1.15	2.05		.10
MILLWRIGHTS	13.65	1.00	1.00		.10

DECISION NO. MA80-3064 - CONT'D	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
PAINTERS:					
MIDDLESEX (Ashby, Townsend, Pepperell, Groton, Shirley, and Ayer)					
Brush	12.73	.90	1.65		.04
Spray/Sandblast	13.73	.90	1.65		.04
Steel	14.85	.90	1.65		.04
Repaint	10.82	.90	1.65		.04
Residential	9.55	.90	1.65		.04
MIDDLESEX (Boxboro, Acton, Concord, Stow, Maynard, Lincoln, Lexington, Hudson, Sudbury, Wayland, Weston, Waltham, Watertown, Newton, Marlboro, Framingham, Natick, Ashland, Sherborn, Hopkinton, Holliston); NORFOLK (Dover, Medfield, Medway, Millis, Needham, Wellesley)					
New Construction:					
Brush	11.40	.85	.80		.03
Steel	12.65	.85	.80		.03
Spray and Sand Blast	12.40	.85	.80		.03
Repaint and Residential:					
Brush	10.85	.85	.80		.03
Steel	12.10	.85	.80		.03
Spray and Sand Blast	13.40	.85	.80		.03
SUFFOLK, ESSEX, PLYMOUTH (Remainder of County); BRISTOL (Remainder of Co.); MIDDLESEX (Remainder of County); NORFOLK (Remainder of County)					
New Construction:					
Brush/Taper	13.41	.82	1.40		.04
Spray/Sandblast	14.41	.82	1.40		.04
Steel	15.82	.82	1.40		.04

DECISION NO. MA80-3064 - CONT'D	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
PAINTERS: CONT'D					
Repaint:					
Brush/Taper	12.07	.82	1.40		.04
Spray/Sandblast	13.07	.82	1.40		.04
Steel	15.82	.82	1.40		.04
PILEDRIVERMEN	13.15	1.00	1.00		
PLASTERERS:					
SUFFOLK, MIDDLESEX (Arlington, Cambridge, Everett, Malden, Melford, Melrose, Somerville); NORFOLK (Brookline, Milton); PLYMOUTH (Norwell only)	12.55	.85	1.68		.02
PLUMBERS AND STEAMFITTERS:					
BARNSTABLE; BRISTOL (Acushnet, Dartmouth, Fairhaven, Fall River, Freetown, New Bedford, N. & S. Dartmouth, Somerset, Swandea, Westport, and Seeknonk) PLYMOUTH (Marion, Mattapoisett, Rochester, and Wareham); DUKES, NANTUCKET	12.54	1.05	1.73		.20
Residential	11.29	1.05	1.73		.20
PLUMBERS AND PIPEFITTERS:					
MIDDLESEX (Ashland, Belmont, Concord, Framington, Holliston, Hopkington, Lexington, Lincoln, Marlboro, Maynard, Natick, Sherborn, Sudbury, Stow, Waltham, Wayland, Weston, Hudson); NORFOLK (Medway, Medfield, Dover Wellsley)	15.07	1.30	1.08		.05

DECISION NO. MA80-3064 - CONCLUDED	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
PLUMBERS AND PIPEFITTERS: CONT'D					
SUFFOLK, MIDDLESEX (Remainder of County); NORFOLK (except Avon, Holbrook, Randolph, Stoughton, Dover, Medfield, Medway, Wellesley); ESSEX (Lynn, Lynnfield, Nahant, Saugus, Swampscott); PLYMOUTH (Hingham, Hull, Scituate)					
PLUMBERS	15.75	1.02	1.48		.08
PIPEFITTERS	15.61	.94	1.45		.07
PLYMOUTH (Remainder of Co.); BRISTOL (Remainder of County); NORFOLK (Avon, Holbrook, Randolph, Stoughton)	13.60	.95	.80		.05
ROOFERS:					
BARNSTABLE CO., PLYMOUTH (Carver, Lakeville, Marion, Mattapoisett, Middleboro, Rochester, Wareham and Hingham); BRISTOL (Seekonk, Rehoboth, Dighton, Berkley, Swansea, Somerset, Fall River, Freetown, Westport, Dartmouth, New Bedford, Achushnet, Fairham); DUKES; NANTUCKET	10.20	1.00	.55		
SUFFOLK, MIDDLESEX, NORFOLK, ESSEX (Remainder of Co.); BRISTOL (Remainder of Co.)					
Journeyman	12.45	.90	1.85		.17
Pitch Work	13.45	.90	1.85		.17

DECISION # MN80-2088 Mod # 1
(45 FR 83810 December 19,1980)
COUNTIES: Becker, Clay, Cass, Hubbard, Ottertail, Todd, Wadena and Wilkin Cos. Minnesota

OMIT:
Clay County - Heavy Construction only

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.

DECISION NO. NY80-3036 - Mod. #3
(45 FR 28044 - April 25, 1980)
Onondaga County, New York

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Change:					
Boilermakers	14.63	1.275	10%		.03
Electricians					
Remainder of County					
Electricians	14.30	.87	3%+1.10		.07
Cable Splicer	15.30	.87	3%+1.10		.07
Painters					
Boatswain Chair	12.12	.80	.88		.05
Bridge	12.57	.80	.88		.05
Swing	12.02	.80	.88		.05
Brush, Roller, & Wallcovering	11.37	.80	.88		.05
Structural Steel	11.97	.80	.88		.05
Sandblasting	12.22	.80	.88		.05
Spray, Epoxy	11.87	.80	.88		.05
Taping	11.62	.80	.88		.05
Steamfitters	13.145	1.00	1.55		.025

DECISION NO. NY80-3036 - Mod. #3 Cont'd

LINE CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Electrical Overhead & Underground Distrubution Work					
Journeyman Lineman & Technician	11.60	1.40	3%+1.00	a	
Cable Splicer	15.32	1.40	3%+1.00	a	
Groundman Digging Machine Operator, Groundman Dynamite Man	10.465	1.40	3%+1.00	a	
Groundman Mobile Equipment Operator, Mechanic First Class, Ground Truck Driver	9.33	1.40	3%+1.00	a	
Groundman Truck Driver (Tractor Trailer)	9.8975	1.40	3%+1.00	a	
Driver Mechanic, Groundman-Experienced	8.2621	1.40	3%+1.00	a	
All Overhead Transmission Line Work and Lighting for Athletic Fields					
Journeyman Lineman & Technician	13.25	1.40	3%+1.00	a	
Groundman Digging Machine Operator, Groundman Dynamite Man	11.95	1.40	3%+1.00	a	
Groundman Mobile Equipment Operator, Mechanic First Class, Groundman Truck Driver	10.65	1.40	3%+1.00	a	
Groundman Truck Driver (Tractor Trailer Unit)	11.30	1.40	3%+1.00	a	
Driver Mechanic, Groundman-Experienced	10.00	1.40	3%+1.00	a	
Sub-Station, Switching Structures (when not part of the line), Electrical, Telephone or CATV Commercial Work, Street Lighting & Signal Systems					
Journeyman Lineman & Technician	13.95	1.40	3%+1.00	a	
Cable Splicer	15.32	1.40	3%+1.00	a	
Groundman Digging Machine Operator, Groundman Dynamite Man	12.58	1.40	3%+1.00	a	
Groundman Mobile Equipment Operator, Mechanic First Class, Groundman Truck Driver	11.21	1.40	3%+1.00	a	
Groundman Truck Driver (Tractor Trailer Unit)	11.895	1.40	3%+1.00	a	
Driver Mechanic, Groundman-Experienced	10.525	1.40	3%+1.00	a	

DECISION NO. NY80-3036 - Mod. #3 Cont'd

LINE CONSTRUCTION CONT'D	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
All Pipe type Cable Installations, Maintenance jobs or Projects					
Journeyman Lineman	13.95	1.40	3%+1.00	a	
Certified Lineman Welder	14.635	1.40	3%+1.00	a	
Cable Splicer	15.32	1.40	3%+1.00	a	
Groundman Equipment Operator	13.95	1.40	3%+1.00	a	
Groundman Truck Driver (Tractor Trailer Unit)	11.895	1.40	3%+1.00	a	
Groundman Truck Drivers	11.21	1.40	3%+1.00	a	
Groundman	10.525	1.40	3%+1.00	a	

FOOTNOTE:

a. Paid Holidays: New Year's Day, Washington's Birthday, Good Friday, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and Election Day for the President of the United States and Election Day for the Governor of New York State, provided the employee works the day before or the day after a holiday

SUPERSEDEAS DECISION

STATE: MAINE STATEWIDE
DECISION NO.: ME81-3008 DATE: DATE OF PUBLICATION
Supersedeas Decision No. ME80-2005, dated February 22, 1980, in 44 FR 12085
DESCRIPTION OF WORK: Highway Construction Projects excluding major bridges (for example, bascule, suspension and spandrel arch bridges; those bridging waters presently navigable or to be made navigable; and those involving marine construction in any degree); tunnels, building structures in rest area projects and railroad construction.

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CARPENTERS:					
Androscoggin County	4.75				
Aroostook County	5.51				
Cumberland County	5.26				
Kennebec County	5.48				
Knox County	5.31				
Lincoln County	5.42				
Oxford County	5.06				
Penobscot County	5.50				
Piscataquis County	5.55				
Sagadahoc County	5.38				
Somerset County	5.43				
Waldo County	5.39				
Washington County	5.43				
CEMENT MASONS/CEMENT FINISHER:					
Androscoggin, Aroostook, Cumberland, Kennebec, Oxford, Penobscot, Piscataquis, Sagadahoc, Somerset, Waldo, Washington and York Counties	5.53				
ELECTRICIANS:					
Aroostook County	5.25				
Cumberland, Kennebec, Lincoln, Sagadahoc and Waldo Counties	7.58				
Penobscot County	7.52				
Piscataquis and Washington Cos.	7.06				
York County	7.69				

DECISION NO. ME81-3008

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
IRONWORKERS:					
Cumberland County	5.89				
Kennebec County	6.25				
IRONWORKERS:					
REINFORCING:					
Aroostook County	5.00				
Knox, Penobscot, Oxford, Waldo & York Cos.	4.18				
Piscataquis & Washington Cos.	5.00				
Sagadahoc County	5.46				
STRUCTURAL:					
Lincoln, Sagadahoc and Waldo Cos.	6.25				
Penobscot County	4.65				
Piscataquis County	5.59				
Washington County	5.53				
LABORERS:					
ASPHALT RAKERS/WHEELMAN:					
Androscoggin, Knox, Penobscot, Piscataquis & Washington Cos.	5.50				
Aroostook County	5.39				
Cumberland County	6.05				
Franklin County	5.38				
Hancock County	3.75				
Kennebec County	4.90				
Lincoln County	5.39				
Oxford County	5.10				
Sagadahoc County	5.51				
Somerset County	5.19				
Waldo County	5.24				
POWER TOOL OPERATOR:					
Aroostook, Piscataquis & Washington Cos.	4.50				
Kennebec County	4.00				
Lincoln County	4.75				
Sagadahoc County	4.67				
Waldo County	5.03				

DECISION NO. ME81-3008

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
LABORERS (Cont'd):					
BLASTER, POWDERMEN:					
Aroostook, Piscataquis & Washington Cos.	4.50				
CHAIN SAW OPERATORS:					
Aroostook, Kennebec, Hancock, Knox, Penobscot, Piscataquis, Waldo, Washington & York Cos.	4.00				
DRILLERS, WAGON DRILL:					
Piscataquis County	5.39				
Waldo County	5.36				
Washington County	5.00				
LABORERS:					
Androscoggin County	3.79				
Aroostook County	4.00				
Cumberland County	3.93				
Franklin County	4.04				
Hancock County	3.25				
Kennebec County	3.50				
Knox County	3.74				
Lincoln County	4.03				
Oxford County	4.17				
Penobscot County	3.25				
Piscataquis County	3.95				
Sagadahoc County	3.98				
Somerset County	4.34				
Waldo County	3.92				
Washington County	3.89				
York County	4.39				
TRUCK DRIVERS:					
2 AXLE:					
Cumberland County	4.17				
Franklin County	4.10				
Penobscot County	3.60				
Knox County	3.50				
Lincoln County	4.06				
Oxford County	4.14				
Piscataquis County	4.45				
Sagadahoc County	4.15				
Somerset County	3.92				

DECISION NO. ME81-3008

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
TRUCK DRIVERS (Cont'd):					
3 AXLE:					
Cumberland County	4.75				
Knox, Penobscot & Somerset Cos.	4.10				
Lincoln County	4.18				
Oxford County	4.44				
Piscataquis County	4.48				
Sagadahoc County	4.39				
2 & 3 AXLE:					
Androscoggin & York Cos.	4.35				
Aroostook County	3.90				
Hancock & Waldo Cos.	4.10				
Kennebec County	4.03				
Washington County	4.47				
TRAILER DRIVER:					
Knox County	4.38				
Penobscot, Waldo & Washington Cos.	4.35				
SPECIAL EARTH MOVING EQUIPMENT:					
Androscoggin & Sagadahoc Cos.	4.75				
Aroostook, Hancock, Piscataquis & Washington Cos.	6.00				
Waldo County	5.83				
York County	7.00				
POWER EQUIPMENT OPERATORS:					
ASPHALT PAVERS:					
Androscoggin Cobnty	5.23				
Aroostook County	6.62				
Cumberland County	6.05				
Franklin County	6.65				
Hancock, Knox, Penobscot, Piscataquis, Waldo, Washington & York Cos.	6.62				
Kennebec County	5.60				
Lincoln County	5.72				
Oxford County	5.30				
Sagadahoc County	5.49				
Somerset County	5.69				

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POWER EQUIPMENT OPERATORS (Cont'd):	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
BACKHOE:					
Androscoggin County	6.23				
Aroostook County	6.52				
Cumberland County	5.90				
Franklin County	6.43				
Hancock County	6.31				
Kennebec County	5.58				
Knox & Lincoln Cos.	5.50				
Oxford County	6.00				
Penobscot County	6.66				
Piscataquis County	6.55				
Sagadahoc County	6.07				
Somerset County	6.32				
Waldo County	6.10				
Washington County	6.42				
York County	6.35				
BULLDOZER:					
Androscoggin County	6.30				
Aroostook County	6.95				
Cumberland County	6.75				
Franklin County	5.57				
Hancock County	5.00				
Kennebec & Lincoln Cos.	5.50				
Knox County	6.09				
Oxford & Somerset Cos.	6.00				
Penobscot & Piscataquis Cos.	6.40				
Sagadahoc County	6.39				
Waldo County	6.08				
Washington County	6.72				
York County	5.97				
CRANE/DRAGLINE:					
Androscoggin County	5.75				
Aroostook County	6.83				
Cumberland County	6.25				
Kennebec County	8.06				
Knox County	6.13				

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POWER EQUIPMENT OPERATORS (Cont'd):	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
CRANE/DRAGLINE (Cont'd):					
Lincoln County	7.40				
Oxford County	6.75				
Penobscot County	6.43				
Piscataquis County	6.80				
Sagadahoc County	6.94				
Waldo County	7.23				
Washington County	6.76				
CRUSHER SCREENING PLANT OPERATOR:					
Androscoggin County	5.35				
Aroostook & Piscataquis Cos.	5.33				
Hancock County	5.21				
Penobscot & Washington Cos.	5.36				
Sagadahoc County	5.23				
Waldo County	5.21				
York County	5.00				
FRONT END LOADERS:					
Androscoggin County	6.30				
Aroostook County	6.00				
Cumberland County	6.20				
Franklin County	5.83				
Hancock County	6.40				
Kennebec County	4.87				
Knox County	6.17				
Lincoln County	5.69				
Oxford County	6.00				
Penobscot County	6.40				
Piscataquis County	6.17				
Sagadahoc County	5.91				
Somerset County	5.50				
Waldo County	6.40				
Washington County	6.19				
York County	5.50				

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POWER EQUIPMENT OPERATORS (Cont'd):	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
GRADALL:					
Androscoggin County	6.30				
Aroostook County	7.00				
Cumberland County	6.75				
Hancock County	5.81				
Lincoln & Knox Cos.	7.35				
Penobscot County	8.35				
Piscataquis County	7.12				
Sagadahoc County	6.81				
Waldo County	6.82				
Washington County	6.92				
York County	6.30				
GRADER:					
Androscoggin & Cumberland Cos.	6.75				
Aroostook County	6.67				
Franklin County	7.34				
Hancock County	6.00				
Kennebec County	5.85				
Knox County	6.62				
Lincoln County	6.62				
Oxford County	6.00				
Penobscot County	6.40				
Piscataquis County	6.71				
Sagadahoc County	6.67				
Somerset & York Cos.	6.00				
Waldo & Washington Cos.	6.66				
HYDROSEEDER:					
Androscoggin County	4.25				
Aroostook & Piscataquis Washington Cos.	5.00				
Cumberland County	4.25				
Franklin County	4.25				
Kennebec County	4.75				
Knox & Lincoln Cos.	4.25				
Penobscot County	5.60				
Sagadahoc County	4.25				
Waldo County	4.70				
York County	4.00				

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POWER EQUIPMENT OPERATORS (Cont'd):	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
MECHANIC:					
Androscoggin County	5.63				
Aroostook County	5.50				
Kennebec County	5.25				
Knox County	5.95				
Lincoln County	5.77				
Oxford County	4.75				
Penobscot County	6.88				
Piscataquis County	6.04				
Sagadahoc County	5.43				
Somerset County	5.90				
Waldo County	6.26				
Washington County	6.08				
York County	5.12				
MULCHER:					
Androscoggin County	4.50				
Aroostook County	4.63				
Franklin County	4.00				
Hancock County	4.58				
Kennebec County	5.25				
Knox and Lincoln Cos.	4.50				
Penobscot and Piscataquis Cos.	4.75				
Sagadahoc & Waldo Cos.	4.50				
Washington County	4.69				
OILER GREASER:					
Androscoggin & Sagadahoc Cos.	4.45				
ROLLER, EMBANKMENT:					
Aroostook County	5.82				
Cumberland County	5.02				
Hancock County	5.00				
Knox, Lincoln & Piscataquis Cos.	5.82				
Oxford County	4.45				
Washington County	6.62				
York County	5.68				
ROLLER, PAVEMENT:					
Androscoggin, Cumberland & Kennebec Cos.	5.19				
Aroostook County	6.62				
Franklin County	5.05				
Hancock County	6.62				

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	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS (Cont'd):					
ROLLER, PAVEMENT Cont'd):					
Knox County	6.62				
Lincoln County	5.64				
Oxford County	5.18				
Penobscot & Piscataquis Cos.	6.62				
Sagadahoc County	5.18				
Somerset County	5.34				
Washington County	5.50				
York County	5.40				
SCRAPERS:					
Aroostook, Knox, Lincoln, Piscataquis & Washington Cos.	5.50				
Hancock County	4.92				
SKIDDER:					
Piscataquis & Washington Cos.	4.00				
SHOVEL:					
Hancock, Waldo and Washington Cos.	6.00				

"Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5 (a)(1)(ii))."

SUPERSEDEAS DECISION

STATE: VERMONT COUNTIES: STATEWIDE
DECISION NO.: VT81-3007 DATE: DATE OF PUBLICATION
Supersedes Decision No.: VT78-2091, dated December 10, 1976 in 41 FR 54146 and VT78-2070, dated August 11, 1978 in 43 FR 35887
DESCRIPTION OF WORK: Highway Construction Projects (excluding tunnels, building structures in rest area projects and railroad construction; bascule, suspension and spandrel arch bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CARPENTERS:					
Bennington County	6.36	.40	.50		.04
Rutland County	6.55				
Windham County	6.58				
Windsor County	6.17				
Remainder of Counties	6.65	.35	.30		
CEMENT MASONS:					
Addison County	6.65	.35	.30		
Caledonia County	7.20				
Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans and Washington Counties	7.30				
Rutland County	5.85				
Windham County	6.58				
Windsor County	6.17				
ELECTRICIANS:					
Chittenden County	8.80				
Rutland County	5.50				
Windham and Windsor Counties	7.16				
Remainder of Counties	7.58				
IRONWORKERS:					
STRUCTURAL:					
Addison, Bennington, Lamoille, Orange, and Orleans Counties	8.45				
Remainder of Counties	7.40	.45	.60		
REINFORCING:					
Addison, Lamoille and Orleans Counties	6.75				
Remainder of Counties	6.46	.24			.05
LABORERS:					
Addison and Lamoille Counties	3.85	.15		a	
Bennington County	4.65				
Essex County	4.65			a	
Caledonia County	4.62			a	
Chittenden County	4.41			a	

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	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
LABORERS (Cont'd):					
Franklin County	4.46			a	
Grand Isle County	4.43			a	
Orange County	4.75			a	
Orleans County	4.66			a	
Rutland County	4.55				
Washington County	4.50			a	
Windham County	4.87				
Windsor County	4.56			a	
DRILLER:					
Orange And Rutland Counties	5.00				
Remainder of Counties	5.70			a	
PIPELAYER:					
Addison and Lamoille Counties	4.25			a	
Bennington County	4.90				
Caledonia County	4.87			a	
Chittenden County	4.66			a	
Essex County	4.90			a	
Franklin County	4.71			a	
Grand Isle County	4.68			a	
Orange County	5.00			a	
Orleans County	4.91				
Rutland County	4.80				
Washington County	4.75			a	
Windham County	5.12				
Windsor County	4.81			a	
TRUCK DRIVERS:					
Truck Drivers, 2 Axle:					
Rutland County	5.27				
Remainder of Counties	5.35				
Truck Drivers, 3 Axle:					
All Counties	5.50				
EARTH AUGER/POST DRIVER:					
Caledonia County	5.63				
Windsor County	6.16				
Remainder of Counties	5.50				

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	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS:					
Backhoe:					
Caledonia County	8.65	.35	.50	b	.05
Grand Isle County	8.20			b	
Orange County	7.75	.35	.50	b	.05
Orleans County	9.05			b	.05
Rutland County	8.30				
Windsor County	8.09				
Remainder of County	8.20	.35	.50	b	.05
Backend/Screedman:					
Bennington County	7.93				
Chittenden, Essex, Franklin and Grand Isle Counties	7.75	.35	.50	b	.05
Broom:					
Addison and Caledonia Counties	7.20	.35	.50	b	.05
Bennington County	6.80				
Essex, Franklin, Lamoille, Rutland and Windham Counties	5.50			b	
Orange County	6.35	.35	.50	b	.05
Orleans County	5.50	.35	.50	b	.05
Washington County	6.75			b	
Windsor County	6.19				
Bulldozer:					
Addison, Essex, Franklin, Grand Isle, Orange and Orleans Counties	7.75	.35	.50	b	.05
Bennington County	8.30	.85	1.00	b	.05
Caledonia County	8.05			b	
Chittenden County	8.70	.35	.50	b	.05
Lamoille County	8.23			b	
Rutland County	8.70	.95	1.00	b	.05
Washington County	8.20	.35	.50	b	.05
Windham County	8.60			b	.05
Windsor County	8.37				

DECISION NO. VT81-3007

POWER EQUIPMENT OPERATORS:	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
(Cont'd):					
Compactor:					
Addison and Windsor Counties	7.59			b	
Bennington County	8.70				
Caledonia, Chittenden, Grand Isle, Lamoille and Washington Counties	8.65			b	
Essex, Franklin and Orleans Counties	7.75	.35	.50	b	.05
Orange County	7.20	.35	.50	b	.05
Rutland County	5.25				
Windham County	8.65	.55	.70	b	.05
Compressor:					
Bennington County	8.57				
Orange County	7.17	.35	.50	b	.05
Windsor County	7.20				
Remainder of Counties	7.95			b	.05
Crane:					
Addison, Caledonia, Lamoille and Washington Counties	9.05			b	.05
Orleans County	8.20	.35	.55	b	.05
Rutland County	6.50				
Windsor County	8.27				
Remainder of Counties	8.20	.35	.50	b	.05
Gradall:					
Caledonia, Lamoille and Orleans Counties	9.05			b	.05
Orange County	7.75	.35	.50	b	.05
Rutland County	7.00				
Washington County	8.57			b	
Windsor County	7.98				
Remainder of Counties	8.20	.35	.50	b	.05

DECISION NO. VT81-3007

POWER EQUIPMENT OPERATORS:	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
(Cont'd):					
Grader:					
Bennington County	8.90	.35	1.00	b	.05
Caledonia County	8.18			b	
Rutland County	7.44				
Washington County	8.44			b	
Windham County	8.20	.35	.50	b	.05
Windsor County	8.27				
Remainder of Counties	7.95	.35	.50	b	.05
Loader:					
Bennington County	8.75	.80	.75	b	.05
Caledonia County	7.90	.45	.60	b	.05
Rutland County	6.94				
Windsor County	7.76				
Remainder of Counties	7.75	.35	.50	b	.05
Mechanic:					
Addison County	8.00			b	
Bennington County	8.79			b	
Caledonia County	8.20	.55	.70	b	.05
Lamoille County	8.70	.85	1.00	b	.05
Rutland County	7.53				
Windsor County	7.76				
Remainder of Counties	7.75	.35	.50	b	.05
Oilers:					
Bennington County	7.10				
Paver:					
Bennington County	8.70				
Caledonia County	8.20	.55	.70	b	.05
Rutland County	5.25				
Windham County	8.55			b	.05
Windsor County	7.76				
Remainder of Counties	7.75	.35	.50	b	.05

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	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS: (Cont'd):					
Rollers:					
Bennington County	9.82				
Caledonia County	8.20	.55	.70	b	.05
Rutland County	5.78				
Washington County	7.80			b	
Windham County	8.00				
Windsor County	7.76				
Remainder of County	7.75	.35	.50	b	.05
Shovel:					
Bennington County	8.73				
Chittenden, Essex, Franklin, Grand Isle and Washington Counties	9.15	.85	1.00	b	.05
Lamoille County	9.15			b	
Line Stripper:					
Bennington County	7.50				
Backhoe/Loader Combination (Farm Type):					
Rutland and Windsor Counties	7.00				
Remainder of Counties	6.95			b	.05
Specialized Earth/Rock Haulers:					
All Counties	6.50				

FOOTNOTE:

a. Two (2) paid holidays: Memorial Day & Independence Day, providing the employee has been employed the schedule workday prior to the holiday and the schedule workday after the holiday.

b. Nine (9) paid holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Washington's Birthday, Columbus Day and Veteran's Day, provided the employee has been employed at least 7 days or more prior to the holiday and has worked the day before and the day after the holiday.

"Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5 (a)(1)(ii))."

[FR Doc. 81-1332 Filed 1-15-81; 8:45 am]

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federal register

Friday
January 16, 1981

Part VI

Architectural and Transportation Barriers Compliance Board

Minimum Guidelines and Requirements for Accessible Design; Final Rule

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1190

Minimum Guidelines and Requirements for Accessible Design

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board hereby issues its minimum guidelines and requirements (guidelines and requirements) for standards for accessibility and usability of Federal and federally funded buildings and facilities by physically handicapped persons. These guidelines and requirements are issued pursuant to the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (the 1978 Act), amending the Rehabilitation Act of 1973, Pub. L. 93–112. The guidelines and requirements provide a basis for the issuance of consistent and improved accessibility and usability standards issued by the four Federal standard setting agencies, the General Services Administration, Department of Housing and Urban Development, Department of Defense and United States Postal Service, under the Architectural Barriers Act of 1968, as amended.

EFFECTIVE DATE: January 6, 1981.

FOR FURTHER INFORMATION CONTACT: Larry Allison, Director of Public Information, (202) 245–1591 (voice or TDD); Charles Goldman, General Counsel, (202) 245–1801 (voice or TDD); Karen Smith, Director, Technical Services (202) 472–3237 (voice), (202) 245–1801 (TDD).

SUPPLEMENTARY INFORMATION:

A. Background

Section 502 of the Rehabilitation Act of 1973, Pub. L. 93–112, 29 U.S.C. 792, established the Architectural and Transportation Barriers Compliance Board (ATBCB or Board) as an independent Federal agency to insure compliance with standards issued under the Architectural Barriers Act of 1968 (Pub. L. 90–480) (42 U.S.C. 4151 *et seq.*), as amended. The Board consists of eleven Federal agency members plus eleven members appointed by the President from the general public.[1]

Congress found that compliance with the Architectural Barriers Act had been spotty and that enforcement of accessibility standards[2] was necessary to fulfill the Congressional commitment to afford handicapped individuals the opportunity to move freely and integrate themselves in society. See H.R. Rep. No. 244, 93d Cong., 1st Sess. 23 (1973); S. Rep. No. 318, 93d Cong. 1st Sess. 49 (1973).

Congress expanded the responsibilities of the ATBCB in the 1978 Act. Section 118 of the 1978 Act, amending the Rehabilitation Act of 1973 ((29 U.S.C. 792), sec. 502(b)(7)), requires the Architectural and Transportation Barriers Compliance Board (ATBCB) "to establish minimum guidelines and requirements for standards issued pursuant to the * * * Architectural Barriers Act of 1968." Pub. L. 90–480 as amended (42 U.S.C. 4151 *et seq.*). Based on the minimum guidelines and requirements issued by the ATBCB, four Federal agencies—Department of Defense, General Services Administration, Department of Housing and Urban Development, and the United States Postal Service—are to prescribe standards for the design, construction, and alteration of certain Federal and federally-assisted buildings "to insure, whenever possible, that physically handicapped persons will have ready access to, and use of, such buildings." 42 U.S.C. 4152–4154a. Existing access standards[3] issued by those agencies will be revised to conform to the guidelines and requirements.

Congress recognized the need for consistent application of the Architectural Barriers Act throughout the nation. The Board will exercise strong leadership, provide technical assistance, and work with the agencies setting standards to insure they follow the minimum guidelines and requirements in revising their standards. See S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. No. 1149, 95th Cong., 2d Sess. (1978); Report by the Comptroller General, *Making Public Buildings Accessible to the Handicapped: More Can Be Done*, B–182030 (1980).

B. Problem of Inaccessibility

> The physically handicapped are citizens of this country—just as others of us are; they pay taxes and contribute to the economy of the country—just as others of us do; they deserve access to their public buildings on an equal basis with the rest of us.

These were the words Senator Edward Bartlett, the Senate sponsor of the bill which became the Architectural Barriers Act, spoke immediately before the passage of the Act. 113 Cong. Rec. 24133 (1968). The Act demonstrates a unanimous Congressional purpose to insure that "certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped." Title of Pub. L. 90–480.

In enacting this legislation, Congress intended to afford physically handicapped persons "every opportunity to obtain gainful employment and otherwise enter into the mainstream of American life." Congress found that the Federal government had "literally locked out millions of its citizens from the public buildings which it has * * * financed by not requiring that these buildings be designed and constructed so that people with physical impairments could readily enter and use the facilities of such buildings." S. Rep. No. 538, 90th Cong., 1st Sess. 3 (1967); see also H.R. Rep. No. 1532, 90th Cong., 2d Sess. 2, 3, and 4 (1968).

In a 1975 report examining the implementation of the Architectural Barriers Act the Comptroller General observed:

> Accessibility of public buildings is essential if the handicapped are to have the same rights and opportunities as the able-bodied in obtaining government services and employment outside their homes.

Report by the Comptroller General, *Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped*, B–182030 (1975).

The history of the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978 reflects a continuing congressional awareness of the problems of architectural barriers.

> While a 3- to 6-inch step is no barrier to the vast majority of the population of the United States, it is an insurmountable barrier to someone in a wheelchair. The reality of barriers may only be a passing thing to the able-bodied individual, but it a constant

[1] The agency members are the heads or their designees (Executive Level IV or above) of the Departments of Education; Transportation; Health and Human Services; Housing and Urban Development; Labor; Interior; Justice; Defense; General Services Administration; Veterans Administration; United States Postal Service. The Act requires at least five of the members from the general public to be physically handicapped.

[2] To implement the Board's enforcement mission as set forth in 29 U.S.C. 792(b)(1), through administrative procedures set forth in 36 CFR Part 1150, the ATBCB recently revised its original enforcement rules. 41 FR 55441 (1976) to enhance their readability, reflect the experiences of several years practice and to reflect the amendments in the Rehabilitation Act made by the 1978 Act. 45 FR 78472 (1980).

[3] GSA: 41 CFR 101–19.6, effective September 2, 1969, revised October 14, 1980 (45 FR 67664); HUD: 24 CFR Part 40, effective September 2, 1969; DOD: DOD 4279.1–M "Construction Criteria," June 1, 1978, paragraph 5–6; USPS: Postal Service Contracting Manual, Publication 41, § 18–518.4, 39 CFR 601.100, as amended by handbook RE–4, November 1979.

concern and frustration to the handicapped individual.

S. Rep. No. 890, 95th Cong., 2d Sess. 16 (1978).

The ATBCB views handicapped persons as first class citizens. Disabled persons should not be treated, as one witness testified when the Architectural Barriers Act was pending, as "back door citizens, persons dependent on others to do every day simple things." Hearings on S. 222 Before the Subcomm. on Public Buildings and Grounds of the Senate Committee on Public Works, 90th Cong., 1st Sess. 71 (1967). See also Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963).

The ATBCB itself is also quite knowledgeable in the problems of inaccessibility. Since the Board's formalized complaint system began in fiscal year 1977, the ATBCB has received hundreds of complaints of inaccessible sites. In 1978–1979, the Board conducted 1000 field reviews, surveying approximately 100 buildings in each of ten cities across the country. In its field reviews and complaint processing, the ATBCB has seen the spectrum of access problems identified in Federal and federally-funded projects. This includes a lack of parking for handicapped persons, inaccessible bathrooms, inaccessible entrances, elevator and other controls that were too high, a lack of tactile identification for blind and visually-impaired persons and a lack of warning systems for deaf and hearing-impaired persons. The ATBCB is aware that the problem of inaccessible buildings and facilities is national in scope.

C. Rulemaking History

On February 22, 1980, the Board published in the **Federal Register** at 45 FR 12167, a Notice of Intent to Issue Proposed Rules. The Notice of Intent to Issue Proposed Rules recited the Board's intent to compile information regarding design specifications and scoping requirements for the proposed minimum guidelines and requirements on accessibility. Comments were solicited for 45 days on the key issues anticipated to be addressed in the Notice of Proposed Rulemaking. One hundred seventeen comments from a cross-section of the public were received. Disabled persons and their advocacy organizations, universities, building industry organizations, and Federal and State agencies submitted comments.

Based on the comments received, Board discussions, and other information available, the Board published on August 18, 1980, in the Federal Register, 45 FR 55010, a Notice of Proposed Rulemaking (NPRM). The NPRM contained the proposed rule, a preamble, and draft regulatory analysis. Public comment on the proposed rule was invited for sixty days. Several issues, relating both to scope and technical matters, were highlighted for public comment.

The ATBCB forwarded nearly 10,000 copies of the NPRM to persons who requested copies or were on the ATBCB mailing list. The ATBCB received a total of 281 comments prior to the closure of the docket on October 17, 1980. All comments postmarked on or before that date were considered. No time extensions were granted. Comments received are available for inspection at 330 C Street, S.W., Room 1014, Washington, D.C. 20202, from 9:00 a.m. to 5:30 p.m., Monday through Friday.

D. Review by Office of Legal Counsel

At its December 12, 1980, meeting the ATBCB decided to take the extraordinary action of submitting its draft final rule to the Office of Legal Counsel (OLC), U.S. Department of Justice, for review prior to final consideration by the Board. The Office of Legal Counsel, in an opinion of December 30, 1980, which is included in the rulemaking docket, advised the Board that the draft final rule, with its detailed provisions, constituted "minimum guidelines and requirements" within the meaning of 29 U.S.C. 792(b)(7).

The ATBCB is within its discretion in establishing specific requirements, including each of certain items, for standards to achieve ready access and use. The Board's authority relating to minimum guidelines and requirements does not extend to regulations governing waivers and modifications as previously proposed in Subpart B. The ATBCB's authority over waivers and modifications is in the enforcement area. 29 U.S.C. 792(b)(1), 36 CFR Part 1150.

OLC considered whether the provisions relating to additions and alterations exceeded the applicable requirements of 42 U.S.C. 4155. OLC concluded that it was lawful to provide that a space be made accessible when alterations of elements within a space together constitute an alteration of the space itself. OLC also recognized the validity of the Board's provisions in the NPRM regarding vertical access. Under the NPRM an alteration of stairs and escalators was treated as an alteration of the building's system for providing vertical access. Nonetheless, as a matter of policy, the Board modified this provision to require accessible vertical access only in more limited circumstances. See discussion below in F. Section-by-Section Analysis. The provisions with respect to additions, 36 CFR 1190.32, were viewed as reasonably treated as new construction, and also found to be legally sufficient.

The Office of Legal Counsel reviewed carefully the provisions relating to alterations, 36 CFR 1190.33(b), which contain the "50% rule" requiring additional work where alterations within a 12 month period exceed 50% of the full and fair cash value. The Office of Legal Counsel felt it was within the ATBCB's mandate under the remedial statute it was implementing to require an accessible route and entrance when a building is being substantially altered. The Office of Legal Counsel did feel the Board proposal to require accessible toilet rooms on each floor in every case in which the alterations cost 50% of the facility's full and fair cash value was overly broad. The rule has been revised.

The Office of Legal Counsel sustained the ATBCB views on the scope of applicability of the Architectural Barriers Act with respect to leased buildings. The statute must be read to include leased buildings within the accessibility requirements of the Act, 42 U.S.C. 4155. This extends to extensions as well as renewals of leases. Buildings under Federal lease, including renewals and extensions, must be accessible.

E. Overview of the Regulation

These minimum guidelines and requirements, the first to be issued by the ATBCB, contain both technical and scoping provisons for the generic (common) elements and features of buildings and facilities. These are the basis for the accessibility and usability standards enforced under Section 502 of the Rehabilitation Act. This will provide a Government-wide basis for a common understanding of accessibility.

The ATBCB guidelines and requirements consist of five major components. Subpart A, General, sets out the purpose, applicability, definitions, relationship of the guidelines and requirements to the Architectural Barriers Act standards, other uses, and effect of State or local law on the guidelines and requirements. Subpart B has been reserved for reasons elaborated below. Other departures from the guidelines and requirements are permitted under specific design exceptions. Subpart C enumerates the scoping and technical provisions applicable to new construction, additions, alterations, and leased buildings. Subpart D contains the technical provisions. Subpart E is reserved for special use provisions applicable to elements or types of buildings, *e.g.*, library stacks, hospitals,

penal institutions, and residential structures.

Throughout the rulemaking process, the ATBCB considered the technical specifications in the proposed and final 1980 revision to the American National Standard Institute (ANSI) standard. ANSI is a private institute in New York City, not connected with the Federal government, that provides a mechanism for creating voluntary consensus standards. In May 1980, subsequent to the issuance of the ATBCB Notice of Intent, the American National Standard Institute published its technical accessibility standard. The 1980 ANSI standard states that scoping provisions are to be developed by administering agencies. ANSI A.117.1 (1980) §§ 2.1, 2.2. The ATBCB believes that a single document including both technical and scoping provisions is most usable in achieving accessibility.

At the beginning of the rulemaking process, the Board was presented with the issue of determining how to utilize the expertise of ANSI while protecting the public interest and ensuring adequate administration and enforcement of the Architectural Barriers Act.

In general, the system of voluntary standards tends to the development of commercially acceptable standards. However, that process is less than ideal from a regulatory perspective. Hamilton, *The role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health* ("Hamilton"), 56 Tex. L. Rev. 1446–1447 (1978). The ANSI voluntary standard concensus process is not an open public dialogue process as required by the Administrative Procedure Act, 5 U.S.C. 553. The views of the general public are not solicited and thus not considered. The ATBCB process for developing guidelines and requirements for standards applicable to Federal procurement and grants is consistent with OMB Circular A–119 on the use of voluntary standards. The ATBCB is voluntarily taking cognizance of that circular. However, the voluntary standards techniques has come under Congressional criticism. *Voluntary Industrial Standards in the United States: Report to the Subcommittee on Science, Research and Development of the House Committee on Science and Technology*, 93d Cong., 2d Sess. 88–89 (1974). See also S.Rep. No. 91–1282, 91st Cong., 2d Sess. 6 (1970); H.R. No. 1291, 91st Cong., 2d Sess. 181 (1970).

The ATBCB, while wary of the pitfalls of voluntary consensus standards, is mindful of the significant achievements with respect to ANSI A117.1 (1980). For that reason, the ATBCB, quite properly, considered that work as most significant in shaping the particular provisions and weighed it carefully. See Hamilton, 56 Tex. L. Rev. at 1448. The ATBCB, consistent with its recognition of the practical need for a single document containing both scoping and technical provisions, also developed scoping sections as ANSI suggested. The ATBCB also recognized the significant technical contribution made by the ANSI Standard and has adopted many of its provisions.

F. Section-by-Section Analysis/Major Comments

This section provides a brief review of the comments and changes from the NPRM to the final rule. A final Regulatory Analysis has been prepared which contains an in-depth discussion of the alternatives and issues considered by the ATBCB.

Subpart A contains the General Provisions. The ATBCB has determined that its authority from the 1978 Act is to issue a binding, legislative rule which insures *ready* access and use. See *Batterton v. Frances*, 432 U.S. 416 (1977), *American Telephone and Telegraph Co. v. United States*, 299 U.S. 232 (1936); *National Nutritional Foods Association v. Weinberger*, 512 F.2d 688 (2d Cir. 1975). Also see the Regulatory Analysis containing Issue Papers of December 2, 1980, and April 4, 1980.

In this context 36 CFR 1190.1, Purpose, has remained unchanged.

The dates previously mentioned in proposed 36 CFR 1190.2(b)(2)(ii) (A) and (B) have been deleted to avoid any confusion over the applicability of the guidelines and requirements. The application of the minimum guidelines and requirements is prospective not retroactive in nature. A building designed, constructed, altered or leased after the effective date of an accessibility standard issued under the Architectural Barriers Act must comply with that standard. Utilizing the process set forth in proposed 36 CFR Part 1150, the ATBCB enforces those standards in the buildings and facilities required to comply with the Architectural Barriers Act. See 36 CFR 1150.2(c).

A few of the federal members wanted the ATBCB to clarify that certain categories of acquired buildings were not covered by the Architectural Barriers Act. While the ATBCB has not reviewed in detail the particular program statutes, it recognizes that, as a general rule, buildings purchased or acquired directly by the Government without construction or alteration are not subject to the Architectural Barriers Act. See Regulatory Analysis containing Issue Paper No. 1, April 4, 1980.

The definition section, proposed 36 CFR 1190.3, was the focus of several comments. The definition of entrance has been added. The new definition clarifies that the entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware on the entry door(s) or gate(s). In some facilities the spaces that house the major activities for which the building or facility is intended, such as office space or transit loading areas, are located above or below ground, with access from the street level to an underground or raised level or levels via escalators or stairs. In those instances, the vertical access is considered an integral part of the entrance, and an elevator, ramp, or lift must be provided to the first of those levels in order for the entrance to comply with this section. With respect to an underground shopping/office area, the entrance platform is the interior platform from which doors lead to offices, stores, or other facilities. For purposes of these guidelines and requirements, the entrance to an underground transit facility includes the approach walk, the vertical access leading from the exterior to the interior platform or platforms, the fare gate or other point of controlled access, and all intervening spaces. The term "platform" is used here in the generic sense of a flat area or landing; it is not limited to the area between or alongside the tracks of a transit station from which transit cars are entered.

The definitions of "modification" and "waiver" have been removed as a result of the Office of Legal Counsel's opinion on Subpart B. Commenters thought the terms "normal maintenance" and "extraordinary repair" should be defined. The ATBCB looks to the standard-setting agencies to more precisely define these terms in the standards to be issued by the agencies under the Architectural Barriers Act, Pub. L. 90–480, as amended. The definition of "Disability" as contained in § 1190.3 is consistent with that utilized under Section 504 of the Rehabilitation Act. The definition of "full and fair cash value" has been changed to include three methods to determine the value of a building: the assessed value as equalized at one hundred percent (100%) valuation; the replacement cost; or the fair market value. The value of a building will be calculated for the estimated date that the work will begin.

Section 1190.4, Issuance of Architectural Barriers Act standards by standard-setting agencies, has been revised slightly from the provisions in

the NPRM. Comments were raised regarding the authority of the Board to enforce its own guidelines and requirements in the event the agencies setting standards under the Architectural Barriers Act fail to issue conforming standards. Proposed 36 CFR 1190.4(d). The Board is hopeful that each agency will issue conforming standards. 36 CFR 1190.4(d). The ATBCB expects that the agencies will act expeditiously, and anticipates that the standards will be published within one year of the effective date of the ATBCB minimum guidelines and requirements.

Section 1190.5, Guidelines: Other uses, is unchanged from the original proposal. The ATBCB provision allowing use of the minimum guidelines and requirements by other governmental and nongovernmental entities does not contradict the mandate of the Architectural Barriers Act standards.

Section 1190.6, Interpretation of guidelines, attracted only minor comment. It is unchanged and contains standard rules of interpretation.

Section 1190.7, Effect of State or local law, notes that the obligation to comply with this part is not affected by any State or local law. The question of the interrelationship of the Federal and State/local standards is one resolved on the basis of principles of preemption.

Section 1190.8, Site conditions, providing that site conditions were not to be used as a justification for noncompliance, was of concern to some commenters. Due to the difficult nature of this subject, it has been reserved for future use. The ATBCB recognizes that certain extreme site and/or climatic conditions, such as permafrost, would justify a waiver or modification by the appropriate head of the agency setting the standard.

Section 1190.9, Severability, is retained unchanged. No comments were received.

Subpart B—Waivers and Modifications: Processed departures, attracted considerable and divergent comments. In view of the nature of the comments on proposed 36 CFR 1190.21, 1190.22, and 1190.23, these sections are grouped together. Several commenters thought the provisions were far too liberal and would lead to excessive relaxation of the standards; others, however, thought the provisions were too restrictive of the rights of agencies setting standards under the Architectural Barriers Act. Some of the Federal agencies also thought those provisions were beyond the scope of the ATBCB's authority in these guidelines and requirements. To resolve the controversy, the Department of Justice, Office of Legal Counsel (OLC), was requested by the Board to review Subpart B. The OLC believes that the Board is not authorized to promulgate regulations in this rule governing waivers and modifications. The ATBCB, as a result, has removed all reference to the Subpart B guidelines and requirements on waivers and modifications and has reserved "Subpart B" for future use. To ensure that all waivers and modifications are based upon findings of fact and are not inconsistent with the provisions of the Architectural Barriers Act and Section 502 of the Rehabilitation Act, the ATBCB will supervise the agencies' determinations of waivers and modifications on a case by case basis through the use of the Board's recently revised enforcement procedures in 36 CFR Part 1150, 45 FR 78472. See Section 502 of the Rehabilitation Act, 29 U.S.C. 792(b)(1). Under these provisions, the Executive Director is free to institute compliance proceedings against any facility where the Executive Director claims that a waiver or modification was granted improperly.

Subpart C—Scope, attracted considerable comment concerning the nature of the guidelines and requirements. Some agencies expressed the view that the guidelines and requirements were all-inclusive in both their technical and scoping provisions. However, it is well established that guidelines may be extremely detailed. See *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976). Moreover, the scoping provisions should be viewed as minimum guidelines and requirements. Certain minimum items must be provided for a building to be accessible. The quantification of these items is thus appropriate. See *FMC Corp. v. Train*. This approach was found by OLC to be within the Board's statutory authority.

In response to the public comment, however, the ATBCB did reconsider its policy on particular items affecting the extent to which a new building or a facility may be required to be accessible. Several changes were incorporated into 36 CFR 1190.31, Accessible buildings and facilities: New Construction.

In 36 CFR 1190.31(b), Parking and passenger loading zones, the questions considered by the Board included whether parking for disabled persons should be required and what number of parking spaces should be specified by the guidelines and requirements. The ATBCB decided to retain the proposed language requiring that if any parking is provided, parking must be provided for disabled persons. However, compliance with this section is not required if the only parking provided is for official vehicles owned or leased by the government.

The ATBCB also considered carefully the provisions in 36 CFR 1190.31(f), Elevators, especially in terms of its cost implications. The ATBCB has determined that few buildings will be constructed by or on behalf of the United States which will not contain an elevator. The agencies setting standards under the Architectural Barriers Act do not anticipate that this will be a problem. The provisions in the NPRM have been retained.

The provisions relating to the number of entrances, 36 CFR 1190.31(h), attracted considerable comment. The ATBCB considered such factors as the location, number, and costs of entrances. The ATBCB decided that, "At least one entrance to a building or facility shall comply with § 1190.120, *Entrances*. When a building or facility has entrances which normally serve any of the following functions: transportation facilities, passenger loading zones, parking facilities, taxi stands, pubic streets and sidewalks, accessible interior vertical access, then at least one of the entrances serving each such function shall comply with § 1190.120, *Entrances*. When a building or facility has entrances on more than one side then at least one entrance on each side shall comply with § 1190.120, *Entrances*." The ATBCB recognizes that certain extreme topographical conditions may preclude accessibility of a particular entrance.

The ATBCB also weighed carefully the highlighted questions relating to doors. The ATBCB decided that the scoping provisions relating to doors, proposed 36 CFR 1190.31(i), should be revised to provide, in effect, that at each accessible entrance to a building or facility there must be at least one accessible door. Similarly, there must be at least one accessible door to each accesssible space within a building or facility. However, each door that is required by § 1190.50(h), Egress, and each door that is an element of an accessible route shall comply with § 1190.130, Doors. The NPRM had required all doors to be accessible.

The ATBCB considered the question of whether the Board had sufficient research on accessible windows to justify the scoping provisions of § 1190.31(j) in the NPRM. The Board concluded it did not; accordingly the provision has been reserved.

The NPRM highlighted questions concerning the requirements on the location and number of acessible toilet and bathing fixtures. The ATBCB decided to revise proposed 36 CFR

1190.31(k) to provide that each toilet and bathing facility must provide at least one accessible fixture and accessory of each type provided. The Board deleted the provision which required 2% of all fixtures and accessories to be acessible in multiple fixture facilities.

The ATBCB has decided to revise proposed 36 CFR 1190.31(l), Drinking Fountains and Water Coolers, to provide that if only one drinking fountain or water cooler is provided per floor it shall be a two-level fountain or cooler and the lower level must comply with 36 CFR 1190.160. If more than one is provided per floor then approximately 50% (fifty percent) of the drinking fountains and water coolers provided shall comply with 36 CFR 1190.160; the others shall be of the standard height. Commenters pointed out that some people with orthopedic problems cannot bend to use low fountains and suggested that there was a need to require fountains and coolers at two different heights.

Public comments on the proposal relating to the provisions in proposed 36 CFR 1190.31(n), Alarms, were mixed. Certain groups thought the flashing exit signs were acceptable while others did not. The ATBCB has decided to retain the proposed language as it benefits the largest cross-section of the population, including handicapped and able-bodied persons, while not increasing the cost of an alarm system significantly. The term "alarm systems" has been inserted to make this paragraph consistent with § 1190.180, Alarms. The ATBCB also recognizes the need for additional research in this area.

Tactile warnings, 36 CFR 1190.31(o), were carefully considered. Comments received on the NPRM indicated that there continues to be confusion in the use of tactile warnings and informational cues. Until the Board obtains additional research and information on tactile warnings, the Board decided to require tactile warnings only on the hardware of all doors that lead to hazardous areas. Tactile warnings are prohibited on emergency exit doors. The Board decided to reserve the technical section, tactile warnings, 36 CFR 1190.190, until additional research is obtained and therefore has eliminated reference to these provisions in paragraph 1190.31(o).

The ATBCB also considered the highlighted issue of volume controls for telephones in proposed 36 CFR 1190.31(q). However, the Board strongly encourages installation of TDDs, especially in buildings visited by large numbers of people. Several issues relating to telecommunication devices for the deaf (TDD) were also highlighted in the NPRM. A telecommunications device for deaf persons (TDD) is a teletypewriter, or similar keyboard device, attached to a standard telephone by means of an acoustical coupler, and by which two persons can communicate over regular telephone lines by typing their conversation. Although TDDs received strong support from deaf persons and their advocacy organizations, the ATBCB has decided to defer including a requirement for TDDs in Federal and federally-funded buildings until additional information is obtained. The ATBCB has also decided to adopt scoping requirements similar to those in the ANSI standard for volume controls; that is, at least one telephone shall be equipped with a volume control if banks of telephones are provided.

NPRM 36 CFR 1190.31(r), Seating, tables and work surfaces, requested comment on the adequacy of the requirement that 5% of the total fixed or built-in seating tables and work surfaces be required to be accessible. From the limited responses provided on this issue, the ATBCB concluded that its proposal was reasonable.

The question of numbers was also raised in connection with 36 CFR 1190.31(s), Assembly areas. The number of viewing areas in the proposed rule has been retained in the final.

In 36 CFR 1190.31(t), Storage, the Board questioned whether all storage areas should be required to be accessible. The ATBCB concluded that if storage facilities are intended to be provided in accessible space for occupant use, only one storage facility of each type provided must be accessible. Additional storage space which is not accessible is, of course, permissible.

Under 36 CFR 1190.32, Additions, additions are generally to be treated as new construction. This approach was supported by the OLC opinion. The ATBCB had retained the proposed language in 36 CFR 1190.32 (a) and (b) but revised proposed 36 CFR 1190.32 (c) and (d). This change requires that at least one accessible entrance, one accessible route, and one accessible toilet and bathing facility be provided in the existing building if these elements are not provided in the addition. This section, for example, allows a designer the choice of providing an accessible entrance in the new addition or utilizing an existing accessible entrance in the existing building. The designer may also find it practical to create an accessible route and an accessible entrance in the existing building as a more economical solution to the usability and accessibility issue if no entrances are planned in the new addition. If elements, spaces, or common areas are located in the existing building and they are not provided in the addition, consideration should be given to making those elements, spaces, and common areas accessible in the existing building. If the elements in 36 CFR 1190.32(a)(b)(c) were not provided, the addition would be extremely difficult or impossible for a disabled person to use. The revision provides for less access than in the NPRM. However, it effects a balancing of interests, as the comments warranted, to achieve access and use at a reasonable cost.

Proposed 36 CFR 1190.33, Accessible buildings and facilities: Alterations, attracted wide comment. A number of Federal agencies strongly opposed, under any circumstances, the requirement to make more than the altered area accessible.

The NPRM highlighted the issue of where a means of vertical access must be provided. Proposed 36 CFR 1190.33(a)(2). Some comments questioned the ATBCB's authority and policy on this matter. The ATBCB's review of the history of the Architectural Barriers Act demonstrated that it is within the Board's discretion to require that vertical access be provided in the circumstances specified. See Regulatory Analysis containing Issue Paper of December 8, 1980. The language in the NPRM was modified to require the following: "If power-driven vertical access equipment (e.g., escalators) is planned or installed where none existed previously, or if new stairs (other than stairs installed to meet emergency exit requirements) requiring major structural changes are planned or installed where none existed previously, then a means of vertical access shall be provided that complies with § 1190.70 Ramps and curb ramps, § 1190.100, Elevators, or § 1190.110, Platform lifts. It is consistent with the letter and spirit of the Architectural Barriers Act that accessibility shall be incorporated as each part of the facility is altered so that eventually the entire facility will be accessible. The OLC opinion supported this approach.

Under 36 CFR 1190.33(a)(3), formerly (a)(4), the words "portion of" when referring to "space" have been deleted. Commenters noted the difficulty in defining what "portion of" meant.

The NPRM 36 CFR 1190.33 (b) and (c) would have required basic accessibility throughout the building if the alteration involved more than 50% of the value and floor space. After considering the public comment, the Board has revised its rule to eliminate the phasing requirement proposed in 36 CFR 1190.33(a)(3) and to substitute a twelve (12) month time limit

for invocation of the 50% criteria, 36 CFR 1190.33(b). The phasing requirement, commenters noted, would be extremely difficult to monitor. The gross square footage criteria was eliminated because it appears to be misleading. 36 CFR 1190.33(b) requires that certain elements and spaces must be accessible in order to provide the most basic access to and use of a building and that these elements and spaces must be designed and altered to comply with the guidelines and requirements. Without the elements and spaces required by 36 CFR 1190.33(b) (1) (2) and (3)—that is, at least one accessible route, at least one accessible entrance, and at least one accessible toilet facility on each substantially altered floor with a minimum of one accessible toilet facility in each altered building—it would be extremely difficult or impossible for a handicapped person to use a facility even if the facility were otherwise accessible. The number of toilet rooms required to be accessible if no alterations were planned on existing toilet rooms has been decreased from one per floor, altered or not, consistent with the OLC opinion. Moreover, consistent with commenters' suggestion to ease the financial burden of doing the work required by 36 CFR 1190.33(b), exceptions have been added. If the cost of the elements and spaces required by 36 CFR 1190.33(b) exceeds 15% of the total cost of all other alterations, then the agency may elect to implement the required improvements within a five year period and thus reduce the financial impact of a previously unscheduled alteration. Consideration should also be given to providing the accessible elements or spaces enumerated in § 1190.33(b)(6). The ATBCB has excepted from the 50% rule alterations which are limited solely to the electrical, mechanical, or plumbing system and which do not involve the alteration of elements of spaces required to be accessible under Part 1190. This change is consistent with the OLC opinion.

The subject of the applicability of the Architectural Barriers Act to leased buildings, 36 CFR 1190.34, was considered fully. The ATBCB recognizes that Congress amended the Architectural Barriers Act in 1976, Pub. L. 94–541, to cover all buildings leased by the Federal government. Leased buildings are required to be accessible *at the time* the lease is entered into, rather than at a later time when such structures may be altered. The 1976 amendments also extended coverage of the Architectural Barriers Act to unilateral "extensions" of leases as well as bilateral "renewals" of leases. See ATBCB Minutes of Meeting October 31, 1980. The provisions concerning leases were found by OLC to be within the Board's statutory authority.

The ATBCB notes that the language "whenever possible" in the Architectural Barriers Act is a recognition that it may not, under necessarily limited circumstances, be possible to lease accessible space. This may also be true with respect to leases in the more remote areas where accessible space may not be available, or where space is leased for officials servicing natural or human made disasters, e.g., Three Mile Island. The Board, for this reason, has added the following exception to the full accessibility requirements for leased space: "If no space complying with (a) or (b) is available, space as available may be leased provided: (1) The leasing authority certifies that space is unavailable due to the remoteness of the area or that the lease is necessary for officials servicing natural or human-made disasters; and (2) the ATBCB is provided a listing of instances in which this exception is applied, as part of the semi-annual report to Congress." If other deviations from the requirements of § 1190.34 are necessary, these will be made through the waiver or modification process.

Subpart D attracted generally favorable comments.

36 CFR 1190.40, Human data, sets forth basic requirements, *e.g.*, moving wheelchair clearances and reach limitations. Generally the comments were favorable. The section remains as proposed in the NPRM. However, the language for minimum clear width for a single wheelchair has been clarified to provide for a 3'–0" (915mm) except that the clear width may be reduced to 2'–8" (815mm) for a distance not to exceed 2'–0" (610mm) in length at points such as doorways. Other paragraphs have been renumbered.

The provisions in 36 CFR 1190.50, Walks, floors, and accessible routes, are the same as in the NPRM. In general, comments received were favorable to this section. The word "nominal" has been inserted in proposed 36 CFR 1190. 1150(c)(1) and (e)(1) to accommodate the dimensions needed for door stops. No substantive change in the requirement has been made.

The technical provisions relating to parking, proposed 36 CFR 1190.60, Parking and passenger loading zones, remain unchanged except that the section has been revised to include specifications for accessible spaces for side lift vans. Accessible spaces for side lift vans may be used to meet the requirements of 36 CFR 1190.31(b).

The NPRM provisions relating to ramps and curb ramps, proposed 36 CFR 1190.70, were the focus of two decisions. It was decided to retain the language in the NPRM which does not require a standard or uniform location of curb ramps. The ATBCB will seek to work with the Federal Highway Administration to develop uniform requirements for the location of curb ramps which intersect vehicular ways. It was also decided to revise proposed 36 CFR 1190.70(c) to require curb ramps of a width of 3'–0" instead of 4'–0". This was based on the public comment to support 3'–0" and lack of any research data to support a width beyond 3'–0". For clarification, the chart on ramp slope has been revised to make it consistent with the text.

36 CFR 1190.80, Stairs, has been retained as proposed. Some questions were received on the use of open risers and the dimensions of stair treads, but no authority or research was cited by commenters. The ATBCB rule is similar to the ANSI A117.1 (1980) provision except that ANSI allows open risers.

The provisions relating to handrails, proposed 36 CFR 1190.90, have been revised based on the work of the American Society for Testing and Materials. A width measurement instead of a perimeter formula is now provided. An additional paragraph, which commenters noted was in ANSI A117.1 (1980) but not in the NPRM, has been added. A handrail or any wall rail or other surface adjacent to it shall be free of any sharp or abrasive elements.

The provisions applicable to elevators, proposed 36 CFR 1190.100, were the subject of considerable comment, particularly the technical and cost implications of the 4'–0" control panel mounting height. The ATBCB retained the NPRM language to retain 4'–0" for the maximum height and 2'–11" minimum. This is consistent with the Human Data, 36 CFR 1190.40. However, the ATBCB will allow floor buttons to be mounted up to 4'–8" if the 4'–0" height imposes a substantial increase in the cost of the elevator.

A typographical error appearing in the NPRM Figure 10.1 was corrected from four seconds to five seconds. The door widths of elevator cars has been revised from 2'8" to 3'0". The ATBCB recognizes that this may be inconsistent with 36 CFR 1190.40 Human data; however, the wider width is necessary because these are moving doors. A provision, which commenters suggested and is based upon ANSI A117.1 (1980), has been added to allow a maximum clearance of

1¼ inches between the elevator car and floor.

Platform lifts, proposed 36 CFR 1190.110, remains as proposed in the NPRM. Comments were relatively few and noncritical.

The comments concerning entrances were directed at the scoping requirements of 36 CFR 1190.31(h) rather than the technical requirements of proposed 36 CFR 1190.120. This section remains essentially unchanged; however, the definition of "entrance" has been added to § 1190.3, Definitions.

The provisions concerning doors were also the subject of several decisions. Under revised 36 CFR 1190.130(a)(3), if accessible doors are near revolving doors or turnstiles, the accessible doors shall be subject to the same use patterns as the revolving door or turnstile.

In revised 36 CFR 1190.130(c)(i), the ATBCB decided the latch side clearance requirement should be 1'6", through 2'0" is recommended. In proposed 36 CFR 1190.130(c)(2) Figure 2 was selected, consistent with the Human data. The NPRM had proposed alternative figures.

The ATBCB decided to retain the provision in proposed 36 CFR 1190.130(c)(4) relating to doors to acute care patient rooms.

In response to public comment, the ATBCB decided to make an exception to 36 CFR 1190.130(f) to allow hardware used to secure the inactive leaf of a double leaf door without a center mullion to be mounted at any height (as opposed to the 4'0" (1,220 mm) general rule).

The ATBCB, on an issue highlighted in the NPRM, decided to retain the proposed language of 36 CFR 1190.130(g) relating to doors to hazardous areas. The subject of door pressures and door closers was carefully examined. The ATBCB decided to revise 36 CFR 1190.130(h)(2) to delete the force requirements for exterior doors. Comments questioned the state-of-the-art technology and research in this matter. The ATBCB, through the National Bureau of Standards, is actively researching this matter.

The proposed 36 CFR 1190.140, Windows, has been reserved until the Board receives additional research and information on this subject.

The subject of toilets, also addressed in the scoping provisions of Subpart C, also entailed considerations of unisex toilets, 36 CFR 1190.150. The ATBCB has decided, on this highlighted issue, to retain the provision on unisex toilets. Commenters generally favored this requirement but requested that it be clarified that only one water closet and one lavatory be provided in each facility. The unisex facility is especially desirable for severely disabled persons who have attendants of the opposite sex.

The text of proposed 36 CFR 1190.160, drinking fountains and water coolers, was corrected to reflect the dimensions in the figures for clarification of descriptive language.

The question raised by commenters on proposed 36 CFR 1190.170, Controls and operating mechanisms, was whether controls should be required to be operable by one hand, similar to ANSI A117.1 (1980). It was agreed that the guidelines and requirements should reflect the ANSI language and this subsection has been changed accordingly.

The provision in proposed 36 CFR 1190.180, Alarms attracted considerable comment to the effect that devices and procedures need to be developed to provide earlier protection warning for deaf/hearing impaired and blind/visually impaired people. The ATBCB decided to require that visual and auditory alarms operate off the same power source. In proposed 36 CFR 1190.180(c)(3) the frequency requirement has been revised to "*less than* 5 Hz," in response to commenters' suggestions to make this provision similar to ANSI A117.1 (1980). Also, this will lessen the likelihood of epileptic seizures.

The Board has decided to reserve 36 CFR 1190.190, Tactile warnings, until additional research is obtained. The Board determined that there does not appear to be any immediate and critical need for tactile warnings, although tactile warnings might provide some assistance and convenience to those who are not skilled in proper cane techniques. For information concerning the technical specifications for tactile warnings, see ANSI A117.1–1980, Section 4.29.

The ATBCB highlighted for public comment the question of contrasting colors and specific shapes to be used as part of the signage to identify particular elements and spaces in proposed 36 CFR 1190.200. The comments support the ATBCB decision to retain the language of the NPRM and also indicated the utility of further research on these matters.

Another highlighted issue, in proposed 36 CFR 1190.210, was whether the maximum height for an operable part of a public telephone shoud be 4'-0" (1220mm) or 4'-6" (1372mm) high. The matter attracted considerable comment. The ATBCB decided that the human data research supported both 4'-0" maximum height for frontal and diagonal reach approaches and 4'-6" maximum height for side reach. Comments received supported both heights for all telephones. The guidelines and requirements have been modified to provide for both heights. This is consistent with proposed 36 CFR 1190.40, Human data. At least one telephone per bank shall be installed at 4'-0". Reference to TDDs has been deleted from this section.

36 CFR 1190.220, Seating, tables, and work surfaces, has been retained as in the NPRM. The section did not generate adverse comments. The ATBCB provision is similar to that in ANSI A117.1 (1980).

36 CFR 1190.230, Assembly areas, is different from the NPRM. The ATBCB rule will facilitate disabled persons' access by providing seating throughout the entire seating plan. The space for two persons has been expanded to 5'-6" to reflect ANSI requirements and to provide space between the wheelchairs.

Comments on § 1190.240, Storage, were limited and basically supportive. The language of the NPRM has been retained and a drawing added.

Subpart E—Special Building or Facility Types and Elements, continues to be reserved in the final rule, as in the NPRM. This subpart will be developed in future rulemaking. The guidelines and requirements as issued now will form the basis for special use guidelines and requirements which will then be applicable to the development of standards under the Architectural Barriers Act for special building types or special use facilities to the extent that these requirements enumerate elements or spaces that would be required by the Architectural Barriers Act to be accessible to handicapped persons. ATBCB expects to interact with the Federal agencies having expertise in specific areas to develop guidelines for the unique aspects of special use facilities. For example, the Department of Interior will be involved in the development of recommendations for historical buildings and recreational facilities, the Department of Health and Human Services, Department of Defense and Veterans Administration will be consulted on recommendations for hospitals.

The Department of Housing and Urban Development is also cooperating in the development of minimum guidelines and requirements for residential structures to be published later at Subpart E. This section of Subpart E will include specific scoping and technical provisions establishing guidelines and requirements for agencies' standards to be issued under the Architectural Barriers Act for accessibility in residential structures and accessible dwelling units. The guidelines and requirements issued now

are applicable to the development of standards under the Architectural Barriers Act to the extent that these requirements enumerate features, other than when affixed to or within an interior dwelling unit, required by the Architectural Barriers Act to be accessible to handicapped persons. See 24 CFR Part 40. These issues may be reexamined by HUD and the ATBCB as part of the rulemaking relating to the details of accessible residential structures. Such reexamination may result in making specific exceptions for residential structures to the general ATBCB requirements.

G. Future Activities

The ATBCB recognizes that technology and accessibility needs are changing. It intends to regularly review these guidelines and requirements to ensure they incorporate state-of-the-art technology as well as respond to the needs of disabled persons.

The ATBCB, as noted throughout this preamble, will be undertaking research to define and expand the guidelines and requirements. In addition, the ATBCB may undertake research concerning the accessibility needs of handicapped persons. The ATBCB encourages the public to provide the Board with information on new and innovative methods to eliminate barriers.

H. Regulatory Analysis

As an independent Federal agency, the ATBCB is not required to comply with Executive Order 12044; however, a draft regulatory analysis was prepared voluntarily and was published in the **Federal Register** for comment along with the NPRM. The ATBCB has solicited and received the views of the Council on Wage and Price Stability on its final rule and on the materials in the regulatory analysis. Those views are included in the rulemaking docket and are available for inspection at the ATBCB offices. The final regulatory analysis is also available for inspection at the ATBCB offices, 330 "C" Street, SW., Room 1014, Washington, D.C. 20202, from 9:00 a.m. to 5:30 p.m., Monday through Friday. For information on the final regulatory analysis, contact Sally Free, 202/245–1801.

I. National Environmental Policy

A negative environmental declaration prepared pursuant to the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4232, indicates that the issuance of the minimum guidelines will not have any significant impact on the environment. This document was prepared before the NPRM and remains in the public docket. The ATBCB received no comments indicating any environmental impact of the guidelines and requirements.

J. Effective Date

Pursuant to 5 U.S.C. 553(d), the ATBCB has determined that it is necessary to make these guidelines and requirements effective on the date issued in order to expedite the development and issuance of consistent Federal standards in accordance with the Architectural Barriers Act of 1968.

The Act, at noted above, directs four Federal agencies to "prescribe standards for the design, construction, and alteration of (certain Federal and federally-assisted) buildings" and "to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings."

These four Federal agencies, as members of the ATBCB, have been actively involved in the development of these guidelines and requirements. The ATBCB expects the agencies to act expeditiously to issue final revised standards within a reasonable time, which should not exceed one year after the effective date of the minimum guidelines and requirements. There is no reason, therefore, to delay the effective date of this rule. Because these ATBCB minimum guidelines and requirements serve as a basis for the standards set by the four standard setting agencies, the general public is not adversely affected by the effective date being the date of issuance.

However, if the guidelines and requirements effective date is delayed 30 days, the public could be adversely affected because it would, in effect, further delay the issuance of consistent accessibility standards by the four Federal agencies.

K. Conclusion

In consideration of the foregoing, Part 1190 is added to Title 36 of the Code of Federal Regulations as set forth below. The preamble to Part 1190 will be published in the Code of Federal Regulations as Preamble A.

The guidelines and requirements are issued under 29 U.S.C. 792, section 502 of the Rehabilitation Act of 1973, as amended.

Dated: January 6, 1981.

By vote of the Board.

Mason H. Rose V,

Chairperson, Architectural and Transportation Barriers Compliance Board.

Donald Elisburg,

Vice Chairperson, Architectural and Transportation Barriers Compliance Board, Assistant Secretary for Employment Standards, Department of Labor.

PART 1190—MINIMUM GUIDELINES AND REQUIREMENTS FOR ACCESSIBLE DESIGN

Subpart A—General

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Subpart E—Special Building or Facility Types or Elements. [Reserved]—Preamble A.

Authority: Sec. 502(b)(7) of the Rehabilitation Act of 1973 (29 U.S.C. 792(b)(7), as amended by the Rehabilitation, Comprehensive Services, and Developmental

Disabilities Amendments of 1978 (Pub. L. 95-602).

Subpart A—General

§ 1190.1 Purpose.

The purpose of this part is to implement Section 502(b)(7) of the Rehabilitation Act of 1973 (29 U.S.C. 792(b)(7)), as amended, which requires the Architectural and Transportation Barriers Compliance Board to establish minimum guidelines and requirements for standards issued under the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*), as amended. This part and the standards to be based on it are intended to ensure that certain buildings and facilities financed with Federal funds are so designed, constructed, or altered as to be readily accessible to, and usable by, physically handicapped persons.

§ 1190.2 Applicability: Buildings and facilities subject to guidelines and standards.

(a) *Definitions.* As used in this section, the term:

(1) "Constructed or altered on behalf of the United States" means acquired by the United States through lease-purchase arrangement, constructed or altered for purchase by the United States, or constucted or altered for the use of the United States.

(2) "Primarily for use by able-bodied military personnel" means expected to be occupied, used, or visited principally by military service personnel. Examples of buildings so intended are barracks, officers' quarters, and closed messes.

(3) "Privately owned residential structure" means a single or multi-family dwelling not owned by a unit or subunit of Federal, state, or local government.

(b) *Buildings and facilities covered.* Except as provided in paragraph (c) of this section, the guidelines and requirements, and the standards to be issued by the standard-setting agencies to conform to it, apply to any building or facility—

(1) The intended use for which either—

(i) Will require that such building or facility be accessible to the public, or

(ii) May result in employment or residence therein of physically handicapped persons; and

(2) Which is—

(i) To be constructed or altered by or on behalf of the United States;

(ii) To be leased in whole or in part by the United States;

(iii) To be financed in whole or in part by a grant or loan made by the United States after August 12, 1968, if the building or facility may be subject to standards for design, construction, or alteration issued under the law authorizing the grant or loan; or

(iv) To be constructed under the authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or Title III of the Washington Metropolitan Area Transit Regulation Compact.

(c) *Buildings and facilities not covered.* The guidelines and requirements, and the standards do not apply to—

(1) Any privately owned residential structure, unless it is leased by the Federal government on or after January 1, 1977, for subsidized housing programs; or

(2) Any building or facility on a military installation designed and constructed primarily for use by military personnel.

(3) Although the ATBCB has not reviewed in detail the particular program statutes, it recognizes that, as a general rule, buildings purchased or acquired directly by the Government without construction or alteration are not covered by the Architectural Barriers Act.

(d) *Effective date of standards.* Any covered building or facility, as provided in this section, which is designed, constructed, altered, or leased after the effective date of a standard issued under this guideline which is applicable to the building or facility, shall be designed, constructed, altered, or leased in accordance with the standard. For purposes of this section, any design, construction, alteration or lease for which bids or offers are received before the effective date of the applicable standards, in response to an invitation for bids or requests for proposals, is not subject to the standard.

§ 1190.3 Definitions.

As used in this part, the term:

"ATBCB" means the Architectural and Transportation Barriers Compliance Board.

"Access aisle" means a pedestrian space between elements such as parking spaces, seating, and desks.

"Accessible" means complying with the specifications and requirements of this part and with any applicable standard issued by a standard-setting agency.

"Accessible route" means a continuous unobstructed path connecting accessible elements and spaces in a building or facility and complying with the space and reach requirements of this part. (Interior accessible routes may include but are not limited to corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include but are not limited to parking access aisles, curb ramps, walks, ramps, and lifts.)

"Accessible space" means a space that complies with this part.

"Addition" means an expansion, extension, or increase in the gross floor area of a building or facility.

"Agency" means a Federal department, agency or instrumentality, as defined in sections 551(1) and 701(b)(1) of Title 5, United States Code, or an official authorized to represent an agency.

"Alteration" means any change in a building or facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangement in structural parts, and extraordinary repairs. It does not include normal maintenance, reroofing, interior decoration, or changes to mechanical systems.

"Architectural Barriers Act" means the Architectural Barriers Act of 1968, Pub. L. 90-480, as amended, 42 U.S.C. 4151 *et seq.*

"Automatic door" means a door—

(1) Used for human passage and

(2) Equipped with a power-operated mechanism and controls that open and close the door upon receipt of a momentary actuating signal.

"Building or facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, parks, sites, or other real property or interest in such property.

"Common areas" means those interior and exterior spaces available for use by all occupants and users of a building or facility, exclusive of any spaces that are made available for the use of a restricted group of people or the use of which is restricted to particular functions.

"Construction" means any erection of a new building or of an addition to an existing building.

"Cross slope" means the slope that is perpendicular to the direction of travel (see "running slope").

"Curb ramp" means a short ramp cutting through a curb or built up to it.

"Disability" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.

"Egress" or "means of egress" means a continuous and unobstructed way of exit travel from any point in a building or facility to an exterior walk or out of a

fire zone. It includes all intervening rooms, spaces, or elements.

"Element" means an architectural or mechanical component of a building, facility, space, or site, *e.g.*, telephone, curb ramp, door, drinking fountain, seating, water closet.

"Entrance" means any access point to a building or portion of a building or facility used for the purpose of entering. An entrance includes the approach walk, the vertical access leading to the entrance platform, the entrance platform itself, vestibules, if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s).

"Essential features" means those elements and spaces that make a building or facility usable by, or serve the needs of, its occupants or users. Essential features include but are not limited to entrances, toilet rooms, and accessible routes. Essential features do not include those spaces that house the major activities for which the building or facility is intended, such as classrooms and offices.

"Exception" means a special provision in this part or in a standard which indicates an acceptable alternative, under specified circumstances, to a requirement stated directly above the exception.

"Executive Director" means the Executive Director of the ATBCB.

"Extraordinary repair" means the replacement or renewal of any element of an existing building or facility for purposes other than normal maintenance.

"Full and fair cash value" is calculated for the estimated date on which work will commence on a project and means—

(1) The assessed valuation of a building or facility as recorded in the assessor's office of the municipality and as equalized at one hundred percent (100%) valuation; or

Note.—The one hundred percent (100%) equalized assessed value shall be based upon the state's most recent determination of the particular city's or town's assessment ratio. Example: Town X has an assessment ratio of forty percent (40%), and the particular building in question is assessed at $200,000.00. To determine the equalized assessed value of this building, divide $200,000.00 by .40, and the equalized assessed value equals $500,000.00.

(2) The replacement cost; or

(3) The fair market value.

"Guidelines, and requirements" means this part.

"Operable part" means a part of equipment or an appliance used to insert or withdraw objects, to activate or deactivate equipment, or to adjust the equipment (*e.g.*, coin slot, push button, handle).

"Physically handicapped person" means any person who has a disability which substantially limits one or more major life activity, including but not limited to such functions as performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"Power-assisted door" means a door—

(1) Used for human passage; and

(2) With a mechanism that helps to open the door, or relieve the opening resistance of a door, upon the activation of a switch or a continued force applied to the door itself.

"Ramp" means a walking surface that has a running slope greater than 1:20.

"Running slope" means the slope that is parallel to the direction of travel (see "cross slope").

"Section 502 of the Rehabilitation Act" or "Section 502" means Section 502 of the Rehabilitation Act of 1973, Pub. L. 93-112, 29 U.S.C. 792, as amended.

"Shall" denotes a mandatory requirement.

"Signage" means the display of written, symbolic, tactile, or pictorial information.

"Site" means a parcel of land bounded by a property line or a designated portion of a public right-of-way.

"Site improvements" means landscaping, paving for pedestrian and vehicular ways, outdoor lighting, recreational facilities, and similar site additions.

"Space" means a definable area, *e.g.*, toilet room, hall, assembly area, parking area, entrance, storage room, alcove, courtyard, or lobby.

"Standard" means any standard for accessibility issued under the Architectural Barriers Act.

"Standard-setting agency" means one of the four agencies required to issue standards under the Architectural Barriers Act, *i.e.*, the General Services Administration, the Department of Housing and Urban Development, the Department of Defense, and the United States Postal Service.

"Structural impracticability" means having little likelihood of being accomplished without removing or altering a load-bearing structural member at an increased cost of 50 percent or more of the value of the element of the building or facility involved.

"Tactile" means perceptible through the sense of touch.

"Tactile warning" means a surface texture applied to or built into walking surfaces or other elements to warn visually impaired persons of hazards in the path of travel.

"Walk" means an exterior pathway or space with a prepared surface intended for pedestrian use and having a slope of 1:20 or less. It includes general pedestrian areas such as plazas and courts.

§ 1190.4 Issuance of Architectural Barriers Act standards by standard-setting agencies.

(a) These guidelines and requirements are the minimum requirements for standards issued under the Architectural Barriers Act by the Administrator of General Services, Secretary of Housing and Urban Development, Secretary of Defense, and Postmaster General.

(b) Standards which conform to or exceed the provisions of the guidelines shall be deemed in compliance with the guidelines and requirements.

(c) Each standard-setting agency is encouraged to issue standards which follow the format of these guidelines and requirements. However, standards which differ in format from these guidelines and requirements but are otherwise consistent with the guidelines and requirements shall be deemed in compliance with these guidelines and requirements.

§ 1190.5 Guidelines: Other uses.

The guidelines and requirements may be used by other governmental and nongovernmental entities to make buildings and facilities accessible to, and usable by, physically handicapped persons.

§ 1190.6 Interpretation of guidelines.

(a) These guidelines and requirements shall be liberally construed to carry out the purposes and provisions of the Architectural Barriers Act and Section 502 of the Rehabilitation Act.

(b) Words importing the singular number may extend and be applied to the plural and vice versa. However, unless otherwise specified in the guidelines and requirements, each element or space of a particular building or facility shall comply with the guidelines and requirements.

(c) Use of the imperative mood, *e.g.*, "provide," means the provision is mandatory. This form is being used to avoid wordiness and monotony but means the same as if the word "shall" had been included.

(d) The provisions in the minimum guidelines and requirements are based upon adult dimensions and anthropometrics.

(e) Dimensions that are not marked "minimum" or "maximum" are absolute,

unless otherwise indicated in the text or captions. All dimensions are subject to conventional building tolerances for field conditions.

§ 1190.7 Effect of State or local law.

The obligation to comply with this part is not affected by any State or local law.

§ 1190.8 Site conditions. [Reserved]

§ 1190.9 Severability.

If any section, subsection, paragraph, sentence, clause, or phrase of these guidelines and requirements is declared invalid for any reason, the remaining portions of these guidelines and requirements that are severable from the invalid part shall remain in full force and effect. If a part of these guidelines and requirements is invalid in one or more of its applications, the part shall remain in effect in all valid applications that are severable from the invalid applications.

Subpart B [Reserved]

Subpart C—Scope

§ 1190.30 Scope. [Reserved]

§ 1190.31 Accessible buildings and facilities: New construction.

Except as otherwise provided in Subpart E, all new construction of buildings and facilities shall comply with the following minimum requirements:

(a) *Accessible route.* At least one accessible route shall comply with § 1190.50, Walks, floors, and accessible routes, and shall connect an accessible building entrance with:

(1) Transportation facilities located within the property line of a given site, including passenger loading zones, public transportation facilities, taxi stands, and parking;

(2) Public streets and sidewalks;

(3) Other accessible buildings, facilities, elements, and spaces that are on the same site; and

(4) All accessible spaces, rooms, and elements within the building or facility.

(b) *Parking and passenger loading zones.* If any parking is provided, for employees or visitors, or both, each such parking area shall comply with § 1190.60, Parking and passenger loading zones, and the following table:

Total parking in lot	Required minimum number of accessible spaces
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	(1)
Over 1000	(2)

(1) 2 percent of total.
(2) 20 plus 1 for each 100 over 1000.

(1) EXCEPTION: The total number of accessible parking spaces may be distributed among parking lots, if greater accessibility is achieved.

(2) EXCEPTION: This paragraph does not apply to parking provided for official government vehicles owned or leased by the government and used exclusively for government purposes.

If passenger loading zones are provided, at least one passenger loading zone shall comply with § 1190.60, Parking and passenger loading zones. Parking spaces for side lift vans, § 1190.60(c)(2)(a), are accessible parking spaces and may be used to meet the requirements of this paragraph.

(c) *Ramps and curb ramps.* If there is an abrupt level or grade change, if the slope is greater than 1:20, and if no other means of accessible vertical access is provided, a ramp or curb ramp shall be provided. If a ramp or curb ramp is provided, it shall comply with § 1190.70, Ramps and curb ramps.

(d) *Stairs.* Except as provided in paragraph 1190.31(f)(1), stairs connecting levels that are not connected by an elevator shall comply with § 1190.80, Stairs.

(e) *Handrails.* Handrails shall be provided at each ramp and staircase as required in § 1190.70, Ramps and curb ramps, and § 1190.80, Stairs, respectively, and shall comply with § 1190.90, Handrails.

(f) *Elevators.* One passenger elevator complying with § 1190.100, Elevators shall serve each level in all multi-story buildings and facilities. If more than one elevator is provided, each elevator shall comply with § 1190.100, Elevators.

(1) *Exception.* Elevator pits, elevator penthouses, mechanical rooms, piping, or equipment catwalks are excepted from this requirement.

(2) *Exception.* Ramps or platform lifts complying with § 1190.70, Ramps and curb ramps, and § 1190.110, Platform lifts, respectively, may be used in lieu of an elevator.

(g) *Platform lifts.* If the slope is greater than 1:20, and if no other means of accessible vertical access is provided, a platform lift may be provided if there is an abrupt level or grade change. If a platform lift is provided, it shall comply with § 1190.110, Platform lifts.

(h) *Entrances.* At least one entrance to a building or facility shall comply with § 1190.120 Entrances. When a building or facility has entrances which normally serve any of the following functions: transportation facilities; passenger loading zones; parking facilities; taxi stands; public streets and sidewalks; accessible interior vertical access, then at least one of the entrances serving each such functions shall comply with § 1190.120, Entrances. When a building or facility has entrances on more than one exposure, then at least one entrance for each exposure shall comply with § 1190.120, Entrances, unless site conditions preclude accessibility.

(i) *Doors.* (1) At each accessible entrance to a building or facility, at least one door shall comply with § 1190.130, Doors.

(2) For each space within a building or facility, at least one door at each accessible entrance to the accessible space shall comply with § 1190.130, Doors.

(3) Each door required by § 1190.50(h), Egress, shall comply with § 1190.130, Doors.

(4) Each door that is an element of an accessible route shall comply with § 1190.130, Doors.

(j) *Windows.* [Reserved]

(k) *Toilet and bathing facilities.* Each toilet and bathing facility provided shall comply with § 1190.150, Toilet and bathing facilities, and in each such facility where any of the fixtures and accessories specified in § 1190.150 (b) and (c) are provided, at least one accessible fixture and accessory of each type provided shall comply with § 1190.150 (b) and (c). For special use situations, refer to Subpart E, Special Building or Facility Types or Elements.

(l) *Drinking fountains and water coolers.* If drinking fountains or water coolers are provided, approximately 50% of those provided on each floor shall comply with § 1190.160, Drinking fountains and water coolers, and shall be dispersed throughout the floor. If only one drinking fountain or water cooler is provided on any floor, it shall have two levels and the lower level shall comply with § 1190.160.

(m) *Controls and operating mechanisms.* If controls and operating mechanisms are provided, each shall comply with § 1190.170, Controls and operating mechanisms.

(n) *Alarms.* If alarm systems are provided, each shall comply with § 1190.180, Alarms.

(o) *Tactile warnings.* Tactile warnings complying with § 1190.130(g), Doors to hazardous areas, shall be provided on the hardware of all doors that lead to hazardous areas. Tactile warnings shall not be used at emergency exist doors.

(p) *Signage.* (1) The international symbol of accessibility shall comply with paragraph 1190.200(e), Symbol of accessibility, and shall be used at the following locations:

(i) Parking spaces designated as reserved for the physically handicapped;

(ii) Passenger loading zones;

(iii) Accessible entrances;

(iv) Accessible toilet and bathing facilities.

(2) Informational signing, if provided, shall comply with § 1190.200.

(q) *Telephones.* At each location where public telephones are provided, each telephone shall comply with § 1190.210, Telephones. If public telephones are provided in a building or facility, then a reasonable number but always at least one shall be equipped with a volume control.

(r) *Seating, tables, and work surfaces.* If fixed seating, tables, and work surfaces are provided, at least 5 percent of each element shall comply with § 1190.220, Seating, tables, and work surfaces.

(s) *Assembly areas.* If assembly areas are provided, accessible viewing positions shall comply with § 1190.230, Assembly areas, and the following table:

Capacity of assembly	Number of viewing positions
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	(1)
Over 1000	(2)

[1] 2 percent of total.
[2] 20 plus 1 for each 100 over 1000.

(t) *Storage.* If storage facilities such as cabinets, shelves, closets and drawers are provided in accessible spaces for occupant use, at least one storage facility of each type provided shall comply with § 1190.240, Storage.

§ 1190.32 Accessible buildings and facilities: Additions.

Each addition to an existing building or facility shall comply with § 1190.31, New construction, except as follows:

(a) *Entrances.* If a new addition to a building or facility does not have an entrance, then at least one entrance in the existing building or facility shall comply with § 1190.120, Entrances.

(b) *Accessible route.* If the only accessible entrance to the addition is located in the existing building or facility, then at least one accessible route shall comply with § 1190.50, Walks, floors, and accessible routes, and shall provide access through the existing building or facility to all rooms, elements, and spaces in the new addition.

(c) *Toilet and bathing facilities.* If there are no toilet rooms and bathing facilities in the addition and these facilities are provided in the existing building, then at least one toilet and bathing facility in the existing building shall comply with § 1190.150, Toilet and bathing facilities.

(d) *Elements, spaces, and common areas.* If elements, spaces, or common areas are located in the existing building and they are not provided in the addition, consideration should be given to making those elements, spaces, and common areas accessible in the existing building.

§ 1190.33 Accessible buildings and facilities: Alterations.

(a) *General.* Alterations to existing buildings or facilities shall comply with the following:

(1) If existing elements, spaces, essential features, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of § 1190.31, Accessible buildings and facilities: New construction.

(2) If power-driven vertical access equipment (*e.g.*, escalator) is planned or installed where none existed previously, or if new stairs (other than stairs installed to meet emergency exit requirements) requiring major structural changes are planned or installed where none existed previously, then a means of accessible vertical access shall be provided that complies with § 1190.70, Ramps and curb ramps; § 1190.100, Elevators; or § 1190.110, Platform lifts.

(3) If alterations of single elements, when considered together, amount to an alteration of a space of a building or facility, the entire space shall be made accessible.

(4) Signage. If an existing building contains some but not all accessible elements and spaces, informational signage complying with § 1190.200, Signage, directing the user to accessible facilities shall be placed at each accessible entrance. Each inaccessible entrance and each inaccessible toilet room shall have signage directing the user to the accessible entrance(s) or toilet room(s).

(b) *Alterations involving more than 50% of the full and fair cash value.* If the total cost of all alterations (including but not limited to electrical, mechanical, plumbing and structural changes) for a building or facility within any twelve (12) month period is 50% or more of the building's full and fair cash value (as defined by § 1190.3), then each element or space that is altered or added shall comply with the applicable provisions of § 1190.31, Accessible buildings and facilities: New construction; and the altered building shall contain:

(1) At least one accessible route complying with § 1190.50, Walks, floors, and accessible routes, and § 1190.33(a);

(2) At least one accessible entrance complying with § 1190.120, Entrances. If additional accessible entrances are altered, then they shall comply with § 1190.33(a)(1); and

(3) The following toilet facilities, whichever number is greater:

(i) At least one toilet facility for each sex in the altered building complying with § 1190.150, Toilet and bathing facilities;

(ii) At least one toilet facility for each sex on each substantially altered floor, where such facilities are provided, complying with § 1190.150, Toilet and bathing facilities.

(4) *Exception.* If the cost of the elements and spaces required by § 1190.33(b)(1), (2), and (3) exceeds 15% of the total cost of all other alterations, then a schedule may be established by the standard-setting and/or funding agency to provide the required improvement within a 5 year period.

(5) *Exception.* If the alteration is limited solely to the electrical, mechanical, or plumbing system and does not involve the alteration of any elements and spaces required to be accessible under this Part 1190 the § 1190.33(b) does not apply.

(6) *Exception.* Consideration shall be given to providing accessible elements and spaces in each altered building or facility complying with:

(i) Section 1190.60, Parking and Passenger Loading Zones;

(ii) Section 1190.160, Drinking fountains and Water Coolers;

(iii) Section 1190.180, Alarms;

(iv) Section 1190.210, Telephones;

(v) Section 1190.220, Seating Tables and Work Surfaces;

(vi) Section 1190.230, Assembly Areas;

(vii) Section 1190.240, Storage.

§ 1190.34 Accessible buildings and facilities: Leased.

(a) Buildings or facilities or portions thereof leased by the Federal government shall comply with the requirements of § 1190.31, New

construction, § 1190.32, Additions, and § 1190.33, Alterations.

(b) If no fully accessible space is available, space may be leased only if the following conditions are met:

(1) At least one accessible route is provided from an accessible entrance complying with § 1190.120, Entrances, to all leased portions of the building or facility and to each essential feature which serves that portion of the building or facility. The accessible route shall comply with the requirements of § 1190.50 Walks, floors, and accessible routes.

(2) Each essential feature of the portion of the building or facility to be leased is accessible and complies with the applicable sections.

(3) Common areas that are approved space needs of the occupant agency serving the portions of the building or facility to be leased are accessible and comply with the applicable section.

(c) *Exception.* If no space complying with paragraph (a) or (b) of this section is available, space as available may be leased, provided—

(1) The leasing authority certifies that space is unavailable due to remoteness of the area or that the lease is necessary for officials servicing natural or human-made disasters; and

(2) The ATBCB is provided a listing of instances in which this exception is applied as part of the semi-annual report to Congress.

(d) Any other deviation from the requirements of § 1190.34 shall be made only through the waiver or modification process.

Subpart D—Technical Provisions

§ 1190.40 Human data.

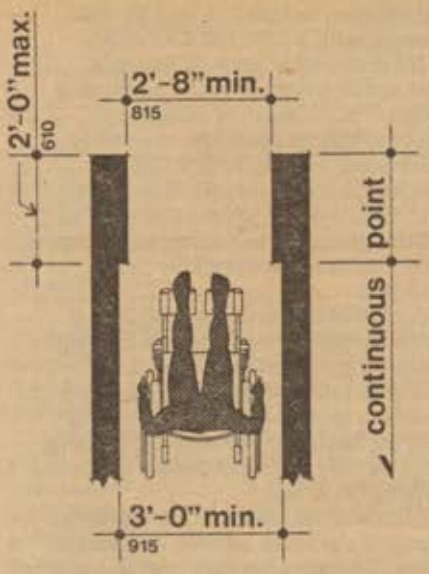
(a) *General.* This section is the basis for clearances and equipment location required by other sections.

(b) *Moving wheelchair clearances.* Provide the clearances for moving wheelchairs as follows:

(1) Minimum clear width for passage of a single wheelchair is 3'0" (915 mm) (fig. 4.1).

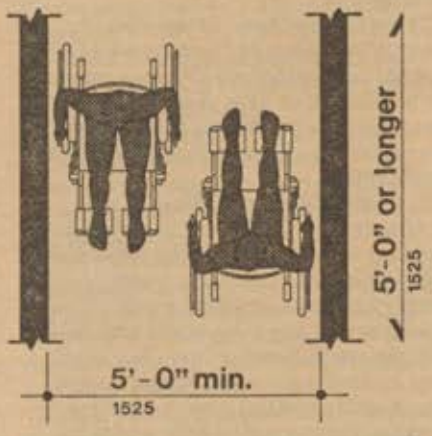
(i) *Exception.* The clear width may be reduced to 2'8" (815 mm) for a distance not to exceed 2'0" (610 mm) in length at points such as doorways (fig. 4.1).

(ii) [Reserved].



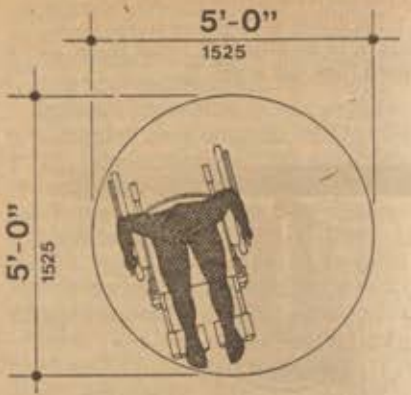
passage 4.1

(2) Minimum clear width for two wheelchairs to pass is 5'0" (1,525 mm) (fig. 4.2).

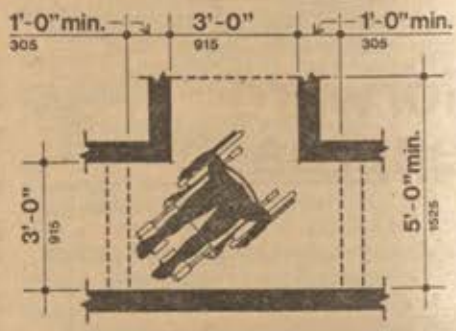


two-way 4.2

(3) Minimum clear space to make a 180 degree turn is 5'0" (1,525 mm) diameter (fig. 4.3) or a T-shaped space that complies with Figure 4.4.



180°/360° 4.3



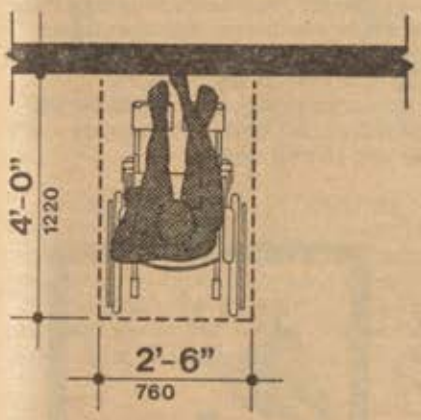
t-turn 4.4

(c) *Clear floor or ground space.* Provide the following clear floor or ground space to accommodate a single, stationary occupied wheelchair:

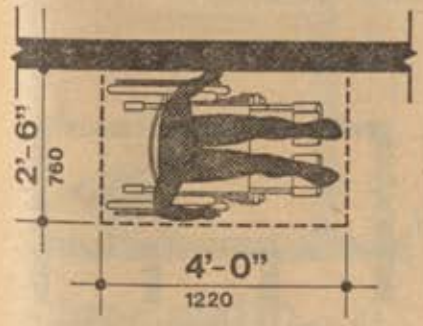
(1) Clear floor or ground space shall be a minimum of 2'6" by 4'0" (760 mm by 1,220 mm) (fig. 4.5).

clear floor or ground space 4.5

(2) Position clear floor or ground space for either forward or parallel approach to an object or element as required (figs. 4.6 and 4.7).



forward approach 4.6

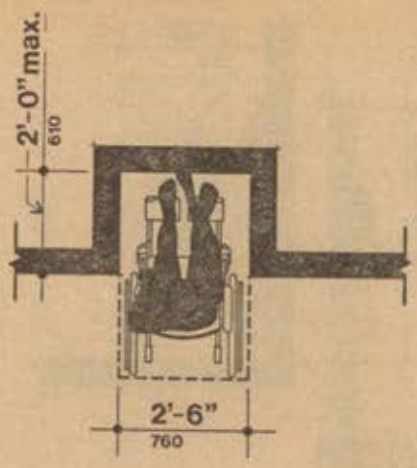


parallel approach 4.7

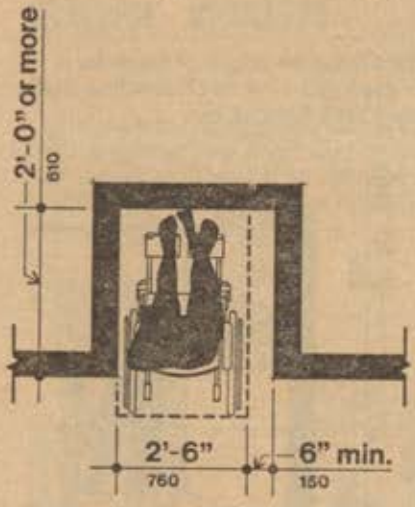
(3) Clear floor or ground space may overlap the clear space required under some objects.

(4) Clear floor or ground space shall adjoin or overlap an accessible route or another clear floor or ground space for at least one full, unobstructed side.

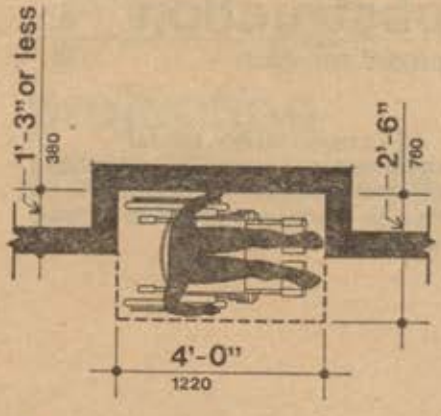
(5) If clear floor or ground space is confined or restricted on all or part of three sides, provide additional maneuvering space adjoining clear floor or ground space as shown in figures 4.8, 4.9, 4.10 and 4.11.



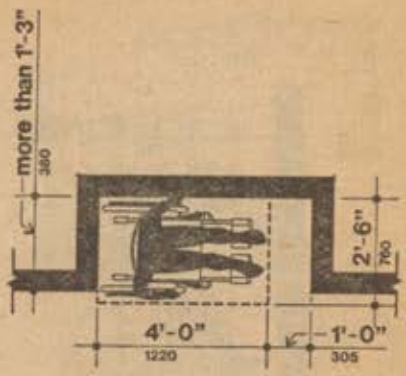
alcove 4.8



alcove 4.9



alcove 4.10



alcove 4.11

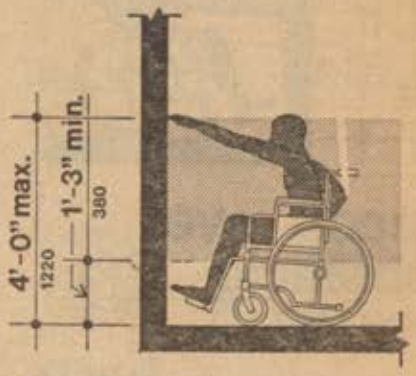
(6) Surfaces of clear floor or ground spaces shall comply with § 1190.50(i), walks, floors, and accessible routes.

(d) *Reach limitations.* Reach limitations are a function of approach in the clear floor or ground space:

(1) Forward reach:

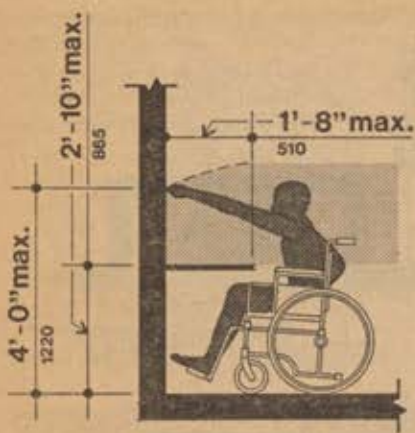
(i) Maximum height of reach for a forward approach shall be 4'0" (1,220 mm) (fig. 4.12).

(ii) Minimum height of reach for a forward approach shall be 1'3" (380 mm) (fig. 4.12).

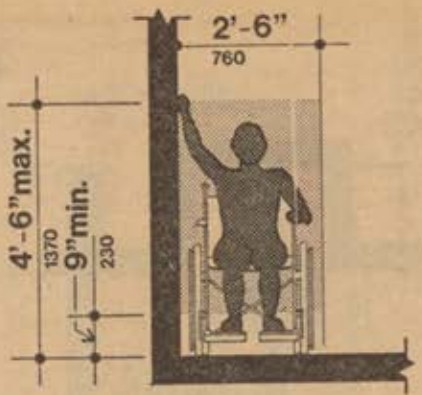


forward reach 4.12

(iii) Maximum height of reach for a forward approach over an obstruction shall comply with figures 4.13 and 4.14.

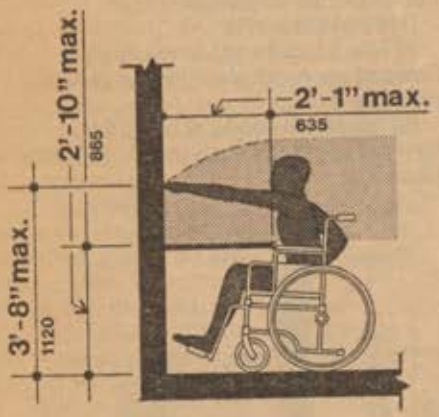


reach over obstacle
forward approach
4. 13

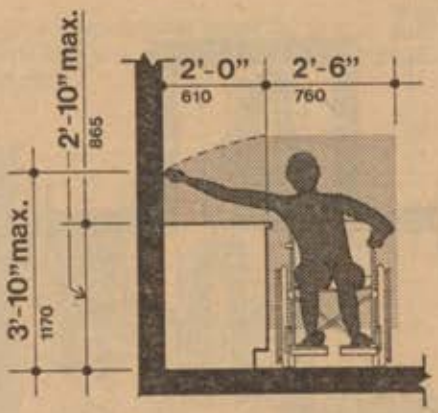


side reach
4. 15

(iii) Maximum height of reach for a side approach over an obstruction shall comply with figure 4.16.



reach over obstacle
forward approach
4. 14



reach over obstruction
parallel approach
4. 16

(2) Side reach (parallel approach):

(i) Maximum height of reach for a side approach shall be 4'6" (1,370 mm) (fig. 4.15).

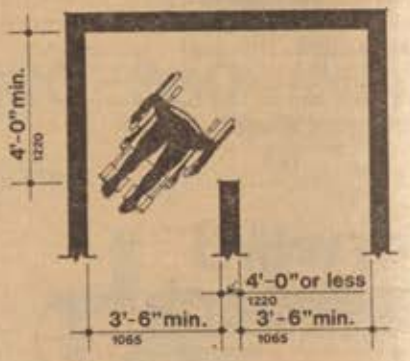
(ii) Minimum height of reach for a side approach shall be 9 inches (230 mm) (fig. 4.15).

(3) To be accessible, special equipment may require measurements different from those provided above and these measurements should be dictated by equipment design.

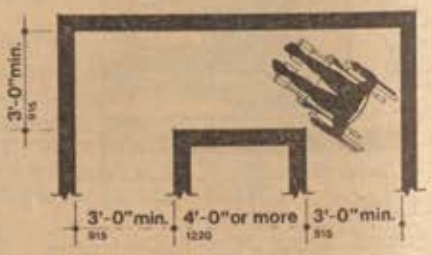
§ 1190.50 Walks, floors, and accessible routes.

(a) *General.* Accessible routes required by Subpart C—Scope shall comply with this section.

(b) *Width.* Provide the minimum clear width for continuous passage and for point passage required by § 1190.40(b)(1) (fig. 4.1). Provide maneuvering clearances as shown in figures 5.1 and 5.2 if the accessible route requires a turn around an obstruction.



turn
maneuvering clearances
5. 1



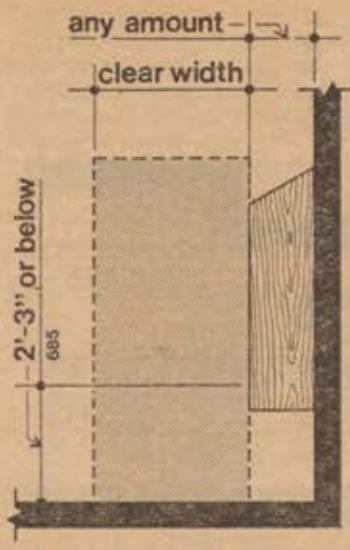
turn
maneuvering clearances
5. 2

(c) *Protruding objects.* No protruding object shall reduce the clear width of an accessible route or maneuvering space below the minimum required by § 1190.40(b)(1) (fig. 5.3).

clear width

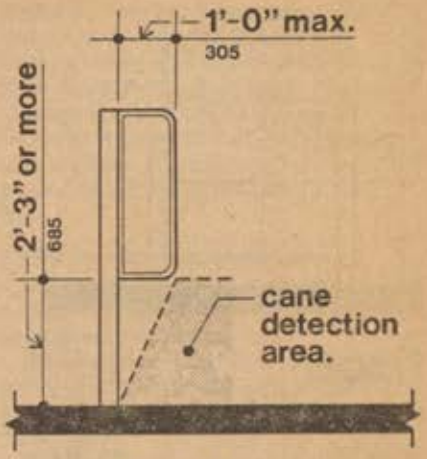
5. 3

(1) Objects less than 2'0" (610 mm) long that are fixed to wall surfaces shall not project into accessible routes more than 4 inches (100 mm) if mounted with their leading edges between 2'3" and 6'8" (685 mm and 2030 mm) (nominal dimension) above finish floor (fig. 5.4).



clear width

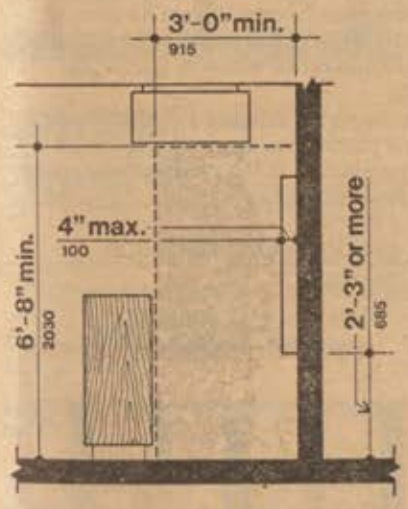
5. 5



projecting object

elevation

5. 7



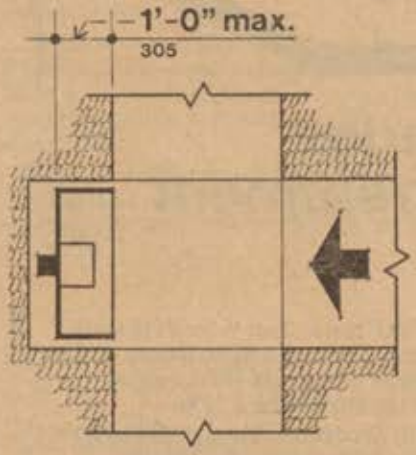
clear width

around object 24" long max.

5. 4

(2) Objects fixed to wall surfaces may project more than 4 inches (100 mm) if mounted with the lower extreme of their leading edge less than 2'3" (685 mm) above the finish floor. These objects shall not project into the required minimum clear width (fig. 5.5).

(3) Free standing objects mounted on posts or pylons may overhang 1'0" (305 mm) maximum from 2'3" to 6'8" (685 mm to 2030 mm) above ground or finished floor surface (figs. 5.6 and 5.7).

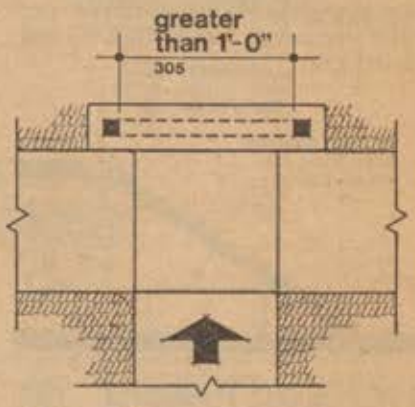


projecting object

plan view

5. 6

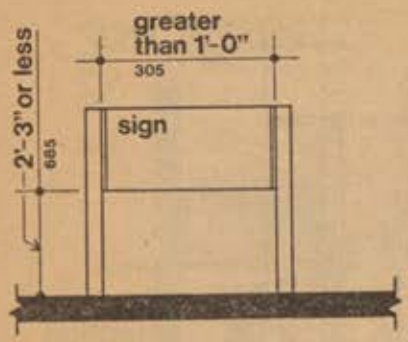
(4) Objects greater than 1'0" (305 mm) wide mounted with their leading edge less than 2'3" (685 mm) may protrude any distance (figs. 5.8 and 5.9).



fixed obstruction

plan view

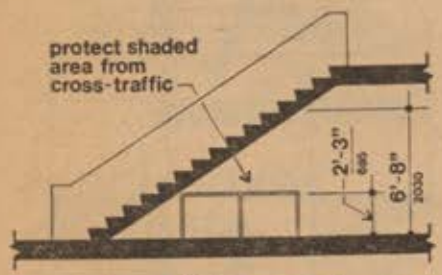
5. 8



fixed obstruction 5.9
elevation

(d) *Passing space.* If an accessible route has less than a 5'0" (1,525 mm) clear width, provide accessible passing spaces at intervals not exceeding 200 ft. (61 mm) unobstructed view. See figures 4.2 and 4.4 for examples of acceptable passing spaces.

(e) *Vertical clearance.* Provide a minimum vertical clearance (headroom) of 6'8" (2,030 mm) throughout accessible routes. If vertical clearance of area adjoining accessible route is reduced to less than 6'8", (nominal dimension) provide a barrier to warn blind or visually-impaired persons (figs. 5.4 and 5.9 and 5.10).

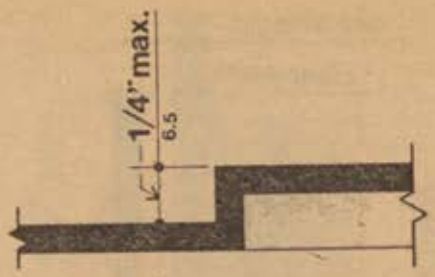


overhead hazard 5.10

(f) *Slope.* Accessible routes with running slopes of 1:20 or greater shall be considered ramps and shall comply with § 1190.70, Ramps and curb ramps. Cross-slopes on accessible routes shall not exceed 1:48 (¼ inch per foot).

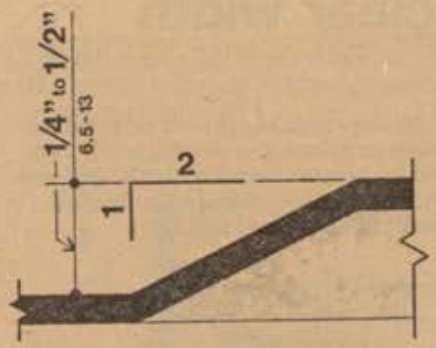
(g) *Changes in level.* All changes in level or grade in accessible routes shall comply with the following:

(1) Up to ¼ inch (6 mm): vertical without edge treatment (fig. 5.11).



edge treatment 5.11

(2) ¼ inch to ½ inch (6 mm to 13 mm): beveled with slope not exceeding 1:2 (fig. 5.12).



edge treatment 5.12

(3) Greater than ½ inch (13 mm): comply with § 1190.70, Ramps and curb ramps; § 1190.100, Elevators; or § 1190.110, Platform Lifts.

(i) *Exception.* Exterior sliding door thresholds may be ¾" (19 mm) maximum if beveled with slope not exceeding 1:2.

(ii) [Reserved]

(4) Stairs shall not be the sole means of vertical access along an accessible route.

(h) *Egress.* Arrange egress so as to be readily accessible from all accessible rooms and spaces. Where fire code provisions require more than one means of egress from any space or room, such means of accessible egress shall also be provided to handicapped persons.

(1) *Exception.* In multiple story buildings and facilities where at-grade egress from each floor is impossible, either of the following is permitted:

(i) The provision of approved fire and smoke partitions within each story creating horizontal exits; or

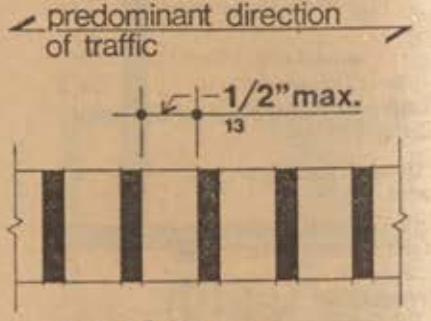
(ii) The provision of areas of refuge within each floor approved by agencies having authority for safety.

(2) [Reserved]

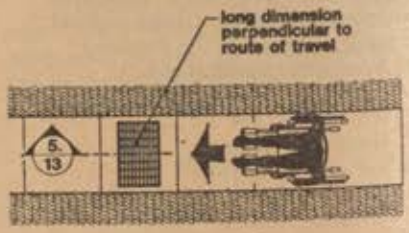
(i) *Ground and floor surfaces*—(1) *Surface Condition.* Surfaces of paving and floors shall be stable, firm, and slip-resistant. Irregular paving and flooring materials that may cause tripping or difficult wheelchair passage because of height differentials are not permitted on accessible routes.

(2) *Drainage.* Design accessible routes so that their surfaces will not collect water. Gratings located in accessible routes shall have openings no greater than ½ inch (13 mm) when measured in the dominant direction of travel (fig. 5.13).

Gratings with elongated openings shall be so placed that the long dimension is perpendicular to the predominant route of travel (fig. 5.14).



section: grating 5.13
detail of fig. 5.14



grating orientation 5.14

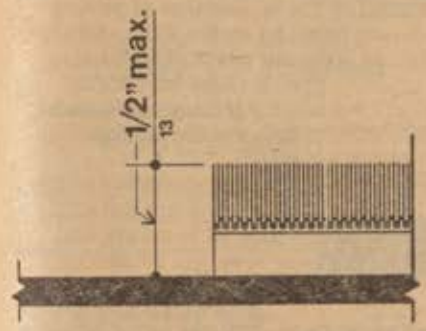
(3) Carpeting. If carpet or carpet tile is used on an accessible ground or floor surface, it shall:

(i) Be securely attached;

(ii) Have a firm cushion or pad or no cushion or pad;

(iii) Have a construction of level loop, textured loop, level cut pile, or level cut/uncut pile;

(iv) Have a maximum combined thickness of pile, cushion, and backing height of ½ inch (13 mm) (Fig. 5.15); and



carpet height 5.15

(v) Exposed edge(s) and trim shall be securely fastened in place and shall comply with paragraph 1190.50(g), Changes in level.

§ 1190.60 Parking and passenger loading zones.

(a) *General.* Parking and passenger loading zones required to be accessible by Subpart C—Scope shall comply with this section.

(b) *Location.* Accessible parking spaces and accessible passenger loading zones shall:

(1) Be the spaces or zones located closest to the nearest accessible entrance on an accessible route; and

(2) If located in a separate building or facility, be on the shortest accessible route to an accessible entrance of the parking facility.

(c) *Accessible parking spaces.* Provide accessible parking spaces (fig. 6.1) that:

(1) Are at least 8'0" (2,440 mm) wide,

(2) Have an adjacent access aisle at least 5'0" (1,525 mm) wide and shall comply with § 1190.50, Walks, floors, and accessible routes;

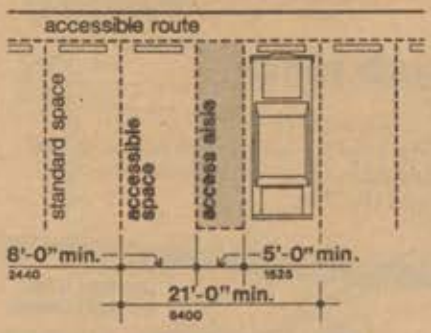
(i) *Exception.* If accessible parking spaces for side lift vans are provided, each shall have an adjacent access aisle at least 8'0" (2,440 mm) wide and shall comply with § 1190.50, Walks, Floors, and Accessible Routes.

(ii) [Reserved].

(3) May share a common access aisle between two parking spaces;

(4) Do not permit parked vehicle overhangs to reduce the clear width of accessible routes; and

(5) Have parking spaces and access aisles with surface slopes not exceeding 1:48 (¼ inch per foot) in all directions.



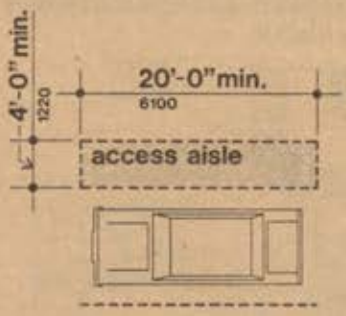
accessible parking 6.1

(d) *Passenger loading zones.* Provide accessible passenger loading zones that:

(1) Have an access aisle at least 4'0" (1,220 mm) wide by 20'0" (6 m) long adjacent, parallel, and level with the vehicle standing space,

(2) Have curb ramps conforming to § 1190.70, Ramps and curb ramps, if there are curbs between the access aisle and other portions of the accessible route; and

(3) Have vehicle standing spaces and access aisles with surface slopes not exceeding 1:48 (¼ inch per foot) in all directions (figure 6.2).



unloading zone 6.2

(e) *Vertical clearance.* Provide minimum vertical clearances of 9'6" (3.45 m) at accessible parking spaces, at accessible passenger loading zones, and along vehicle access routes to such areas from site entrances. (f) *Signage.* Signage reserving accessible parking spaces and identifying passenger loading zones and vehicle access routes shall comply with § 1190.200, Signage. Signage shall incorporate the International Symbol of Accessibility and shall not be obscured by a vehicle parked in the space (figures 20.1 and 20.2).

§ 1190.70 Ramps and curb ramps.

(a) *General.* Ramps and curb ramps required by Subpart C—Scope shall comply with this section.

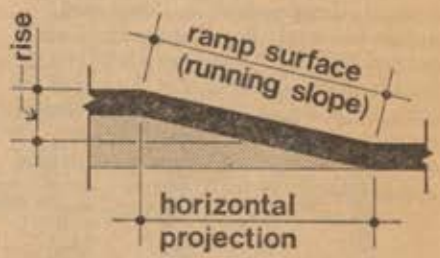
(b) *Slopes and rise.* Provide the least practical slope for any ramp or curb ramp subject to the following maximums:

(1) New Construction requirements:

(i) Maximum running slope shall not exceed 1:12 (8.3%) (fig. 7.1).

(ii) Maximum rise for any run shall not exceed 2'6" (760 mm) (fig. 7.2).

(iii) Maximum slopes of adjoining gutters, road surface, or accessible routes shall not exceed 1:20 and shall comply with § 1190.70(e)(8) (fig. 7.12).



ramp slope 7.1

slope	maximum rise		maximum projection	
	in	mm	ft	m
1:12 to < 1:16	30	760	30	9
1:16 to < 1:20	30	760	40	12
1:20	30	760	50	15

maximum rise & projection 7.2
new construction

(2) Existing construction requirements:

(i) If space limitations prevent compliance with paragraph 1190.70(b)(1), slopes and rises listed in figure 7.3 may be used.

(ii) [Reserved].

slope	maximum rise		maximum projection	
	in	mm	ft	m
1:10 to 1:8	3	75	2	0.6
1:12 to 1:10	6	150	5	1.5

maximum rise & projection

7.3

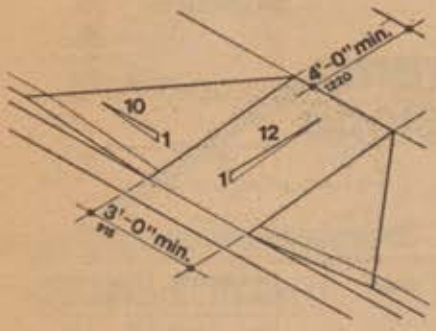
existing construction

(c) *Width.* Ramps and curb ramps shall have a minimum clear width of 3'0" (915 mm) exclusive of edge protection or flared sides.

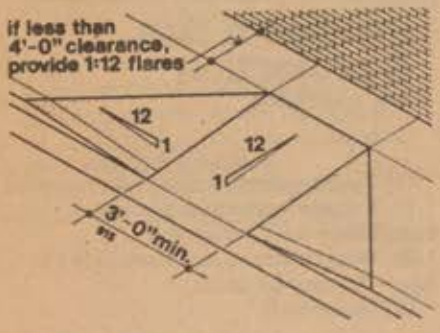
(d) *Cross-slope and surface.* Cross-slope of ramp surfaces shall not exceed 1:48 (¼ inch per foot). Ramp surfaces shall comply with § 1190.50, walks, floors, and accessible routes.

(e) *Curb ramps.* In addition to the requirements of paragraphs 1190.70(a), (b), and (c), curb ramps shall comply with the following requirements:

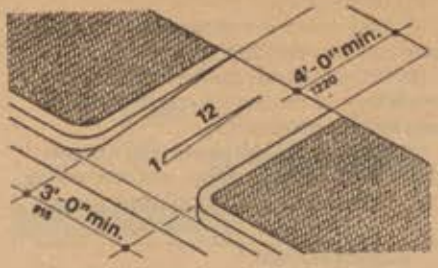
(1) Provide flared sides if ramps are located where pedestrians may walk across the ramp; flared slope shall not exceed 1:10 (fig. 7.4) where a 4'0" (1,220 mm) landing is provided at the top of the curb ramp. If less than 4'0" (1,220 mm) is provided, the flared slope shall not exceed 1:12 (fig. 7.5). Where pedestrians will not normally walk across a ramp, returned curbs may be used (fig. 7.6).



curb ramp 7.4

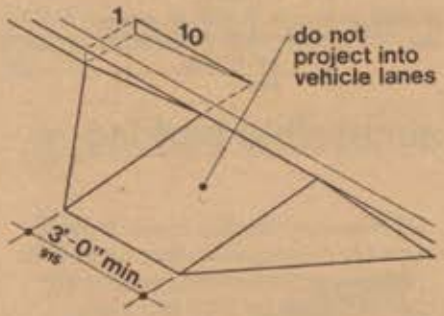


curb ramp 7.5



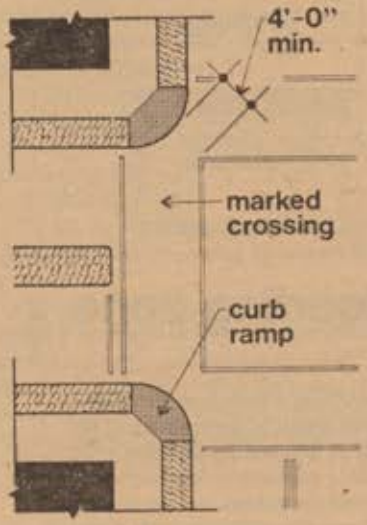
curb ramp 7.6

(2) Locate built-up curb ramps so that they do not project into vehicular traffic lanes (fig. 7.7).

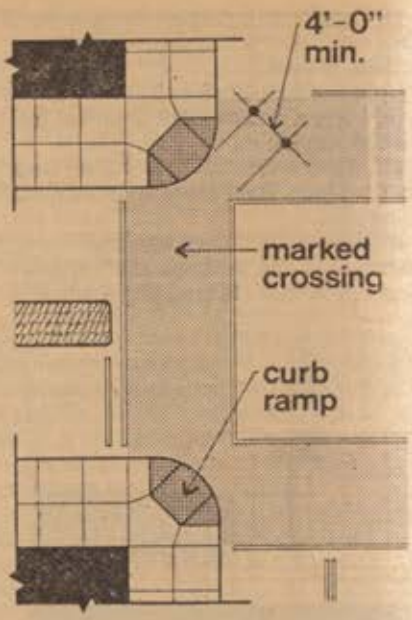


curb ramp 7.7

(3) Diagonal or corner type curb ramps having returned curbs or well defined edges, shall have such edges parallel to the direction of pedestrian flow (fig. 7.8). Diagonal or corner type curb ramps having flared sides shall have at least a 2'0" (610 mm) long segment of straight curb located on each side of the curb ramp and within marked crossings (fig. 7.9).



crossing 7.8

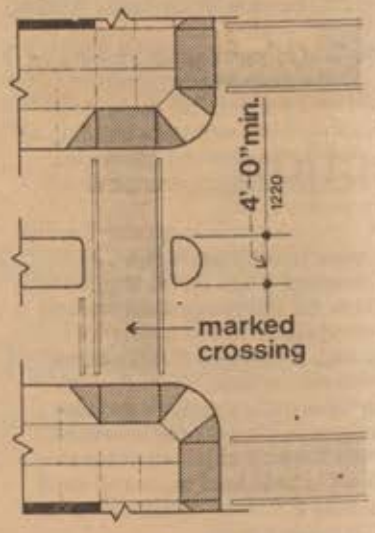


crossing 7.9

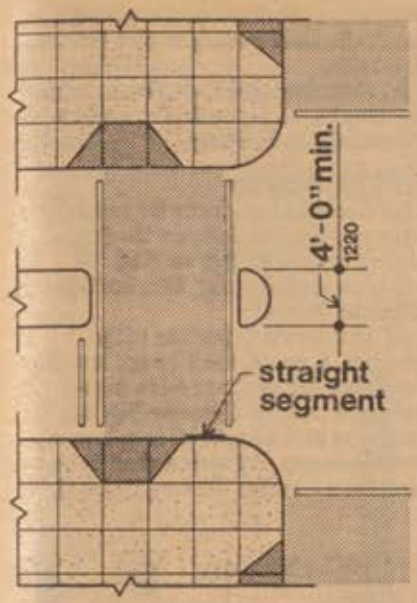
(4) Curb ramp discharge (top and bottom) shall be to a 4'0" (1,220 mm) minimum deep clear space (figs. 7.4 and 7.5). If the marked crossings are provided, locate bottom discharge entirely within marked crossings (figs. 7.8 and 7.9).

(5) Locate curb ramps to prevent blockage of discharge areas by parked vehicles.

(6) Cut any islands through flush with street surfaces or ramp each side to permit crossing. Provide 4'0" (1,220 mm) long rest area (see figs. 7.10 and 7.11).



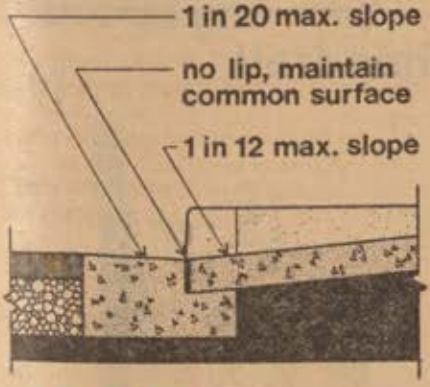
crossing 7.10



crossing 7.11

(7) Curb ramps having less than a 6-inch (150 mm) rise do not require handrails.

(8) Transitions from ramps to walks, gutters, or streets shall be flush and free of abrupt changes (fig. 7.12).



section 7.12

(f) *Ramps.* In addition to the requirements of § 1190.70(a), (b), (c) and (d) provide the following at all ramps:

(1) Provide landings at the top, bottom, and at changes of direction. If ramp runs exceed maximum projection given in figures 7.2 and 7.3, provide intermediate landings. Landings shall:

(i) Have a width which shall be at least as wide as the widest ramp run approaching it.

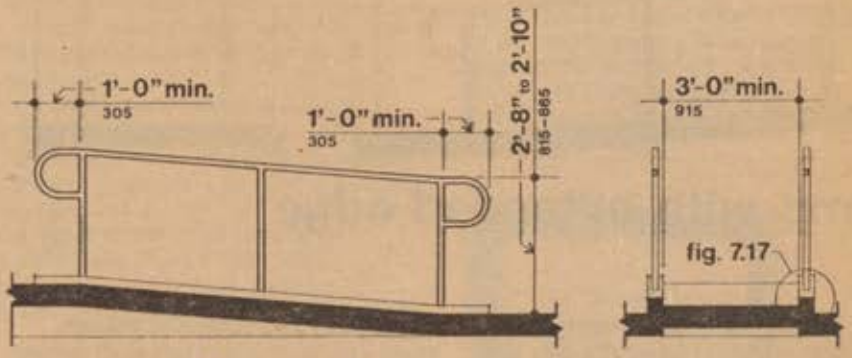
(ii) Have a minimum length of 5'0" (1,525 mm).

(iii) Have a minimum size at direction changes that is 5'0" by 5'0" (1,525 mm by 1,525 mm).

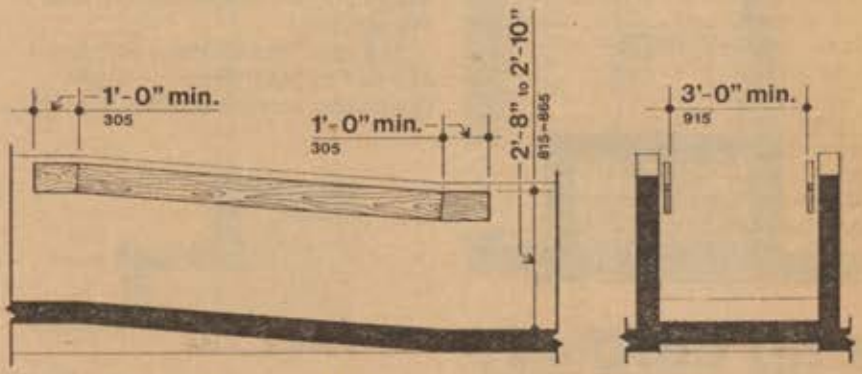
(iv) Shall comply with § 1190.130.

doors, if doors open into them.

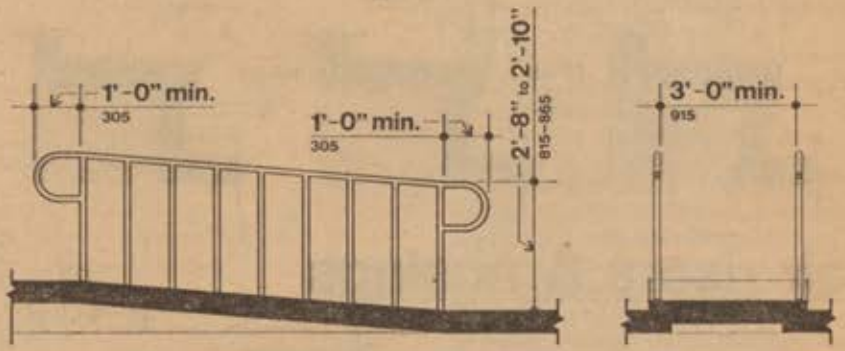
(2) Provide handrails that comply with § 1190.90, handrails, on both sides of any ramp run exceeding a 6-inch (150 mm) rise or a 6'0" (1,830 mm) horizontal projection (figs. 7.13, 7.14, 7.15, and 7.16).



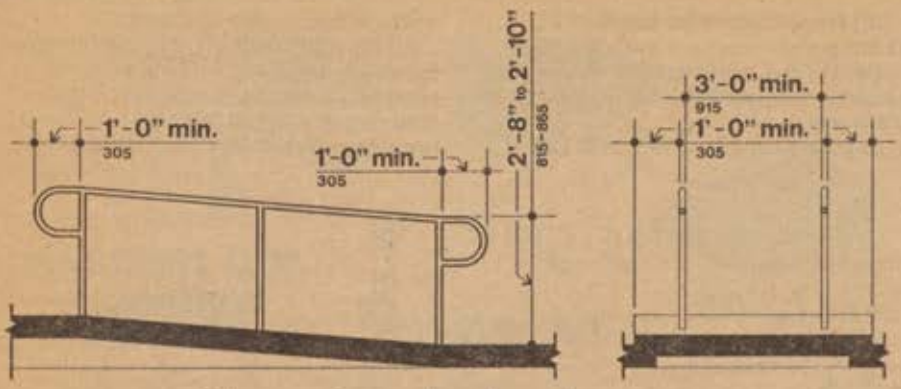
ramp with curb 7.13



ramp with wall 7.14

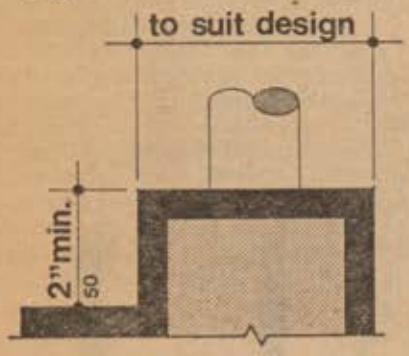


ramp with vertical guard 7.15



ramp with extended edge 7. 16

(3) Provide curbs, walls, vertical guards or projected edges at ramps and landings with drop-offs. Minimum curb height shall be 2 inches (50 mm) (fig. 7.17).



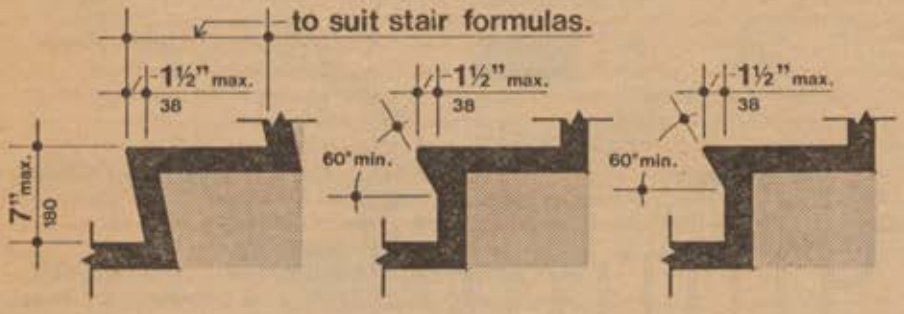
ramp curb 7. 17

(g) *Exterior conditon.* Curb ramps, ramp, and landing surfaces shall comply with paragraph 1190.50(i)(2), drainage.

§ 1190.80 Stairs.

(a) *General.* Stairs required by Subpart C—Scope shall comply with this section.

(b) *Risers.* Provide risers that do not exceed 7 inches (180 mm) in height. Open risers are not permitted (fig. 8.1).



stair risers & nosings 8. 1

(c) *Nosings.* Nosings shall:

(1) Project a maximum of 1½ inches (38 mm);

(2) Have a leading edge with a maximum radius of curvature of ½ inches (13 mm); and

(3) Be formed by risers that are sloped, or shall have undersides of the nosings which form an angle not less than 60 degrees from the horizontal (fig. 8.1).

(d) *Handrails.* Provide continuous handrails at both sides of stairways. Handrails shall comply with § 1190.90, Handrails.

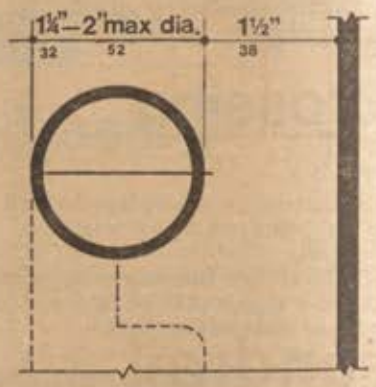
(e) *Exterior conditions.* Stair treads and landing surfaces shall comply with § 1190.50(i)(2), Drainage.

§ 1190.90 Handrails.

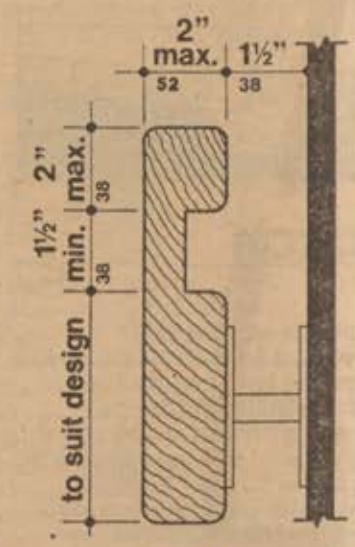
(a) *General.* Handrails for ramps or stairs required by Subpart C—Scope shall comply with this section.

(b) *Size and spacing.* Size and spacing of handrails shall:

(1) The handgrip portion of the handrail, if round, shall be not less than 1¼ inches (32 mm) nor more than 2 inches (50 mm) in diameter (fig. 9.1). If the shape of the handrail is not round, then the larger dimension shall be not more than 2 inches (50 mm) (fig. 9.2).

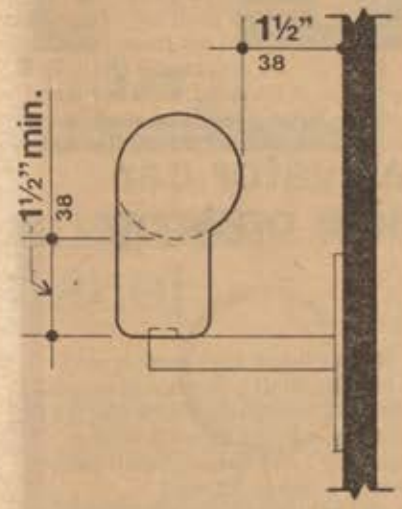


handrail 9. 1

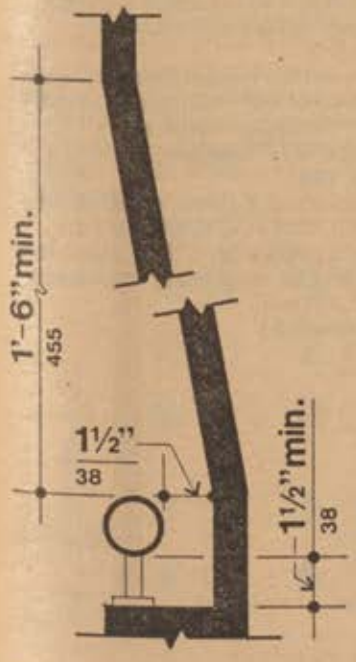


handrail 9. 2

(2) If handrails are mounted adjacent to walls or other surfaces, provide a 1½ inch (38 mm) (minimum/maximum) clear space between the surface and the handrail (figs. 9.1, 9.2, 9.3, and 9.4). The handrail and the surfaces adjacent to the handrail shall be free of any sharp or abrasive elements. Edges shall have minimum radius of ⅛ inch (3 mm). Freestanding rails located farther than 6 inches (150 mm) from wall or other vertical surfaces are not subject to this provision.



handrail 9.3



handrail 9.4

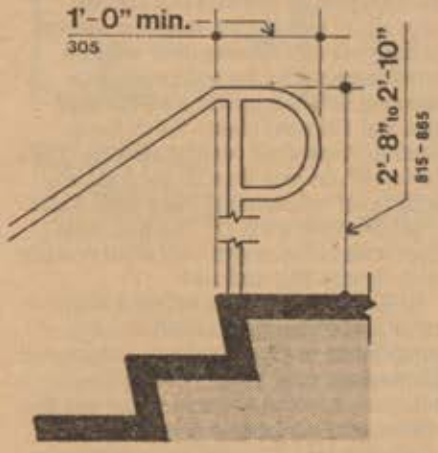
(3) Handrails may be mounted in recesses if the recesses comply with figure 9.4.

(4) On switchbacks or dogleg ramps or stairs, inside handrails shall be continuous.

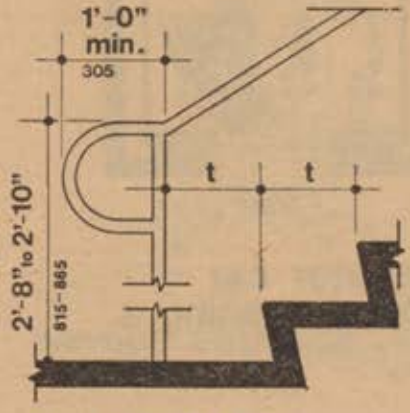
(c) *Handrail projections.* (1) If outside handrails are not continuous, then:

(i) At a ramp landing, handrails shall project parallel with ramp or landing surface for a length of 1'0" (305 mm) beyond the top and bottom of ramp surfaces (figs. 7.13, 7.14, 7.15, and 7.16).

(ii) At a stair landing, handrails shall project at least 1'0" (305 mm) beyond the top riser and at least 1'0" (305 mm) plus the depth of one tread beyond the bottom riser. The 1'0" (305 mm) projection shall in each instance be parallel with the floor (figs. 9.5 and 9.6).



extension handrails 9.5

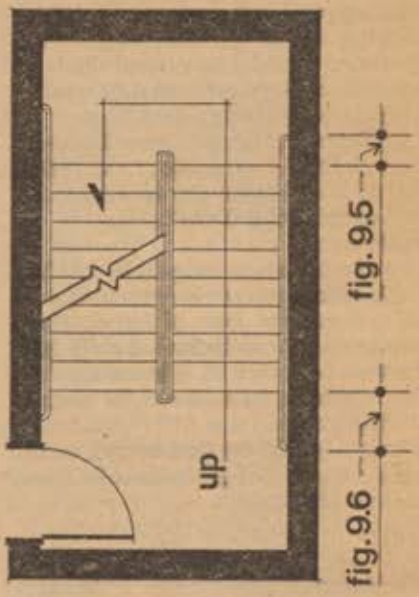


extension handrails 9.6

(iii) *Exception.* Full extension of handrails shall not be required in alterations where such extensions would be hazardous or impossible due to plan configurations.

(2) Gripping surfaces shall not be interrupted with newel posts, balusters, or other obstructions.

(d) *Mounting height.* Mount handrails for accessible stairs and ramps at a height of 2'8" to 2'10" (815 mm to 865 mm) above stair nosing(s) or ramp surface as applicable (see figs. 7.13, 7.14, 7.15, 7.16, 9.6, and 9.7).



stairway 9.7

(e) *Structural strengths.* Handrails, as installed, shall support a minimum momentary concentrated load applied at the top edge of 200 lbs. (91 kg) horizontally and 30 percent of that load vertically downward. Where the railing system is installed in public assembly occupancies, the loading shall be increased 50 percent.

Handrails shall not rotate within their fittings. Handrails of material other than metal shall meet the same structural requirements.

(f) *Hazards.* Ends of freestanding handrails shall be either rounded or returned smoothly to floor or post (see § 1190.50(c), Protruding objects.)

§ 1190.100 Elevators.

(a) *General.* (1) Elevators required by Subpart C—Scope shall comply with this section. For additional information see the *American National Standard Safety Code for Elevators.*

Dumbwaiters, Escalators and Moving Walks, A17.1, and see also National Elevator Industry, Inc. (NEII) *Suggested Minimum Elevator Requirements for the Handicapped.*

(2) Freight elevators shall not be considered as meeting the requirements of this section.

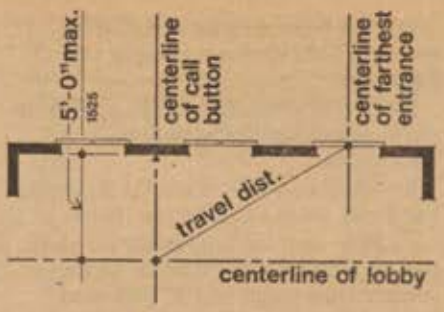
(b) *Operation and leveling.* Elevators shall be automatic and shall be provided with a self-leveling feature that will automatically bring the car to the floor landing within a tolerance of ½ inch (13 mm) under normal loading and unloading conditions. The self-leveling feature shall, within its zone, be entirely automatic and independent of the operating device and shall correct for overtravel or under-travel and shall maintain the car approximately level irrespective of loading conditions.

(c) *Elevator door operation.* Elevator doors shall be a minimum of 3'0" (915 mm) wide and automatic door controls shall comply with the following requirements:

(1) The minimum acceptable time from notification that a car is answering a hall call until the doors of that car start to close shall be as indicated in fig. 10.1. The travel distance shall be established from a point in the center of the corridor or lobby (maximum of 5'0" (1,525 mm)) directly opposite the farthest hall button to the centerline of the farthest hoistway entrance (fig. 10.2).

distance		time
ft	m	sec
0 to 5	1.5	5
10	3	7
15	4.5	10
20	6	13

door timing 10. 1



travel distance 10. 2

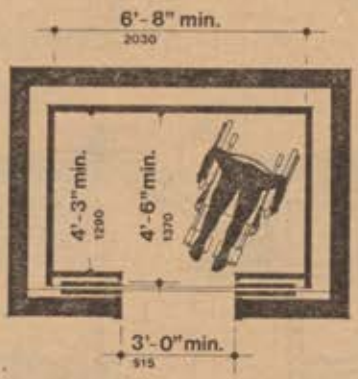
(2) Doors shall remain fully open for a minimum of 5 seconds.

(3) Provide doors with a reopening device which will function to stop and reopen the car door and adjacent hoistway door in case the car door is obstructed while the door is closing. This reopening device shall also be capable of sensing an object or person in the path of a closing door without requiring contact for activation at a nominal height 5 inches and 2'5" (125 mm and 735 mm) above finish floor. Such devices shall remain effective for a period of not less than 20 seconds. For additional information, see ANSI A17.1.

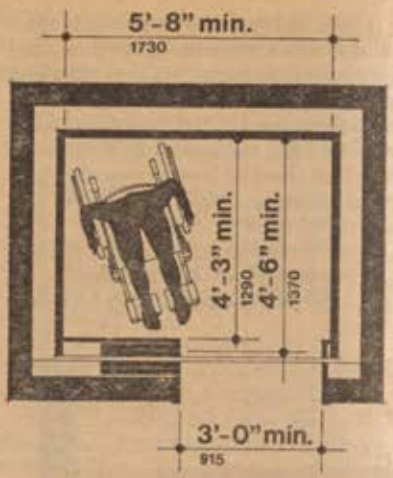
(d) *Elevator cars.* (1) The minimum floor areas of elevator cars shall comply with figures 10.3 and 10.4.

(i) *Exception.* Where existing shaft or structural elements prohibit strict compliance in alteration work, these dimensions may be reduced by the minimum amount necessary, but in no case shall they be less than 4'0" by 4'0" (1,220 mm by 1,220 mm) clear minimum car size.

(ii) [Reserved].



elevator car center opening 10. 3



elevator car side opening 10. 4

(2) Car floors shall comply with § 1190.50, Walks, floors and accessible routes. The clearance between the car platform sill and the edge of any hoistway landing shall be no greater than 1¼ inches (32 mm).

(3) Car controls shall be readily accessible from a wheelchair.

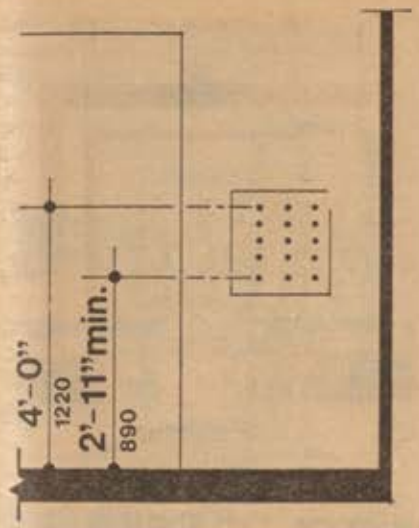
(i) Buttons, exclusive of border, shall have a minimum dimension of ¾ inch (19 mm) and shall be raised or flush with the operating panel.

(ii) Provide a visual signal indicating when each call is registered and answered.

(iii) Mount the highest floor buttons at a maximum of 4'0" (1,220 mm) above the floor and the lowest buttons at a minimum of 2'11" (890 mm) above the floor (fig. 10.5).

(A) *Exception.* If there is a substantial increase in cost as a result of the 4'0" (1,220 mm) requirement, the highest floor buttons may be mounted at a maximum of 4'6" (1,370 mm).

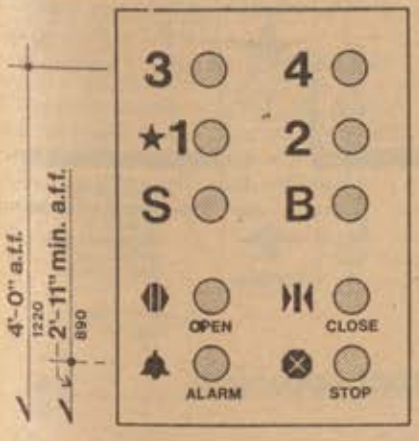
(B) [Reserved.]



control panel 10.5

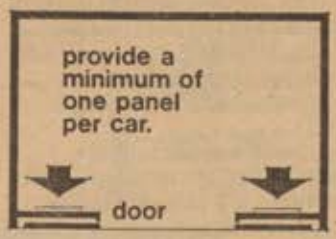
(iv) Group emergency buttons at the bottom of the panel with their centerlines no lower than 2'11" (890 mm).

(v) Designate all control buttons by raised standard alphabet characters for letters, arabic characters for numerals, or standard symbols as shown in figure 10.6. For additional information see ANSI A17.1 and see also NEII *Suggested Minimum Elevator Requirements for the Handicapped.* Place raised designations to the immediate left of the button to which they apply. Permanently attached, applied plates are acceptable. Locate the call button for the main entry floor in the left-most column and designate it with a raised star as shown in figure 10.6.



elevator control panel 10.6

(vi) Locate control panels as shown in figures 10.7 and 10.8.



control locations
center opening 10.7

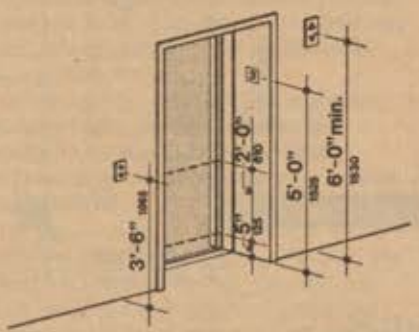
control locations
side opening 10.8

(e) *Door jamb markings.* Provide floor designation markings at each hoistway entrance on both jambs and that comply with the following:

(1) The centerlines of characters shall be located 5'0" (1,525 mm) above finish floor; and

(2) Characters shall be a minimum of 2 inches (50 mm) high and shall comply with § 1190.200, Signage.

(3) Permanently applied plates are acceptable (fig. 10.9).



elevator entrance 10.9

(f) *Lobby call buttons.* (1) Call buttons shall:

(i) Be mounted with centerlines at 3'6" (1.065 mm) above finish floor (fig. 10.9);

(ii) Be a minimum of ¾ inch (19 mm) in diameter;

(iii) Have visual signals indicating when a call is registered and answered;

(iv) Be raised or flush; and

(v) Have the button designating "up" mounted on top.

(2) Objects mounted beneath lobby call buttons shall not project into the elevator lobby more than 4 inches (100 mm).

(g) *Hall lanterns.* Provide an audible and visual signal at each hoistway entrance to indicate car arrival and its travel direction.

(1) Audible signals shall sound once for the up direction and twice for the down direction or shall annunciate the words "up" or "down."

(2) Visual signals shall:

(i) Be mounted with their centerlines a minimum of 6'0" (1,830 mm) above finish floor (fig. 10.9);

(ii) Have a minimum dimension of 2½" (64 mm);

(iii) Distinguish between up and down travel directions; and

(iv) Be visible from the vicinity of call buttons.

(3) In-car lanterns mounted on car door jambs and that comply with § 1190.100(e)(2) are acceptable.

(h) Car position indicator and signal. Provide audible and visual car position indicators within each elevator car as follows:

(1) Audible indicators shall:

(i) Signal as the car passes or stops at each landing. Signal shall exceed the ambient noise level by at least 20 decibels with a frequency below 1,500 Hz; or

(ii) Provide an automatic verbal announcement.

(2) Visual indicators shall:

(i) Be located above the car operating panel or over the car door;

(ii) Visually display the floor number as the car passes or stops at a landing;

(iii) Have characters that are a minimum of ½ inches (13 mm) high and that comply with § 1190.200, Signage, except for § 1190.100(c)(2).

(i) *Illumination levels.* Illuminate car controls, platform, car threshold, and landing sill to a minimum of 5 footcandles.

(j) *Intercommunication systems.* If provided, emergency intercommunication systems shall comply with the following:

(1) Locate the highest operable part of the system no higher than 4'0" (1,220 mm) above car floor;

(2) Identify the system with raised lettering or symbols complying with § 1190.200, Signage;

(3) If system employs a handset, provide a 2'5" (735 mm) cord length;

(4) If system is located in a closed compartment, compartment door hardware shall conform to § 1190.170, Controls, and operating mechanisms;

(5) Provide a momentary contact button to allow hearing-impaired individuals to summon assistance.

§ 1190.110 Platform lifts.

(a) *General.* Platform lifts required by Subpart C—Scope, shall comply with this section.

(b) *Requirements.* Platform lifts shall:

(1) Accommodate an occupied wheelchair within the space provisions of § 1190.40, Human data;

(2) Facilitate unassisted entry and exit from the lift in accordance with the provisions of § 1190.50, Walks, floors, and accessible routes;

(3) Have accessible controls complying with § 1190.170, Controls and operating mechanisms; and

(4) Satisfy safety requirements of the agency having responsibility for safety of the facility.

§ 1190.120 Entrances.

(a) *General.* Entrances required to be accessible by Subpart C—Scope shall comply with § 1190.50, Walks, Floors and Accessible Routes; § 1190.120, Entrances; and § 1190.130, Doors.

(b) *Service entrances.* A service entrance is not to be used as the only accessible entrance unless it is the only entrance to the building or facility.

(c) *Access to elevators.* If elevators are provided, an accessible route shall be provided from an accessible entrance to the elevators.

§ 1190.130 Doors.

(a) *General.* Doors required to be accessible by Subpart C—Scope shall comply with this section.

(1) Gates, including ticket gates, shall comply with this section.

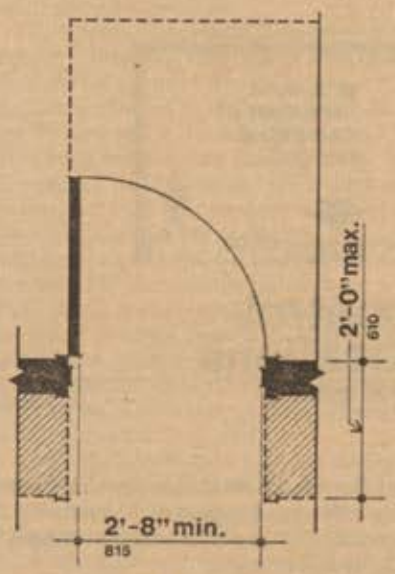
(2) In double-leaf doorways, at least one leaf shall comply with this Section and it shall be the active leaf. Double-leaf automatic doors are excepted from the one leaf provision if both leaves are automatic.

(3) Revolving doors or turnstiles are not accessible doors and shall not be the sole means of access at any accessible entrance or on any accessible route. An accessible door shall be provided immediately adjacent to the turnstile or revolving door and shall be subject to the same use pattern as the turnstile or revolving door.

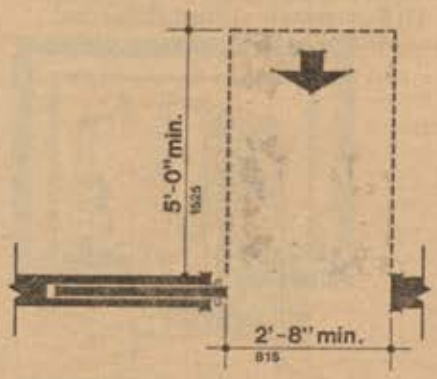
(b) *Clear width.* Provide doorways with clear openings of 2'8" (815 mm) as measured with the door open 90 degrees between the face of the door and the latch side stop (figs. 13.1, 13.2, and 13.3). Openings deeper than 2'0" (610 mm) shall be a minimum of 3'0" (915 mm) wide (fig. 4.1).

(1) *Exception.* If a space and the elements within that space comply with the requirements of § 1190.40, Human Data, and the user does not require full passage into that space, then the opening to that space may be a minimum of 1'8" (510 mm) wide.

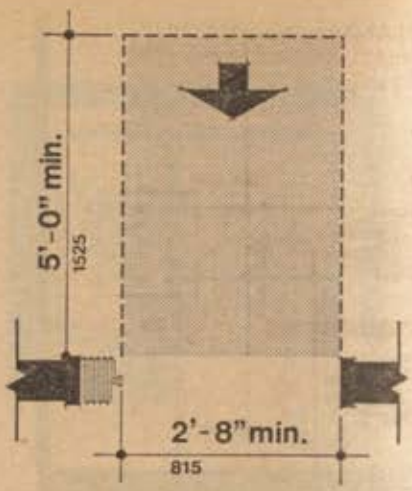
(2) [Reserved]



hinged 13.1



sliding 13.2



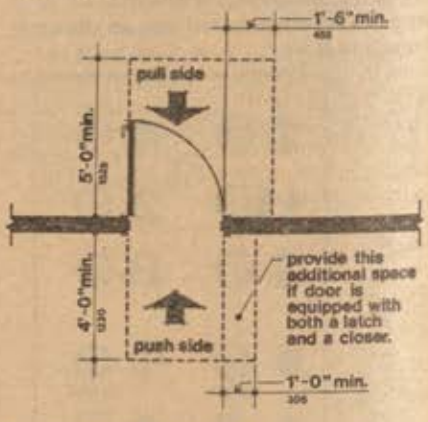
folding 13.3

(c) *Maneuvering space.* Provide the following space at all non-automatic and non-power-assisted doors:

(1) At doors allowing front approach only, maneuvering space shall be as shown in figures 13.2, 13.3, and 13.4. The minimum maneuvering space (*i.e.*, latch side clearance) required for a hinged opening is 1'6" (455 mm), but 2'0" (600 mm) is recommended where space is available.

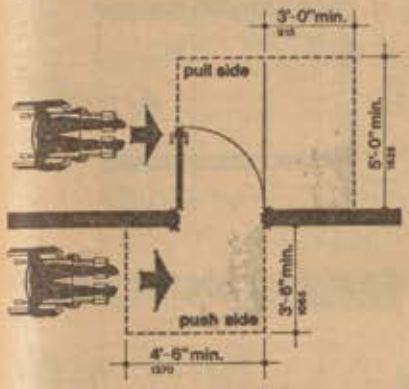
(i) *Exception.* Front approach entry doors to acute care hospital patient bedrooms shall be exempt from the 1'6" (455 mm) requirement of § 1190.130(c)(1) latch side clearance shown in figure 13.4 if the door is at least 3'8" (1,120 mm) wide.

(ii) [Reserved]



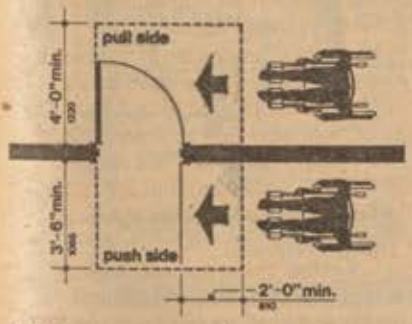
front approach 13.4

(2) At doors allowing hinge side approach only, maneuvering space shall be as shown in figure 13.5.



hinge approach 13.5

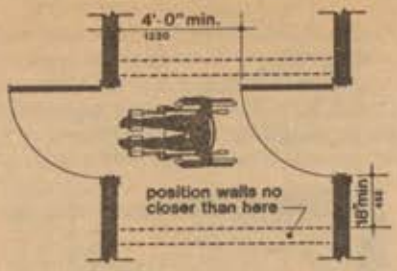
(3) At doors allowing latch side approach only, maneuvering space shall be as shown in figure 13.6.



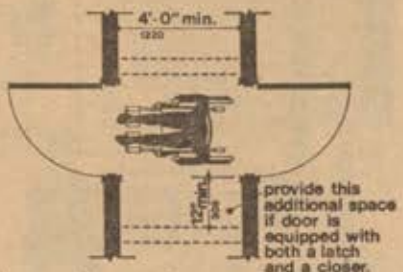
latch approach 13.6

(4) The floor or surface area within the required maneuvering space shall be clear and shall comply with § 1190.50(i), Ground and floor surfaces. It shall have a slope in any direction no greater than 1:48 (¼ inch per foot).

(d) *Doors in series.* Between any two hinged or pivoted doors in series, provide a minimum of 4'0" (1,220 mm) plus the width of any door swinging into the space. Opposing doors shall not swing towards each other, into the intervening space (see figs. 13.7 and 13.8).



doors in series 13.7



doors in series 13.8

(e) *Thresholds.* Raised thresholds, if provided, shall be beveled with a slope not to exceed 1:2 and with heights not exceeding the following:

(1) Exterior sliding doors: ¾ inch (19 mm) maximum.

(2) Other doors: ½ inch (13 mm) maximum. Bevel not required if less than ¼ inch (6 mm).

(f) *Hardware.* Provide handles, pulls, latches, locks and other operating hardware that are easy to grasp with one hand and that do not require twisting of the wrist, tight grasping, or tight pinching to operate. Acceptable designs include, but are not limited to, lever-operated hardware, push-type hardware, and U-shaped handles. Operating hardware shall be exposed and usable from both sides when sliding doors are fully open. Mount no operating hardware higher than 4'0" (1,220 mm) above finish floor.

(1) *Exception.* Mortise and surface mounted bolts used to secure the inactive leaf of a double leaf door without center mullion may be mounted at any height.

(2) [Reserved]

(g) *Doors to hazardous areas.* Provide a textured surface on any door handle, knob, pull, or other piece of operating hardware on doors that lead to areas that may prove hazardous to blind people. Such areas may include, but are not limited to, loading platforms, mechanical equipment rooms, stages, and similar spaces. Textured surfaces may be achieved by knurling, roughening, or applying materials on the hand contact surface. Do not provide textured surfaces on hardware leading to emergency egress or on any doors other than those leading to hazardous areas.

(h) *Closers and opening forces.* (1) Door closers, if provided, shall have a sweep period adjusted so that from a position of 70 degrees open it will take the door a minimum of 5 seconds to reach a point 3 inches (75 mm) from the door jamb, measured from the leading edge of the door.

(2) Maximum pushing or pulling opening forces for doors shall be as follows:

(i) Exterior hinged doors: [Reserved]

(ii) Interior hinged doors: 5 lbs (2.3 Kg)

(iii) Sliding or folding doors: 5 lbs (2.3 Kg)

(iv) Adjust fire doors for the minimum opening and closing forces required by the agency having responsibility for the safety of the facility.

(v) Power-assisted doors: Comply with paragraph 1190.130(g)(2) for closing force. These forces do not apply to forces required to retract or disengage latch bolts or other latching devices.

(i) *Automatic doors.* If automatic pedestrian doors are provided:

(1) They shall not open to back check in less than 5 seconds; and

(2) They shall not require more than 15 lbs (6.8 Kg) to stop door movement;

(3) See the *American National Standard for Power-Operated Pedestrian Doors,* ANSI A156.10 (latest edition) for additional information on the requirements for both standard and custom designed installations. Paragraph 1.1.1 of the ANSI publication contains information on slow opening, low powered automatic pedestrian doors.

§ 1190.140 Windows [Reserved]

§ 1190.150 Toilet and bathing facilities.

(a) *General.* Toilet rooms and bathing facilities required to be accessible by Subpart C—Scope shall comply with this section.

(1) *Exception.* Where alterations to existing facilities make strict compliance with § 1190.150 structurally impracticable, the addition of one

"unisex" toilet per floor containing one water closet and one lavatory that complies with § 1190.150(b) located adjacent to existing facilities will be acceptable in lieu of making existing toilet facilities for each sex accessible.

(2) [Reserved]

(b) *Doors.* Doors to toilet rooms and bathing facilities shall:

(1) Comply with § 1190.130, Doors; and

(2) Not swing into clear floor spaces required at fixtures.

(c) *Clear turning space.* Each accessible toilet room and bathing facility shall have an unobstructed turning space that:

(1) Complies with § 1190.40(b)(3);

(2) Adjoins an accessible route complying with § 1190.50, Walks, floors, and accessible routes; and

(3) May overlap the accessible route and clear floor space at fixture(s).

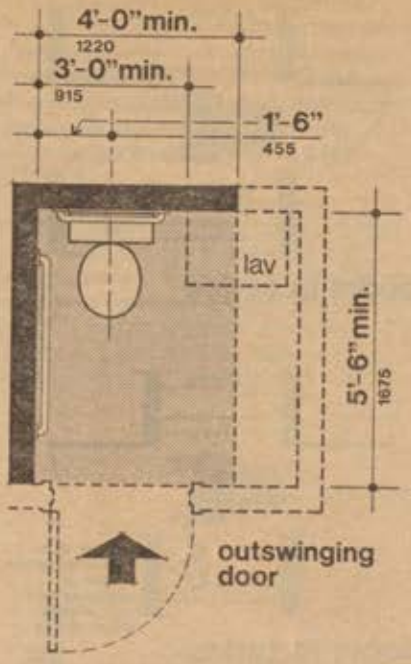
(i) *Exception.* In toilet rooms with one water closet, doors in a clear floor area that is 2'8" by 5'0" (815 mm by 1525 mm) may be provided in lieu of a clear turning space.

(ii) [Reserved]

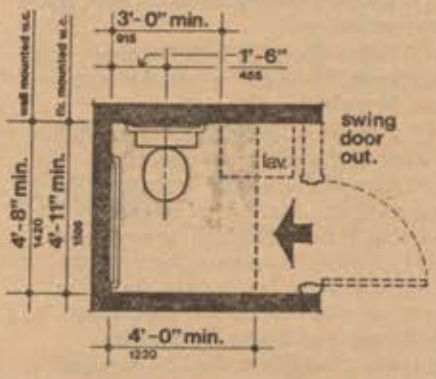
(d) *Signage.* Signage required by Subpart C—Scope that identifies accessible toilet rooms and bathing facilities shall comply with § 1190.200, Signage.

(e) *Toilet fixtures and accessories*—(1) *Water closets.* Accessible water closets shall:

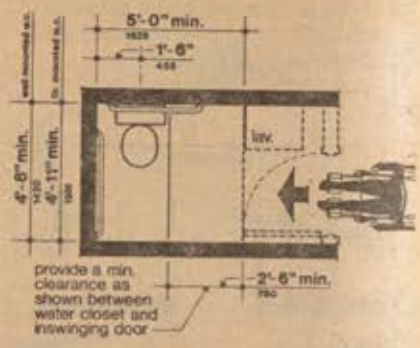
(i) Be provided with clear floor access spaces complying with figures 15.1, 15.2, 15.3 and 15.4 for fixtures not mounted in stalls. Clear floor space may be provided to allow either left-handed or right-handed approach.



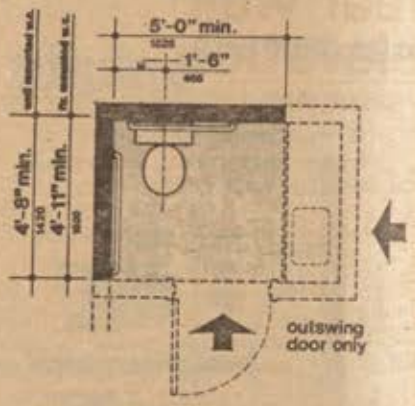
clear floor space
(right-hand approach) 15. 1



clear floor space
(right-hand approach) 15. 2

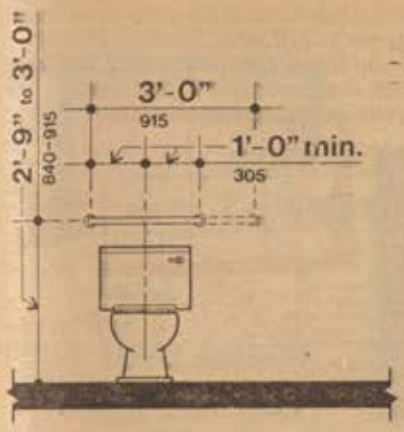


clear floor space
(right-hand approach) 15. 3

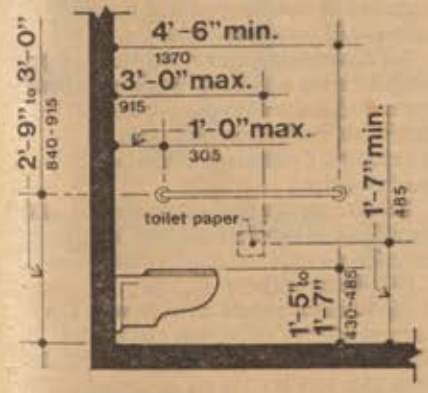


clear floor space
(right-hand approach) 15. 4

(ii) Have top of seats mounted 1'5" to 1'7" (430 mm to 485 mm) above finish floor (see figs. 15.5 and 15.6). Seats shall not be sprung to return to a lifted position when not in use.



rear wall elevation 15.5
without stall



side wall 15.6
without stall or alternate stall

(iii) Have automatic or hand-operated flush controls complying with § 1190.170, Controls and operating mechanisms. Mount controls for use from the wide side of access area and no higher than 3'8" (1,120 mm) above finish floor.

(iv) Have toilet paper dispensers mounted as shown in figure 15.6. Do not use dispensers that control delivery or that do not permit continuous paper flow.

(v) Have grab bars mounted of the length and positioning as shown in figures 15.1, 15.2, 15.3, 15.4, 15.5, and 15.6.

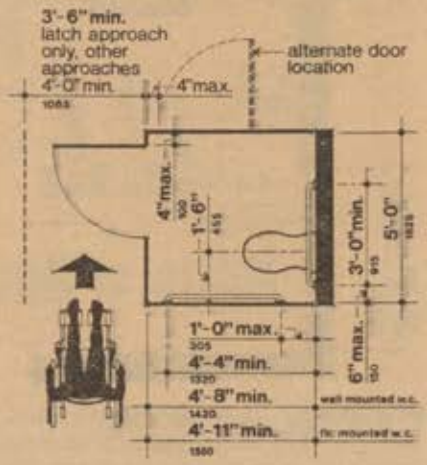
(2) *Toilet stalls.* Accessible toilet stalls shall:

(i) Have a water closet complying with § 1190.150(b)(1); and

(ii) Be of the size and arrangement as shown in figure 15.7. Stall configuration may be reversed for left or right-handed approach.

(A) *Exception.* In instances of alteration work where provision of a standard stall (fig. 15.7) is structurally impractical or plumbing fixture code requirements prevent combining existing stalls to provide space, an alternate stall (fig. 15.8) may be provided in lieu of the standard stall.

(B) [Reserved]



standard stall 15.7
(left-hand approach)

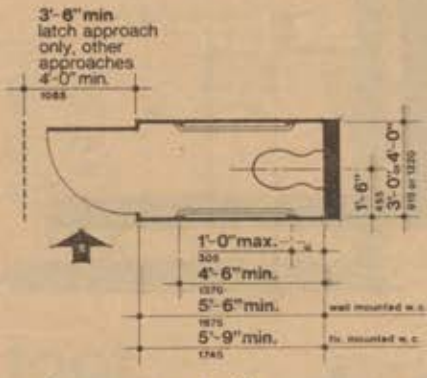
(iii) Have toe clearances at the front partition and at least one side partition of 9 inches (230 mm) above finish floor. If stall depth is greater than 5'0" (1,525 mm), then toe clearance is optional.

(iv) Have doors that comply with § 1190.130, Doors, and that are outswinging; and have the symbol of access affixed to the outside of door.

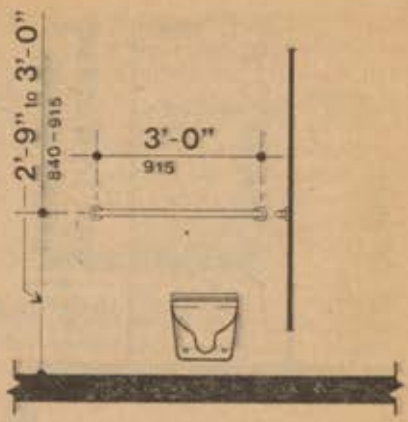
(A) *Exception.* If toilet stall approach is from the latch side of the stall door, clearance between the door side of the stall and any obstruction may be reduced to a minimum of 3'6" (1,065 mm).

(b) [Reserved]

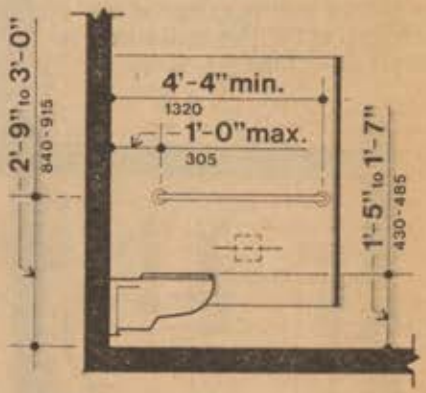
(v) Have grab bars mounted of the length and positioning shown in figures 15.7, 15.8, 15.9, and 15.10



alternate stall 15.8



rear wall elevation 15.9
standard stall



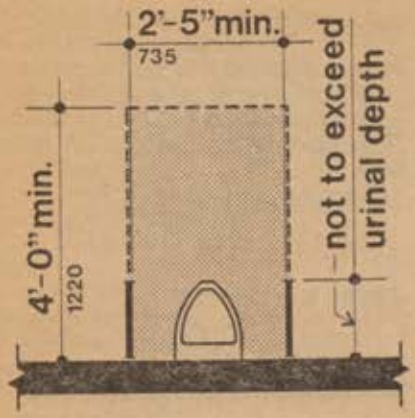
side wall 15.10
standard stall

(3) *Urinals.* Accessible urinals shall:

(i) Have a clear floor space that complies with § 1190.40, Human data.

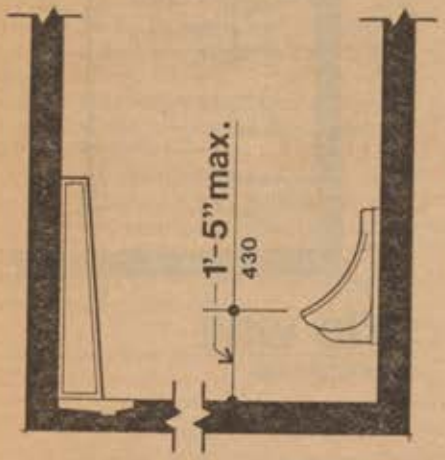
(A) *Exception.* Urinal shields that do not extend beyond the front edge of the urinal rim may be provided with 2'5" (735 mm) clearance between them (fig. 15.11).

(B) [Reserved]



urinal shields 15.11

(ii) Be floor mounted stall type or wall-hung with an elongated rim mounted at 1'5" (430 mm) maximum above finish floor (fig. 15.12).

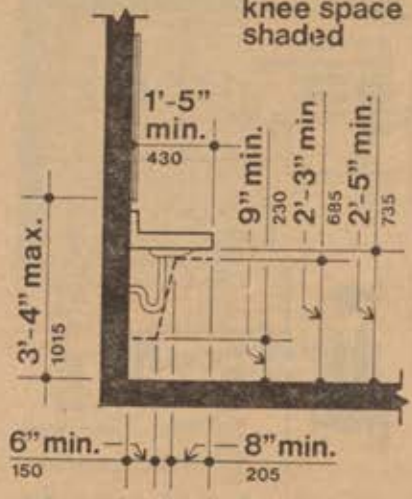


urinals 15.12

(iii) Have automatic or hand-operated controls complying with § 1190.170, Controls and operating mechanisms, and mounted no higher than 3'8" (1,120 mm) above finish floor.

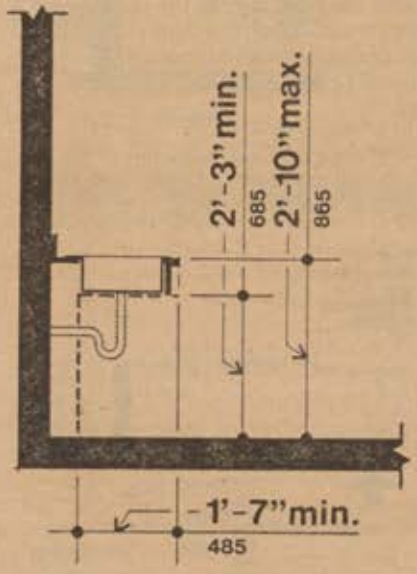
(4) Lavatories and sinks. Lavatories and sinks shall meet the following requirements:

(i) Mount lavatories with the rim or counter surface no higher than 2'10" (865 mm) above finish floor. Provide knee space between bottom of apron and finish floor of at least 2'5" (735 mm) high, 2'6" (760 mm) wide and 1'7" (485 mm) deep (fig. 15.13).



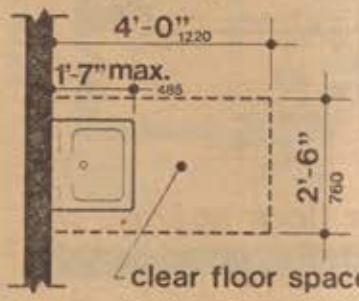
lavatory 15.13

(ii) Mount sinks with the rim or counter surface no higher than 2'10" (865 mm) above finish floor. Provide knee space under the sink of at least 2'3" (685 mm) high, 2'6" (760 mm) wide and 1'7" (485 mm) deep. Sink bowls shall be a maximum of 6½ inches (165 mm) deep (fig. 15.14).



sink 15.14

(iii) Clear floor space permitting front approach shall comply with § 1190.40, Human Data. Clear floor space and knee space shall overlap 1'7" (485 mm) maximum (fig. 15.15).



lavatory 15.15

(iv) Insulate or cover hot water and drain lines. Allow no sharp or abrasive surfaces to remain exposed under accessible lavatories or sinks.

(v) Acceptable faucet control designs include lever-operated, push type, touch-type, and electronically controlled mechanisms that comply with § 1190.170, Controls and operating mechanisms.

(A) *Exception.* Self-closing valves are permitted at lavatories if the faucet remains open for at least 10 seconds.

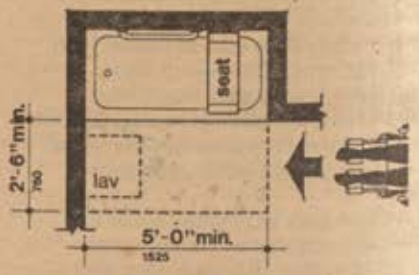
(B) [Reserved]

(5) Mirrors. Mount mirrors with the bottom edge of reflecting surface no higher than 3'4" (1,015 mm) above finish floor (fig. 15.13).

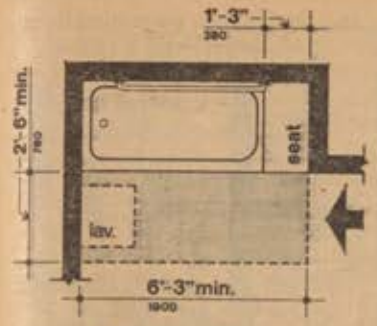
(6) Controls, dispensers, receptacles, or other equipment. Accessible equipment shall comply with § 1190.70, Controls and operating mechanisms.

(f) *Bathing facilities.* Bathtubs or showers shall:

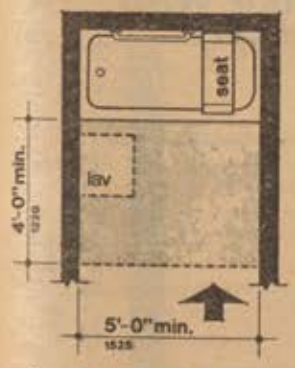
(1) Have clear access space as shown in figures 15.16 to 15.20.



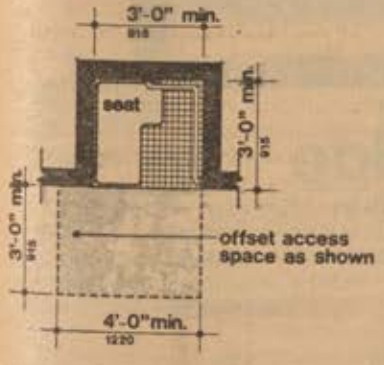
clear floor space with in-tub seat 15.16



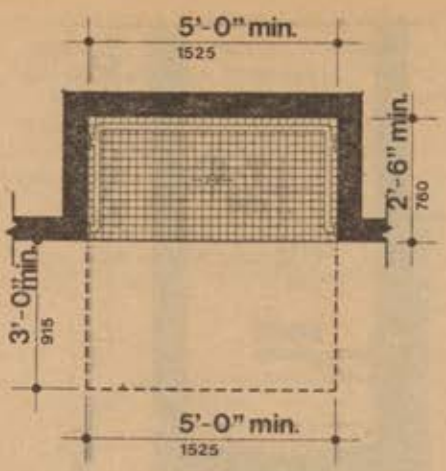
clear floor space
with ledge seat
15.17



clear floor space
with in-tub seat
15.18



transfer stall
15.19

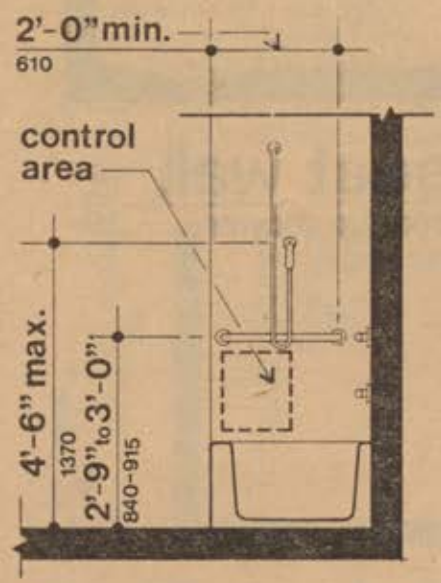


roll-in stall
15.20

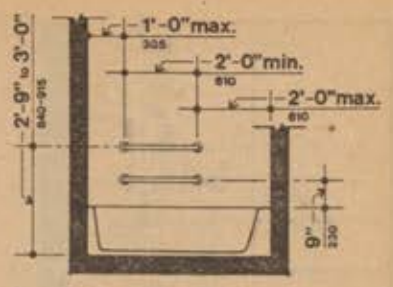
(2) Have seats provided as shown in figures 15.16 to 15.19, 15.24 and 15.26 to 15.28. Seats and their attachments shall safely support a 250 lbs (114 Kg) continuous live load without sustaining permanent deflection. Seats shall not move when mounted during use. In-tub sets shall be portable.

(3) Have grab bars mounted of the length and positioning shown in figures 15.16 to 15.32.

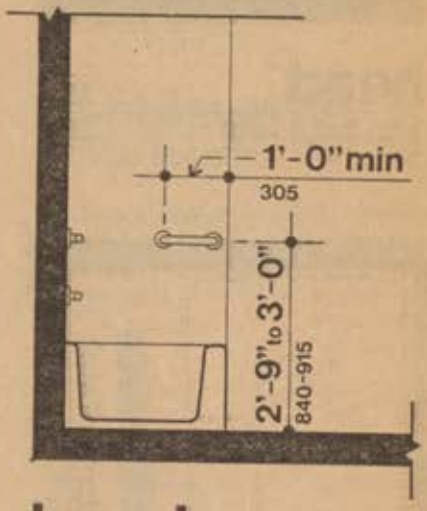
(4) Have faucets and controls complying with § 1190.170, Controls and Operating Mechanisms, located as shown in figures 15.21, 15.29, and 15.31.



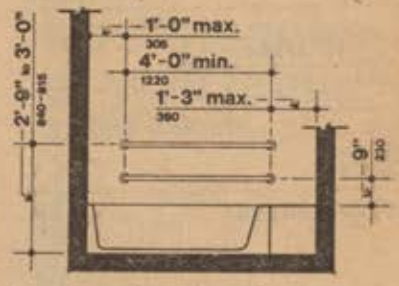
foot
15.21



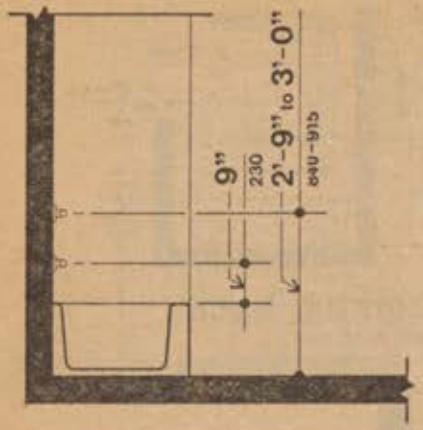
bathtub back
with in-tub seat
15.22



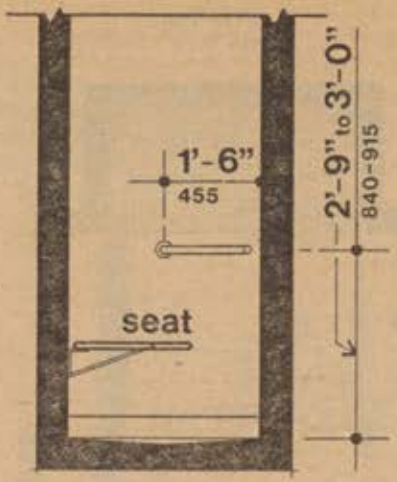
head
with in-tub seat
15.23



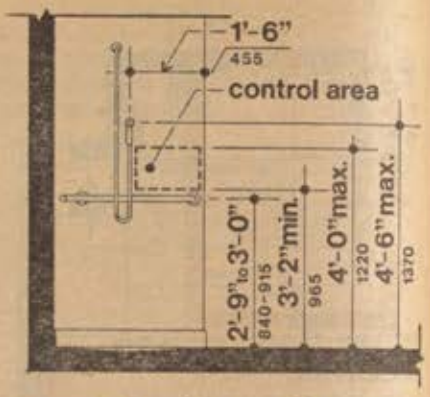
bathtub back
with ledge seat
15.24



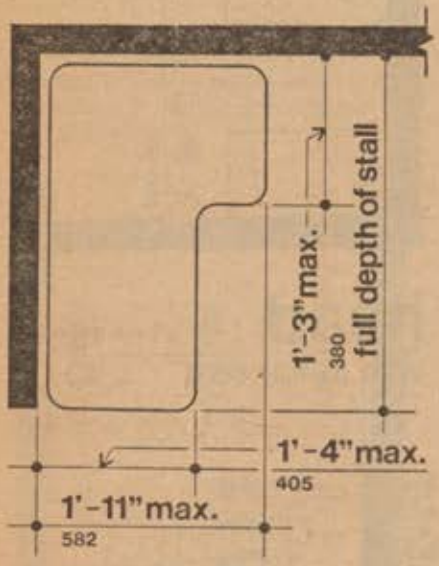
head
with ledge seat
15.25



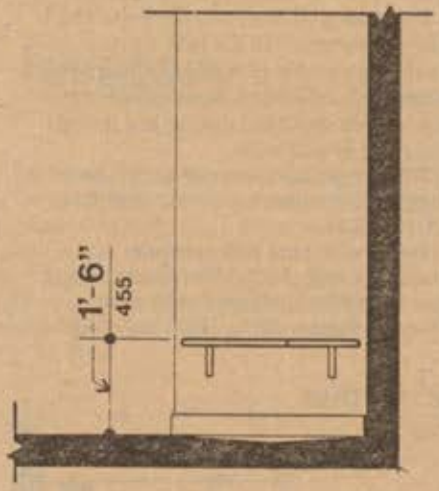
back
transfer shower
15.27



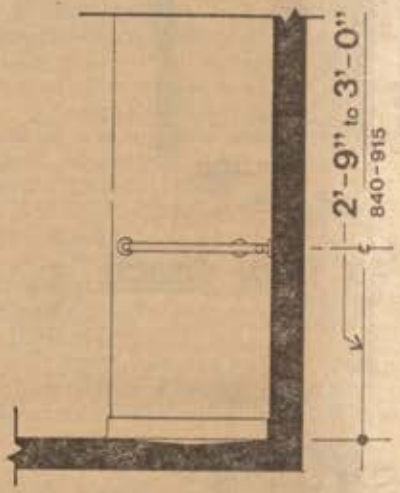
control wall
transfer shower
15.29



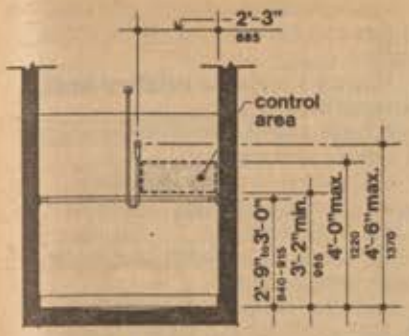
seat
transfer shower
15.26



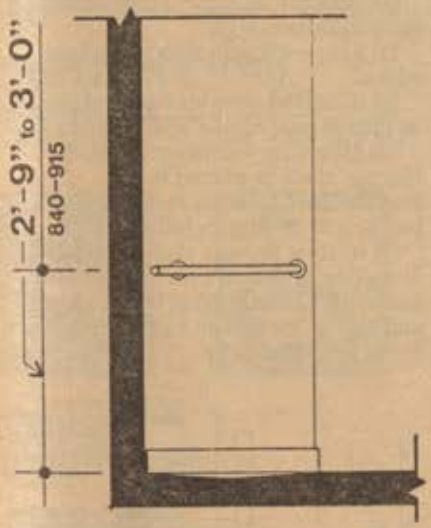
seat wall
transfer shower
15.28



side
roll-in shower
15.30



control wall 15.31
roll-in shower



side 15.32
roll-in shower

(5) Have a shower spray unit with a flexible hose a minimum of 5'0" (1,525 mm) long that is usable as a fixed shower head and as a hand-held shower.

(i) *Exception.* In unmonitored facilities where vandalism is a concern, a fixed shower head mounted at 4'0" (1,220 mm) above the tub bottom may be used in lieu of the hand-held unit.

(ii) [Reserved]

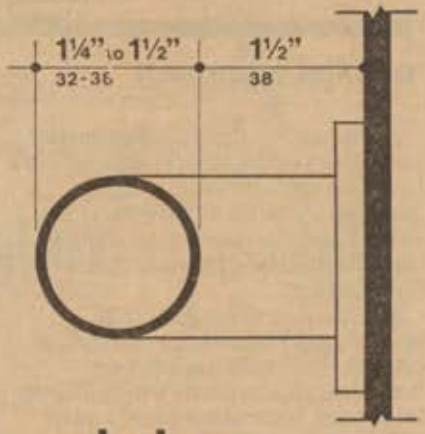
(6) Have enclosures, if provided, that do not obstruct transfer from wheelchairs onto seats or into tubs or access to controls from clear floor spaces. Bathtub enclosures shall not have tracks mounted on the bathtub rims.

(7) Have shower curbs or thresholds no higher than ½ inch (13 mm) beveled.

(g) *Grab bars.* Grab bars for accessible toilet and bathing fixtures shall:

(1) Have a diameter or width of the gripping surfaces that is 1¼ inches to 1½ inches (32 mm to 38 mm).

(2) Have a 1½ inch (38 mm) (maximum/minimum) clear space between the bar and the mounting surface (fig. 15.33).



grab bar 15.33

(3) As installed, support a minimum concentrated load of 250 lb. (114 Kg).

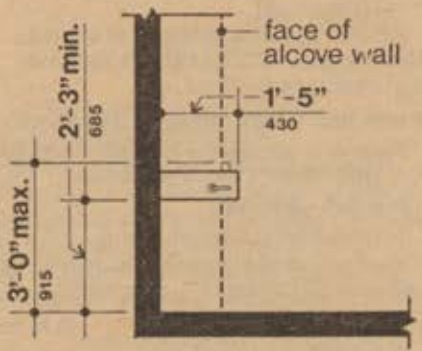
(4) Not rotate in their fittings.

§ 1190.160 Drinking fountains and water coolers.

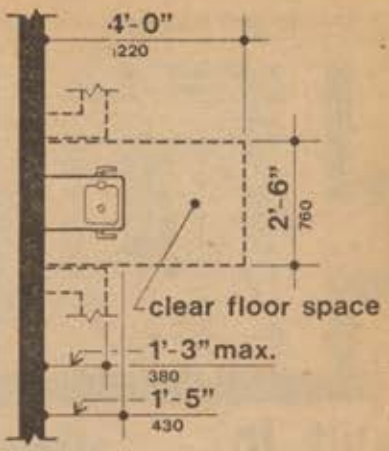
(a) *General.* Drinking fountains and coolers required by Supbart C—Scope shall comply with this section.

(b) *Clearances.* Drinking fountains and water coolers shall have clear floor or ground spaces that comply with § 1190.40, Human data, and shall be:

(1) Cantilevered units with a clear space allowing a forward approach and having a knee space under the unit that is at least 2'3" (685 mm) high, 2'6" (760 mm) wide, and 1'5" (202 mm) deep (figs. 16.1 and 16.2); or

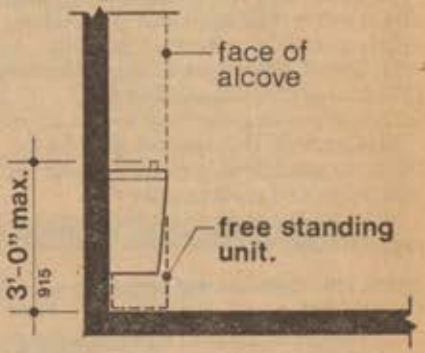


cantilevered 16.1
drinking fountain

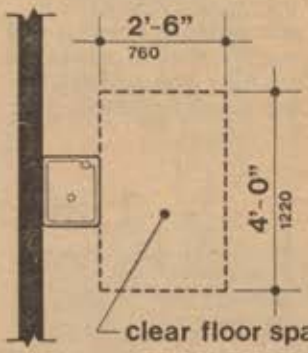


cantilevered 16.2
drinking fountain

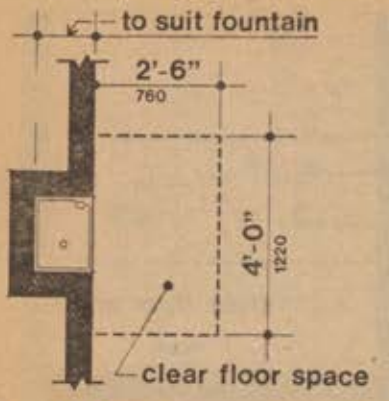
(2) Free-standing or built-in units with a clear space allowing a parrallel approach and not having knee-space (figs. 16.3 and 16.4 and 16.5).



free standing or wall hung 16.3
drinking fountain



free standing or wall hung 16.4
drinking fountain



built in
drinking fountain (16. 5)

(c) *Spouts of drinking fountains and water-coolers.* Spouts shall:

(1) Be mounted no higher than 3'0" (915 mm) above the finish floor, measured to the spout outlet.

(2) Be at the front of the unit and shall direct water flow trajectory parallel or nearly parallel the front of the unit.

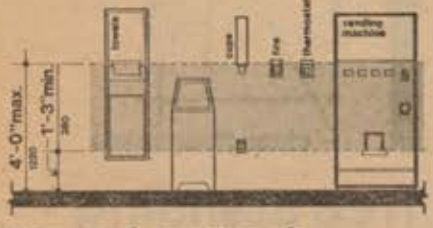
(3) Direct water flow at least 4 inches (100 mm) above the unit basin to facilitate cup or glass insertion.

(d) *Controls.* Unit control shall be front mounted or side mounted near the front edge and shall comply with § 1190.170, Controls and operating mechanisms.

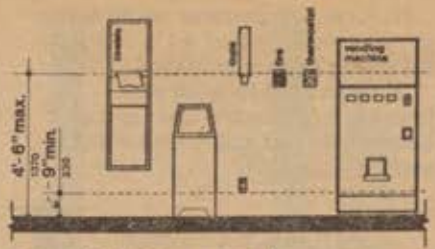
§ 1190.170 Controls and operating mechanisms.

(a) *General.* Controls and operating mechanisms required to be accessible by Subpart C—Scope shall comply with this section.

(b) *Location requirements.* Controls and operating mechanisms shall adjoin clear floor or ground space complying with § 1190.40, Human data. Mount controls and operating mechanisms in compliance with approach direction and reach limitations specified in paragraphs 1190.40(c), Clear floor or ground space, and § 1190.40(d), Reach limitations (figs. 17.1 and 17.2).



forward approach (17. 1)



parallel approach (17. 2)

(c) *Operation.* Controls and operating mechanisms shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate controls shall be no greater than 5 lbs. of force (2.2 Kg).

(d) *Specialized equipment.* If specialized mechanical, electrical, or process equipment has inherent functional requirements which dictate location or force requirements other than those specified in this section, locate the equipment as dictated by its functional requirements.

§ 1190.180 Alarms.

(a) *General.* Alarm systems required to be accessible by Subpart C—Scope shall comply with this section.

(b) *Audible alarms.* Audible alarms shall produce a sound pressure level that exceeds ambient room or space noise by 15 decibels or any maximum noise level of 30 seconds duration by 5 decibels, whichever is greater.

(c) *Visual and other sensory alarms.* If audible alarms are provided, then in addition, provide a visual alarm device adjacent to or within each exit sign which flashes in conjunction with audible alarms and operates from the same power source. Flash frequency of visual alarms shall be less than 5 Hz.

(1) *Exception.* Specialized systems utilizing advanced technology will be considered on a case-by-case basis.

(2) [Reserved]

(d) *Pull Stations.* Alarm pull stations shall comply with § 1190.170, Controls and operating mechanisms.

§ 1190.190 Tactile Warnings. [Reserved]

Note.—For information on tactile warnings, see ANSI A117-1 (1980), Section 4.29.

§ 1190.200 Signage.

(a) *General.* Information and identification of elements and spaces as required by Subpart C—Scope shall comply with this section.

(1) *Exception.* The provisions of § 1190.200(c) are not mandatory for temporary information on room and space signage.

(2) [Reserved]

(b) *Character proportion and contrast.* Letters and numbers on sign systems shall:

(1) Have a width-to-height ratio of between 3:5 and 1:1.

(2) have a stroke width-to-height ratio of between 1:5 and 1:10.

(3) Contrast in value with their backgrounds, preferably light letters on a dark background.

(4) Have a matte finish on a matte finish background.

(c) *Raised or incised characters.* Provide numbers and letters that are:

(1) Raised or incised from the background surface 1/32 inch (0.8 mm). Also incise or raise symbols and pictographs in this manner.

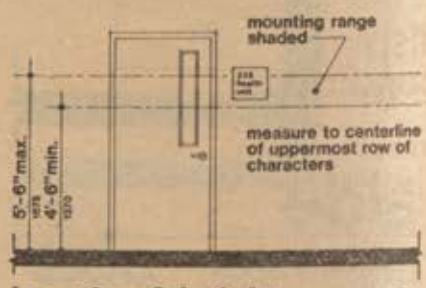
(2) Between 5/8 inch (16 mm) and 2 inches (50 mm) high.

(3) Sans serif with sharply defined edges.

(4) If incised, provided with at least a 1/4 inch (6 mm) stroke width.

(d) *Mounting location and height.* Signage shall be placed in a standardized location throughout a building or facility as follows:

(1) Interior signage shall be located alongside of the door on the latch side and shall be mounted at between 4'6" and 5'6" (1,370 mm and 1,675 mm) above finish floor (fig. 20.1).



location & height (20. 1)

(2) Exterior signage shall be installed at entrances and walks to direct individuals to accessible routes and entrances as required.

(e) *Symbol of accessibility.* Identification of accessible facilities as required by Subpart C—Scope shall be by means of the International Symbol of Accessibility. Display as shown in figures 20.2 and 20.3. Provide symbols of the following minimum dimensions:

Size	Location	Viewing distance
2½ in. (65 mm)	Interior	Up to 30 ft. (9 m).
4 in. (100 mm)	Interior	Greater than 30 ft. (9 m).
4 in. (100 mm)	Exterior	Up to 60 ft. (18 m).
8 in. (200 mm)	Exterior	Greater than 60 ft. (18 m).

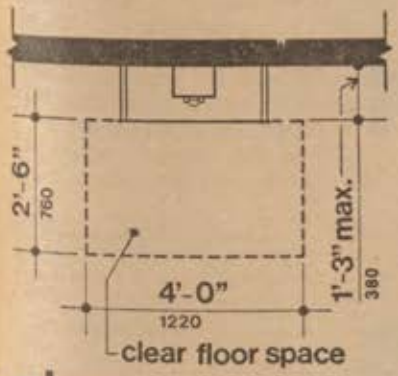
international symbol 20. 2

display conditions 20. 3

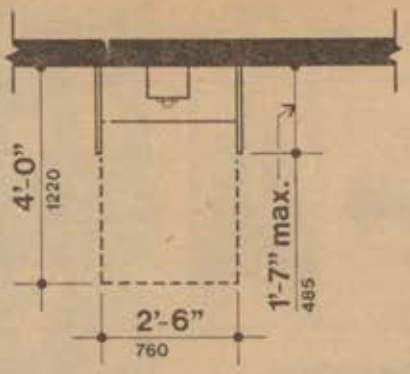
§ 1190.210 **Telephones.**

(a) *General.* Public telephones and related equipment required to be accessible by Subpart C—Scope shall comply with this section.

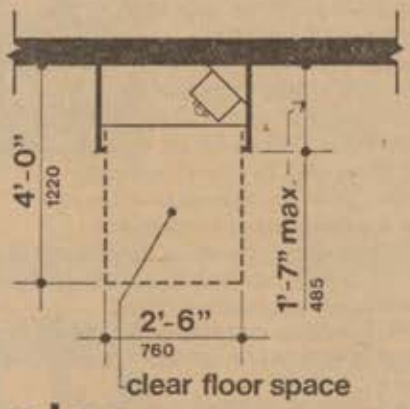
(b) *Clear floor or ground space.* Clear floor or ground spaces that comply with § 1190.40, Human data, shall be provided at each telephone (figs. 21.1, 21.2, and 21.3). These clear spaces shall not be restricted by installation of bases, fixed seats, or enclosures.



plan telephone 21. 1



plan telephone 21. 2



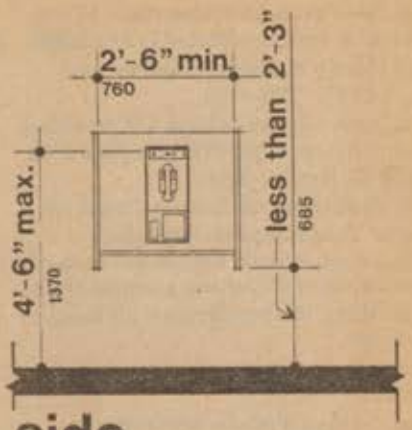
plan telephone 21. 3

(c) *Equipment characteristics.* Telephone equipment shall:

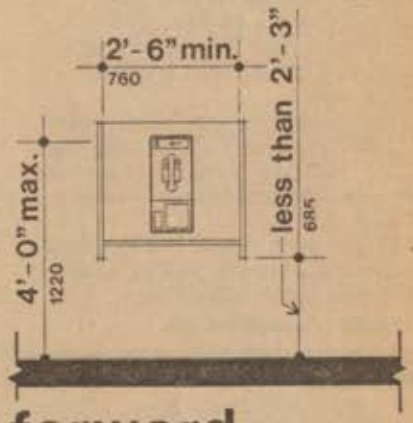
(1) Have the highest operable control, including but not limited to dial and coin slot, located at a maximum of 4'6" (1,370 mm) above finish floor for side reach (fig. 21.4); and 4'0" (1220 mm) for forward and diagonal reach (figs. 21.5 and 21.6).

(i) *Exception.* If banks of telephones are provided, a minimum of one telephone per bank shall have the highest operable control at 4'0" (1220 mm).

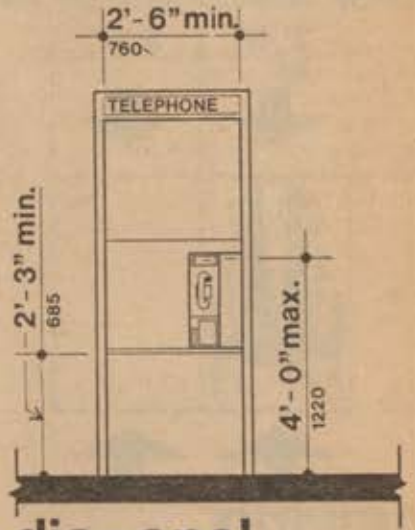
(ii) [Reserved]



side reach telephone 21. 4



forward reach telephone 21. 5



diagonal reach telephone 21. 6

(2) Have push button controls where service by such equipment is available.

(3) Have a minimum handset cord length of 2'5" (735 mm).

(4) Have telephone books, if provided, located in a position that complies with § 1190.40, Human data.

(d) *Equipment for hearing impaired people.* Telephone receivers shall generate a magnetic field in the area of the receiver cap. Volume controls shall be provided in accordance with Subpart C—Scope.

§ 1190.220 Seating, tables, and work surfaces.

(a) *General.* Fixed seating spaces, tables, or work surfaces required to be accessible by Subpart C—Scope shall comply with this section.

(b) *Clearances.* Seating spaces for people in wheelchairs at tables, counters, or work surfaces shall:

(1) Have a clear floor or ground spaces that comply with § 1190.40, Human data.

(2) Have knee spaces that are least 2'3" (685 mm) high, 2'6" (760 mm) wide, and 1'7" (485 mm) deep. Clear access space and knee space may overlap 1'7" (fig. 15.15).

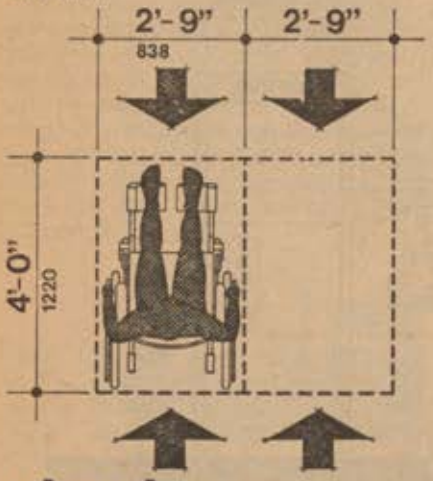
(3) Have table tops or work surfaces mounted between 2'4" to 2'10" (710 mm to 865 mm) above finish floor.

§ 1190.230 Assembly areas.

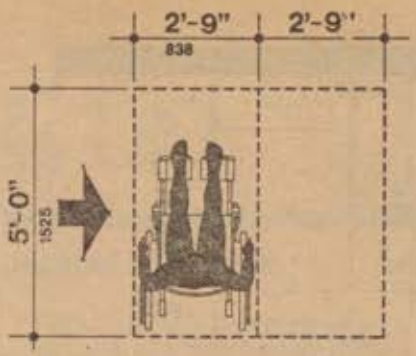
(a) *General.* Assembly areas required to be accessible by Subpart C—Scope shall comply with this section.

(b) *Size and location of viewing positions.* Accessible viewing positions shall:

(1) Provide minimum, level clear floor or ground areas as shown in figures 23.1 and 23.2.



viewing positions 23.1



viewing positions 23.2

(2) Accommodate one occupied wheelchair or one portable seat to accommodate persons with crutches or leg braces.

(3) Be in an adjoining configuration if only two positions are provided. Additional positions may be in single position configurations.

(4) Be an integral part of the seating plan and shall be dispersed throughout the assembly area providing sight lines comparable to those for all seating.

(i) *Exception.* In alteration work where it is structurally impossible to alter seating locations to disperse seating throughout, seating may be located in collected areas as structurally feasible. Seating must adjoin an accessible route that also serves as a means of emergency egress.

(ii) [Reserved]

(5) Adjoin an accessible route of emergency egress as required by paragraph 1190.50(h), Egress.

(6) Have surfaces that comply with § 1190.50(i), Ground and floor surfaces.

(c) *Performing areas.* Provide accessible routes that comply with § 1190.50, Walks, floors, and accessible routes, to performing areas, including but not limited to stages, arena floors, dressing rooms, locker rooms, and other rooms and spaces required for use of the assembly area.

(1) *Exception.* In alteration work where it is structurally impracticable to alter all performing areas to be on an accessible route, at least one of each type shall be made accessible.

(2) [Reserved]

(d) *Listening systems.* Provide assembly areas with a listening system to assist no fewer than two persons with severe hearing loss.

(1) If the listening system serves individual seats, locate such seats within 50 feet (15 m) of the stage or arena. Such locations shall provide a complete view of the stage or arena.

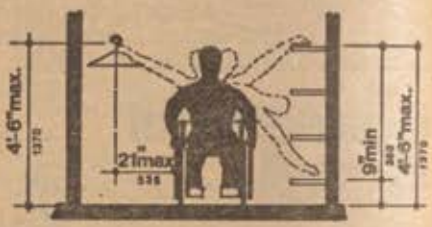
(2) Acceptable types of listening systems include, but are not limited to, audio loops and radio frequency systems.

§ 1190.240 Storage.

(a) *General.* Storage facilities required to be accessible by Subpart C—Scope shall comply with this section.

(1) Provide clear floor or ground spaces that comply with § 1190.40, Human data.

(2) Provide storage spaces and clothes rods that comply with paragraph 1190.40(d), Reach limitations (fig. 24.1).



storage 24.1

(3) Provide accessible hardware that complies with § 1190.170, Controls and operating mechanisms.

(b) [Reserved]

Subpart E—Special Building or Facility Types or Elements. [Reserved]

[FR Doc. 81-1342 Filed 1-15-81; 8:45 am]
BILLING CODE 4110-02-M

federal register

Friday
January 16, 1981

Part VII

Department of Labor

**Employment Standards Administration
Wage and Hour Division**

Procedures for Predetermination of Wage Rates

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 1

Procedures for Predetermination of Wage Rates

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The purpose of this document is to provide the final text of Regulations, 29 CFR Part 1, for predetermination of prevailing wage rates under the Davis-Bacon and Related Acts (minimum wages for Federal and federally assisted construction). Under the statute, the definition of wages includes the basic hourly rate of pay plus the rate for contributions or payments for bona fide fringe benefits. The definition of wages in the regulations has been revised to reflect the statutory definition. A new provision has also been added to the regulations to explain the method used to determine prevailing fringe benefits. In addition, there are clarifications regarding the application of wage determinations, modifications, and supersedeas wage determinations, and the necessary corrective action to be taken by contracting agencies when a wage determination which is either inapplicable or contains substantial errors is included in bidding documents and contracts or when a wage determination is omitted from a covered contract.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Dorothy P. Come, Assistant Administrator, Wage and Hour Division, Department of Labor, Room S3502, 200 Constitution Ave. NW., Washington, D.C. 20210, Phone: (202) 523-8333.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the Federal Register (44 FR 77026) to make certain revisions to 29 CFR Part 1, Procedures for Predetermination of Wage Rates under the Davis-Bacon and Related Acts. As stated in the proposal, its purpose was to reexamine and revise the procedures in Part 1 for predetermination of wage rates under the Davis-Bacon and Related Acts.

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division on or before March 17, 1981. Subsequently, on February 15 and April 1, 1980, notice was given in the Federal Register extending the dates for submission of comments to March 27 and May 27, 1980, respectively. The extensions were granted to afford interested parties additional time to prepare their comments. Comments were received from approximately 128 interested parties, including contracting agencies, contractor associations, contractors, labor unions and organizations, State and local governmental bodies, business organizations, and others. Among those Federal agencies submitting comments were the Department of Defense, the General Services Administration, the Department of Energy, the National Aeronautics and Space Administration, the Logistics Service and the Office of Airport Planning and Programming of the Federal Aviation Administration, and the Department of Housing and Urban Development. Contractor associations and business organizations submitting comments included the Associated General Contractors of America, the Associated Builders and Contractors, Inc., the National Association of Home Builders, the Chamber of Commerce, the National Association of Manufacturers, and the Business Roundtable. Labor unions and organizations commenting on the proposal included the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, whose submission was concurred in full by the center to Protect Workers' Rights and the Laborers International of North America, the International Brotherhood of Electrical Workers, Spokane District Council of Carpenters and the Northeastern Washington-Northern Idaho Building and Construction Trades Council.

While some requests for public hearings were made, it was decided, after careful consideration that, in view of the broad range of responses and issues addressed, such hearings would be redundant.

It has been determined that the amendments to these Regulations do not meet the criteria of Executive Order 12044 and the Department of Labor guidelines (44 FR 5570) for a regulatory analysis.

The following is an analysis of all the principal comments received and the concomitant changes made to the proposed rule. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major comments and recommendations, the Department's findings as to whether or not suggested changes to the proposed rule would be in accordance with the statutory language and intent of the Davis-Bacon Act, and, the substantive changes herein adopted.

§ 1.2 Definitions.

Subsection 1.2(a)(1) generated a substantial number of comments concerning the Department's current practice of determining the prevailing wage rate on the basis of the wage that is found paid most frequently, provided that the wage must be paid to at least 30 percent of the workers in the classification. This principle has been applied to the determination of prevailing wages since 1935, when the Act was amended to require incorporation into contracts of wage determinations issued by the Secretary of Labor. Several commentators argued that the prevailing wage should be determined from the mathematical average only, while others expressed support for the existing procedure reflected in the proposal. It is our belief that the concept of a "prevailing wage" under the Davis-Bacon Act contemplates a rate actually being paid rather than a mathematically contrived figure that may not be paid to any one individual. Under this concept we believe that a rate of central tendency can be acceptably measured by the arithmetic mode or the value in the data set that occurs most frequently, with a proviso to preclude adoption of a wage rate paid to relatively few people.

Some commentators objected to incorporating fringe benefits in the prevailing wage rate on the basis that "open-shop" or "merit pay" contractors in a given area provide disparate fringe benefit packages while contractors signatory to negotiated agreements provide the same fringe package. Thus, they contend that under the proposed regulations, the fringe benefit packages of organized contractors are more likely to be recognized as prevailing. More frequent comments were directed at the procedure to be adopted for computing fringe benefits rather than with the concept that fringe benefits should be recognized as part of the prevailing wage. These commentators expressed concern primarily with 1) whether the prevailing basic hourly wage rate and prevailing fringe benefits should be separately determined or determined as a package, and 2) the manner of treatment of individuals receiving no fringe benefits.

We believe that the method proposed, in which a prevailing package is determined in the first instance, is in accordance with the terms of the Davis-Bacon Act, which defines "prevailing

wages" as including the basic hourly rate of pay *and* the rate of contributions or costs of fringe benefits. A separate determination is required as a practical matter if the averaging method is used, because of the necessity of separating the fringe benefits from the basic hourly rate in paying overtime premiums; where the plurality package rate is utilized, separation into the wage rate and fringe benefits should be easily accomplished.

Treatment of laborers and mechanics receiving no fringe benefits is implicitly set forth in the proposed regulation. If any single package of wages and fringe benefits is paid with respect to a plurality of the workers constituting at least 30 percent of the classification, that package prevails; thus a prevailing package would include the situation where a plurality of the workers receive the same rate and no fringe benefits. Similarly, if there is no plurality wage and fringe benefit package paid with respect to at least 30 percent of the workers, the fringe benefit rate is the average fringe benefit rate weighted by all laborers and mechanics in the classification—including those receiving no fringe benefits; thus the "zeros" are averaged together with the workers who receive fringe benefits. It should be noted that is our experience that fringe benefits of some kind are currently provided by most contractors. We will be meeting with industry groups and conducting pilot studies, as appropriate, to ensure that full, accurate fringe benefit data are collected.

No changes are made in § 1.2(a)(1).

Numerous adverse comments were received on the second sentence of proposed § 1.2(a)(2) concerning differences in wage rates due solely to the point in time at which the wages are paid. These commentators principally contended that the language was unclear, it incorporated a statistically invalid concept, and it unfairly discriminated in favor of collectively bargained wage rates. A few commentators supported the subsection as proposed. On final consideration, we believe that the update of data may more acceptably be accomplished by means such as expedited surveys, truncating the data submission period, modifying the use of peak week data and other methods. We agree that, as proposed, the second sentence of this subsection does not yield totally dependable statistical data. Therefore, the second sentence of this proposed section is deleted and the first sentence, standing alone, is adopted.

Since no comments were received on § 1.2(c), this subsection is adopted as proposed.

One commentator suggested that § 1.2(d) be changed to reflect that the various Federal-Aid Highway Acts have been revised, codified, and re-enacted as Title 23, United States Code. We agree that it is appropriate to adopt the uniform citation suggested by this commentator. The appropriate deletion and substitution has been made in the final text. This commentator also suggested substituting "state highway agency" for "state highway department" in the text. While this has merit, the language of 23 U.S.C. 113 refers to "highway department of the State"; therefore we do not believe that it is appropriate to adopt the suggested change. Another commentator recommended a greatly expanded definition of "agency". We find no basis in existing law to support such a wide-ranging definition of "agency" and have retained the text with the exception of the changes made in reference to 23 U.S.C. 113.

§ 1.3 Obtaining and compiling wage information.

Several commentators objected to the use of wage rate data obtained from Federally financed or locally financed projects subject to coverage by the Davis-Bacon and Related Acts or State prevailing wage laws. The Act contains no such distinction. Federally and locally financed construction must be included to provide realistic data upon which to base determinations for such construction as highways, sewers, bridges, dams and other public works structures that are rarely, if ever, constructed with private funds.

It was suggested that the Department accept data only from contractors so as to eliminate the possibility of duplication. The evidence collection forms used require the listing of sufficient pertinent project information to enable quick and adequate identification of duplicate data. In keeping with the principles of open government, it is the Department's long standing policy, as codified by the current regulations, to encourage and to offer the opportunity to all interested parties to voluntarily submit wage data, thereby expanding the survey's universe and increasing the validity of the survey.

The concern expressed by some public agencies relating to their expanded role in the collection of data is unfounded. The changes in this section are merely editorial and do not mandate an expansion of their role.

By virtue of Pub. L. 90-495 (1968), Davis-Bacon prevailing wage requirements extend to all Federal-Aid highway systems pursuant to 23 U.S.C. 113. Proposed § 1.3(b)(4), which erred in limiting consultation with State Highway departments to Interstate System projects, has been corrected accordingly.

§ 1.4 Outline of agency construction programs.

Several commentators questioned whether the information required by this section would be actually used by the Department, suggesting the requirement was burdensome.

As is implied by the phrase "to the extent practicable", at the beginning of this section, it is recognized that some agencies by virtue of their contracting practices may not be able to submit a complete listing of proposed construction programs. Thus, the section contemplates the submission only of information already in hand or readily obtainable. Accordingly, the reporting requirement, which is also codified in the current regulations, is not considered to be excessively burdensome to Federal contracting agencies and State highway departments. The data submitted is of considerable value to the Department in scheduling wage surveys and to the various contracting agencies in helping to insure a planned approach to wage surveys which will provide wage determinations on an as-needed basis by the procurement community.

§ 1.5 Procedure for requesting wage determinations.

One commentator suggested that this Department should include 18 basic classifications in all wage determinations due to unfamiliarity with proper classifications by the contracting agencies.

This recommendation cannot be feasibly adopted. Wage data for every classification is not always readily available; thus the proposed change would place an excessive administrative burden on the Department. In addition, this recommendation fails to consider variations in the classifications needed, arising from differences in area practices. Experience has shown that while agency officials requesting rates do not always request the proper classifications, follow-up actions by this Department's personnel and the routine issuance of wage determinations containing classifications not specifically requested have in the vast majority of cases essentially obviated the problem suggested by this commentator.

§ 1.6 Application of wage determinations.

§ 1.6(a)(1). Several commentators have suggested the extension of project

wage determinations from the current 120 days to 180 days. This would allow the routine use of wage determinations that are already almost 6 months old when incorporated in the contract. It is believed that this policy would be contrary to Congressional intent that the wage determination reflect the current prevailing wage in the area, to the extent practicable.

Conversely, we cannot adopt the suggestion of another commentator to summarily reject any request for an extension to an expiring project wage determination where an applicable modification has already been made. The criteria for granting extensions which are set forth in both the current and proposed Regulations (i.e., that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of government business) are deemed to be reasonable and should be maintained. The commentator's suggestions for clarifying language of the criteria for requesting extensions and/or new wage determinations have been carefully reviewed and appropriate changes in this paragraph have been made.

§ *1.6(b) and Appendix C.* Several commentators objected to the codification of All Agency Memorandum Nos. 130 and 131, concerning classification of projects. The principal objections concerned the apparent establishment of nationwide standards without regard to local area practices. The memoranda were intended to be guidelines which would not be applicable where the category of a project in a construction sense is not clear and where a different category is established by area practice. Appendix C has therefore been revised to emphasize the significance of area practice where a legitimate dispute exists concerning the character of a project, and to make it clear that such questions are to be referred to the Wage and Hour Division for a ruling.

One commentator suggested that questions should not be referred to the Wage and Hour Division except at the contracting agency's discretion. Because of the Department's statutory responsibilities regarding wage determinations, and because of our experience with misapplication of wage determinations by agencies as a result of their lack of expertise or otherwise, referral of all disputes to the Department has been found to be necessary. The validity of the Department's current regulation (29 CFR 5.12) requiring such referral has been upheld by the Court of Appeals for the Fifth Circuit in *North Georgia Building and Construction Trades Council* v. *Goldschmidt*, 621 F. 2d 697 (1980).

Several specific comments were received concerning the circumstances in which more than one wage determination is issued for a project. In this connection, these comments requested clarification of the terms "project" and "substantial". These sections of the memoranda have been modified as a result of these comments in an attempt to make clear standards for application of multiple schedules—where the work constitutes 20 percent or more of the total project cost, or where the work at issue is estimated to cost at least $250,000. The dual test of amount of construction and functional relationship between the parts of the project in determining what is "incidental", is apparently confusing and unnecessary, and therefore has been elminated. Additional illustrative examples have been added to clarify the term "project".

A few commentators were of the incorrect view that by publishing the memoranda as an appendix, they were not open to comment. To the contrary, this was not the Department's intention, as indicated by the fact that they were published as a part of the document on which comments were invited. They were published as an appendix only because they were not in traditional regulation form. Similarly, one commentator suggested that the agreement of unions and contractors should be obtained. However, the views of these groups were obtained in the rulemaking process.

Appendix C has been amended in accordance with the discussion above. In addition, changes were made to clarify the memoranda, and to combine them into one coherent inclusive document.

§ 1.6(c). Numerous commentators objected to the proposed revision of the "10 day" rule which would require contracting agencies to accept modifications to wage determinations received less than 10 days before the opening of bids unless the agency finds there is not sufficient time to notify bidders of the modification and to send a report of its findings to the Administrator.

It has been the consistent policy of the Department of Labor that bid solicitations should contain the most recently issued determination of current prevailing wages which can be included, without causing undue disruption of the procurement process. However, experience has shown that in many cases contracting agencies have declined to use wage modifications received less than 10 days before bid opening, even though it may have been possible to notify bidders of the modification prior to bid opening.

In this regard, the courts have held that the current 10-day rule imposes an affirmative obligation on the contracting agencies to make a substantive determination as to whether there is sufficient time to notify bidders of modifications received less than 10 days before bid opening. *(Operating Engineers, Local 627 v. Arthurs*, 355 Supp. 7 (W.D. Okla.), *aff'd*, 480 F. 2d 603 (10th Cir. 1973).) In view of the agencies' present obligation to make a determination as to sufficient time and the Department's considered opinion that the agencies frequently fail to do so, it was decided that the Act could be better implemented by adopting the proposed revision to place greater emphasis on the agencies' obligation in this area. Accordingly, the proposed revision of the 10 day rule is not considered a significant change in these obligations. We are also of the opinion that the notification process can be completed in accordance with the 10-day rule in most cases without undue disruption of the procurement process or inflation of bid prices. Of course, it is recognized that there may be cases where an agency will find that it is not feasible to adopt modifications less than 10 days before bid opening. In such cases, the agency would, prior to bid opening, document its finding of insufficient time and incorporate this finding in the contract file or docket.

Accordingly, while we have considered the objections of some commentators to this reporting requirement, we find that written documentation of the agency's finding of insufficient time is in keepng with sound administrative practices and does not impose an undue paperwork burden upon the agency. The Department has determined that it is appropriate to eliminate the requirement that the report be submitted to the Department, and to adopt one commentators recommendation that the report be in the form of a memo to the contract file and made available to the Administrator upon request. With respect to one commentator's view that the reporting requirement will encourage agencies to adopt modifications rather than make a documented finding of insufficient time, we note that the primary purpose of the reporting requirement is to ensure the utilization of modifications where feasible.

Numerous commentators also opposed the proposed "60 day rule". Under this proposed rule, if a contract

(to which a general wage determination has been applied) has not been awarded within 60 days after bid opening, any modification published prior to bid opening would be effective unless the agency has obtained an extension of the 60 day period from the Administrator.

The Department's obligation to insure that the most current determination of prevailing wages is included in contracts subject to the Davis-Bacon Act is also frustrated by delays which occur in awarding a contract after bid opening. However, it was deemed necessary to adopt a 90 day rather than the proposed 60 day rule to be consonant with the expiration date currently placed on project determinations.

In view of the objections to oral notification of a modification to a wage determination, we have studied the issue further and in consideration of the problems which may arise as a result of misinterpretation of an oral modification notice, we deem it appropriate to provide that written notification of a modification constitutes receipt.

It appears from apparent misinterpretations expressed by several commentators that clarification of § 1.6 with respect to projects financed under the National Housing Act and section 8 of the U.S. Housing Act of 1937 would be appropriate. (The somewhat different application of the rules to such projects is mandated by the statutory schemes of those two acts.) However we believe that the present format of the proposed regulations makes it clear that the 10 day rule applies to competitive procurements under these two acts, and therefore we have made no change in that provision.

With respect to the recommendation of one commentator that the proposed regulations be amended to specify that project and general wage determinations should be modified not less often than every 6 months, it is the Department's considered opinion that due to resource limitations and the lack of sufficient wage data in all cases, this recommendation would not be administratively feasible.

Accordingly, § 1.6(b) as amended is adopted.

§ 1.6(e). Several commenttators objected to § 1.6(e), stating that it improperly gives the Administrator discretionary authority to determine what is a wrong or erronerous wage determination. They argued that this is an impractical, destablizing concept, disruptive to the procurement process. They expressed concern that contractors would be penalized for errors which are not their fault. Three of these commentators also stated that the difference between wrong and erroneous wage determinations needed to be clarified. One commentator stated this subsection would allow this Department unlimited flexibility to circumvent other sections of these regulations. One commentator opposed oral notification, recommending adoption of only written notification.

It is not the Department's intention that a contractor would be penalized by the correction of a wage determination prior to contract award. Rather, it is envisioned that in a competitive procurement, the agency would resolicit the contract with the correct wage determination or permit the contractor to withdraw his bid. In other procurements, the contract price (or amount of Federal assistance) presumably would be adjusted accordingly.

It is clear that the word "wrong" as used in this subsection is used in the sense that the wage determination in the contract is not the wage determination applicable to the contract, such as a highway wage determination being used on a residential project. In contrast, an erroneous wage determination contains errors within the wage determination, such as incorrect wage rates. However, in view of obvious confusion expressed over the distinction between "wrong" and "erroneous", the word "erroneous" has been replaced by "contains substantial errors", thereby also limiting the Department's discretion to withdraw a wage determination. Further, we agree that it is appropriate to withdraw the oral notification provision of this section and to only retain the provision for written notification.

§ 1.6(f). Numerous commentators objected to this subsection, which mandates insertion of a wage determination after contract award where no wage determination has been put in the contract or where the Department of Labor issued an inapplicable wage determination because it was misadvised as to the nature of the project or its location. They argue that the contract awarded would not be the same as the contract for which bids were solicited and it would increase costs and contractor risks. They also stated it places an undue hardship on contractors and contracting agencies by requiring them to correct errors which may have been caused by the Department of Labor. Several commentators stated that it gives the Department of Labor powers beyond those expressed in Reorganization Plan 14 of 1950. Several commentators also noted the inherent difficulties in amending or terminating and resoliciting a contract. Three commentators suggested that, if adopted, this section should clearly provide for the right to appeal any decision by the Administrator ordering the incorporation of a wage decision after contract award to the Comptroller General or the Wage Appeals Board.

Subsection 1.6(f) is necessary to make clear the contracting agency's obligation to correct those situations where it has failed to include any wage determination in a covered contract, or has included an inapplicable wage determination. It is incumbent on this Department to insure that the statutory requirement of the Davis-Bacon Act to include proper wage determination in all covered contracts is met. Contrary to the views of some commentators, the authority for this subsection is derived directly from the statutory language as well as Reorganization Plan 14 of 1950.

We are cognizant of the stated additional cost and risk factors and do not intend that this subsection be a disruptive influence. We have provided that appropriate changes can be accomplished by the contracting agency by whatever means it deems appropriate, which should minimize any disruption to the procurement process, or inequitable cost increases or other problems faced by bidders and contractors. Therefore, subsection 1.6(f) has been adopted with minor word change.

No further amendment of this subsection is warranted with respect to the issue of the right to appeal to the Wage Appeals Board, since such a right already exists.

§ 1.6(g). Some commentators objected to proposed § 1.6(g), because its application may result in increased costs to contractors without providing for reimbursement for these extra costs. We recognize back wage payments may be necessary and we contemplate that contractors would take these into account in requesting funding from the contracting agency.

One commentator suggested that it be mandatory that the wage determination current at the time funding is approved by the agency be applied to the contract as of the funding approval date. This commentator also questioned the legality of the Department's authority to require any retroactive payment of Davis-Bacon wage rates. However, retroactive payment is implicit in the various statutory provisions. The Department's position in this regard is consistent with the recent decision in *North Georgia Building and Construction Trades Council* v. *Goldschmidt*, 621 F 2d 697 (5th Cir. 1980). Assuming this subsection would be finalized, this commentator requested

clarification of what wage determination would be applicable—the one current at the time of contract award or start of construction, at the time of funding approval, or at some point in between. It has been determined that the wage determination in effect at the time of contract award (or at the start of construction where applicable) is appropriate. Thus, when a wage determination is made effective retroactively to the contract award date or start of construction, the rates contained therein will be those prevailing at that earlier time.

§ 1.7 Scope of consideration.

Several commentators stated that the definition of area in § 1.2(b) of this part includes political subdivisions smaller than the county, and our reliance in § 1.7(a) on the county as the normal survey area is not consistent with the intent of the Davis-Bacon Act. They suggest we consider smaller local civil subdivisions within the county as the only basis for making wage determinations. Other commentators suggested we expand the area of consideration to the Standard Metropolitan Statistical Area. Subsection 1.7(a) expresses the actual practice that has been used by this Department in making wage determinations. Experience has demonstrated that the standard, but not inflexible, practice of using the county as the area of consideration is the administratively feasible approach in order to collect meaningful data. In our view, this practice is in accord with the Act. However, smaller civil subdivisions are occasionally used where it is warranted under special circumstances. Similarly, when there is not sufficient data available in individual counties to make an accurate wage determination, we have no choice but to survey surrounding counties.

One commentator requested that the distinction between a "metropolitan county" and a "rural county" be clarified in § 1.7(b). The terms "metropolitan county" and "rural county", as used in subsection 1.7(b), generally coincide with the inclusion or exclusion of a county from a Standard Metropolitan Statistical Area, although other criteria may be considered in a particular case if warranted under the circumstances. We believe that this subsection clearly restricts the conditions under which the Department can use data from such dissimilar counties to make a wage determination. However, we believe that it is also necessary to recognize that in extraordinary circumstances, such as when a specialized project is proposed in a rural county where there has been no similar type construction in the county or in surrounding counties, it may be necessary to obtain wage rate data from metropolitan counties where there have been such projects.

A few commentators objected to the term "in the State" as used in §1.7(c) on the basis that the Davis-Bacon Act speaks of civil subdivisions of the states as being the appropriate area of consideration in making wage determinations. One other commentator suggested that this same term was too restrictive and we should be able to consider wage rate data from adjoining states. It has been our policy that in the unusual case where there is not sufficient current wage rate data available in a county or surrounding counties, we expand the area of consideration. We believe that the use of "in the State" is consistent with our policy, but we do not envision except in the most extraordinary circumstances that data from an entire State would be needed to make a wage determination. In view of the comments, we have added "in surrounding counties" immediately before "in the State" in the text to clarify that when such circumstances arise, the first consideration outside the county will be the surrounding counties.

While some commentators objected to work performed as the criterion for making distinctions between classifications of laborers and mechanics, we regard the statute as requiring that distinctions be based on the classification of work performed rather than on the level of skill. In any given classification individual skill levels will vary from employee to employee and any attempt to measure and issue rates on that basis is administratively impossible and could throw the procurement into complete confusion. Subsection 1.7(d) is adopted with a minor language insert clarifying that the classifications will be issued on wage determinations only where the classification prevails in the area.

§ 1.8 Reconsideration by the Administrator.

All comments received were directed at the amount of time and expense in the form of delays to the start of construction involved in seeking reconsideration of wage determinations.

After due consideration the proposed regulation has been changed to reflect the concerns of the commentators and we have made the Administrator responsible for responding substantatively to the reconsideration request within a 30 day period or to notify the requestor that additional time is necessary.

Appropriate changes to reflect this policy have been made in the regulations.

§ 1.9 Review by the Wage Appeals Board.

Two commentators objected to the elimination of administrative hearings, citing the loss of due process and accountability on the part of Wage and Hour officials. This provision was eliminated because of the lengthy delays incurred by formal administrative hearings, the infrequency of their occurrence, the lack of expertise of administrative law judges, and in the interest of minimizing disruptions to the procurement process.

It is the opinion of the Department that in view of the expertise developed by the Wage Appeals Board through its existing responsibilities under section 1.16 of the current regulations, it is appropriate to eliminate the provision for formal administrative hearings. Because of the provision for appeal to the Board, this can be done without depriving interested parties of their right to due process.

One commentator was of the incorrect view that the proposed regulations limit the authority of the Board to hear an appeal on a portion of a wage determination. The Board has this authority. Additionally, pursuant to 29 CFR Part 7, the Board has the discretion to hear an appeal on all or part of any determination.

One commentator also misinterpreted the proposed regulations to indicate that field surveys would no longer be conducted. However, § 1.3(c) of the proposed regulations states that field surveys may be conducted as necessary to obtain sufficient data upon which to base wage determinations.

Accordingly, the proposed regulation will be adopted.

In addition to the above, there were other comments recommending minor editorial and language changes which we deemed valid, and we have amended the affected sections.

This rule was drafted under the supervision and direction of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210 (202–523–6191).

Accordingly, 29 CFR Part 1 is revised as set forth below.

Signed at Washington, D.C. this 12th day of January, 1981.

Donald Elisburg,

Assistant Secretary of Labor, Employment Standards Administration.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

Sec.

1.1 Purpose and scope.
1.2 Definitions.
1.3 Obtaining and compiling wage rate information.
1.4 Outline of agency construction programs.
1.5 Procedure for requesting wage determinations.
1.6 Use and effectiveness of wage determinations.
1.7 Scope of consideration.
1.8 Reconsideration by the Administrator.
1.9 Review by Wage Appeals Board.
Appendix A.
Appendix B.
Appendix C.

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a—276a–7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

§ 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a—276a–7) and other statutes listed in Appendix A to this part which provide for the payment of minimum wages, including fringe benefits to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is to be performed. Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (64 Stat. 1267, 5 U.S.C. Appendix), except those assigned to the Wage Appeals Board (see 29 CFR Part 7), have been delegated to the Assistant Secretary of Labor for Employment Standards who in turn has delegated the functions to the Administrator of the Wage and Hour Division, and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act, each of the other statutes listed in Appendix A, any other Federal statute providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

(c) Procedures set forth in this part are applicable, unless otherwise indicated, both to general wage determinations published in the Federal Register for contracts in specified localities, and to project wage determinations for use on contract work to be performed on a specific project.

§ 1.2 Definitions.[1]

(a) The term "wages" (and its singular form) has the meaning prescribed in section 1(b) of the Davis-Bacon Act (40 U.S.C. 276a(b)). It includes the basic hourly rate of pay and the rate of contributions or payments made on behalf of the laborers and mechanics for bona fide fringe benefits.

(1) A "wage" shall be deemed to be the "prevailing wage" if it is the wage (hourly rate of pay and fringe benefits) paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, *provided* that the wage is paid to at least 30% of those employed in the classification. If the same wage (hourly rate of pay and fringe benefits) is not paid to at least 30% of those employed in the classification during the period in question, the "prevailing wage" shall be deemed to be the average of the basic hourly rates of pay plus the average of the rates of contributions or payments for bona fide fringe benefits, weighted by the total employed in the classification.

(2) In determining the "prevailing wages" at the time of issuance of a wage determination, the Administrator will be guided by paragraph (a)(1) of this section and will consider the types of information listed in § 1.3(b) of this part.

(b) The term "area" in determining wage rates under the Davis-Bacon Act and the prevailing wage provisions of the other statutes listed in Appendix A shall mean the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(c) The term "Administrator" shall mean the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making of wage determinations.

(d) The term "agency" shall mean the Federal agency, State highway department under 23 U.S.C. 113, or recipient State or local government under Title 1 of the State and Local Fiscal Assistance Act of 1972.

[1] These definitions are not intended to restrict the meaning of the terms as used in the applicable statutes.

§ 1.3 Obtaining and compiling wage rate information.

For the purpose of making wage rate determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator will also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid.

(b) The following types of information will be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects. Such statements should indicate the names and addresses of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, the number of workers employed in each classification on each project, and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements. The Administrator may request the parties to an agreement to submit statements certifying to its scope and application.

(3) Wage rates determined for public construction by State and local officials pursuant to prevailing wage legislation.

(4) Information furnished by Federal and State agencies. See § 1.5. In making wage rate determinations pursuant to 23 U.S.C. 113, the highway department of the State in which a project in the Federal-Aid highway system is to be performed shall be consulted. Before making a determination of wage rates for such a project the Administrator

shall give due regard to the information thus obtained.

(5) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to 29 CFR 5.5(a)(1)(ii).

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in § 1.3(b) of this Part, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in the light of § 1.2(a) of this Part.

§ 1.4 Outline of agency construction programs.

To the extent practicable, at the beginning of each fiscal year each agency using wage determinations under any of the various statutes listed in Appendix A will furnish the Administrator with a general outline of its proposed construction programs for the coming year indicating the estimated number of projects for which wage determinations will be required, the anticipated types of construction, and the locations of construction. During the fiscal year, each agency will notify the Administrator of any significant changes in its proposed construction programs, as outlined at the beginning of the fiscal year.

§ 1.5 Procedure for requesting wage determinations.

(a)(1) Except as provided in paragraph (b) of this section, the Federal agency shall initially request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting Standard Form 308 to the Department of Labor at this address:

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, D.C. 20210.

The agency shall check only those classifications on the applicable form which will be needed in the performance of the work. Inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient. Additional classifications needed which are not on the form may be typed in the blank spaces or on a separate list and attached to the form. The agency shall not list classifications which can be fitted into classifications on the form, or classifications which are not generally recognized in the area or in the construction industry.

(2) In completing SF-308, the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate the type of construction involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) The county (or other civil subdivision) and State in which the proposed project is located.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment information which may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(b) Whenever the wage patterns in a particular area for a particular type of construction are well settled and whenever it may be reasonably anticipated that there will be a large volume of procurement in that area for such a type of construction, the Administrator, upon the request of a Federal agency or in his discretion, may publish a general wage determination in the **Federal Register** when, after consideration of the facts and circumstances involved, the Administrator finds that the applicable statutory standards and those of this part will be met. If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor, provided, that questions concerning its use are referred to the Department of Labor in accordance with § 1.6(b).

(c) The time required for processing requests for wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing in the Department of Labor will take at least 30 days.

§ 1.6 Use and effectiveness of wage determinations.

(a)(1) Project wage determinations initially issued shall be effective for 120 calendar days from the date of such determinations. If such a wage determination is not used in the period of its effectiveness it is void. Accordingly, if it appears that a wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937, and the start of construction) the agency shall request a new wage determination sufficiently in advance of the bid opening to assure receipt prior thereto. However, when due to unavoidable circumstances a determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under Section 8 of the U.S. Housing Act of 1937), the head of the agency or his or her designee may request the Administrator to extend the expiration date of the wage determination in the bid specifications instead of issuing a new wage determination. Such request shall be supported by a written finding which shall include a brief statement of the factual support, that the extension of the expiration date of the determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(2) General wage determinations issued pursuant to § 1.5(b) and which are published in the **Federal Register**, shall contain no expiration date.

(b) Application of general wage determinations to projects and application of project wage determinations with more than one wage rate schedule shall be in accordance with Appendix C of this part. Any question regarding application of wage rate schedules or the guidelines contained in Appendix C shall be referred to the Administrator for resolution.

(c)(1) Project and general wage determinations may be modified from time to time to keep them current. A modification may specify only the items being changed, or may be in the form of a supersedeas wage determination, which replaces the entire wage determination. Such actions are distinguished from a determination by the Administrator under paragraphs (d), (e) and (f) of this section that an erroneous wage determination has been

issued or that the wrong wage determination or wage rate schedule has been utilized by the agency.

(2)(i) All actions modifying a project wage determination received by the agency before contract award (or the start of construction where there is no contract award) shall be effective except as follows:

(A) In the case of contracts entered into pursuant to competitive bidding procedures, modifications received by the agency less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening, to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is received after bid opening.

(B) In the case of those contracts entered into under the National Housing Act which are not awarded pursuant to competitive bidding procedures, modifications shall be effective if received prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, if there is no contract for the project awarded pursuant to competitive bidding procedures, modifications shall be effective if received prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is executed, whichever occurs first.

(ii) Modifications to project wage determinations and supersedeas wage determinations shall not be effective after contract award, or after the beginning of construction, as appropriate.

(iii) Actual written notice of a modification shall constitute receipt.

(3) All actions modifying a general wage determination shall be effective with respect to any project to which the determination applies, if published before contract award (or the start of construction where there is no contract award), except as follows:

(i) In the case of contracts entered into pursuant to competitive bidding procedures, modifications published less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is published after bid opening.

(ii) In the case of those contracts entered into under the National Housing Act which are not awarded pursuant to competitive bidding procedures, modifications shall be effective if published prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(iii) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, if there is no contract for the project awarded pursuant to competitive bidding procedures, modifications shall be effective if published prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, or if under paragraph (c)(3)(ii) or (iii) of this section construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any modifications published in the Federal Register prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(v) A modification to a general wage determination is "published" within the meaning of this section on the date of publication in the Federal Register, or on the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first.

(vi) Modifications or supersedeas wage determinations to an applicable general wage determination published after contract award or after the beginning of construction, as appropriate, shall not be effective.

(d) Upon his/her own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (c) of this section, whenever the Administrator finds such a wage determination contains clerical errors. Such corrections shall be included in any bid specifications containing the wage determination, or in any on-going contract containing the wage determination in question, retroactively to the start of construction.

(e) Written notification by the Department of Labor prior to the award of a contract (or the start of construction under the National Housing Act, under Section 8 of the U.S. Housing Act of 1937, or where there is no contract award) that (1) there is included in the bidding documents or solicitation the wrong wage determination or the wrong schedule or that (2) a wage determination is withdrawn because the Department of Labor has determined that it contains substantial errors (as distinguished from rates which are no longer current), shall be effective immediately without regard to paragraph (c) of this section.

(f) The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part does not apply to the contract. Further, the Administrator may issue a wage determination which shall be applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall incorporate the valid wage determination in the contract specifications retroactively to the date of award, or the beginning of construction, as appropriate. This should be done by whatever means the agency deems appropriate, including, for example, terminating and resoliciting the contract, or amending the contract through supplemental agreement or through change order. Such an amendment or change order may include price adjustments where the agency finds it to be appropriate under its regulations.

(g) If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved

prior to contract award or the beginning of construction, as appropriate, the agency shall request a wage determination prior to approval of such funds. Such a wage determination shall be issued based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under Section 8 of the U.S. Housing Act of 1937 or where there is no contract award), as appropriate, and shall be incorporated in the contract specifications retroactively to that date, *provided*, that upon the request of the head of the agency in individual cases the Administrator may issue such a wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

§ 1.7 Scope of consideration.

(a) In making a wage determination, the "area" will normally be the county unless sufficient current wage data (data on wages paid no more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If there has not been sufficient similar construction within the area in the past year to make a wage determination wages paid on similar construction in surrounding counties may be considered, *provided* that projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county, and projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county, except under extraordinary circumstances where there is not sufficient data available on projects in other rural or metropolitan counties.

(c) If there has not been sufficient similar construction in surrounding counties or in the State in the past year, wages paid on projects completed more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(d) Classifications and wage and fringe benefit rates will be issued only for identifiable "classes of laborers and mechanics." Distinctions between classifications are based upon differences in the work performed, not upon skill and supervisory functions. A semi-skilled classification of laborers or helpers, for example, is issued when the classification prevails in the area, provided that the classification as utilized in the area performs a scope of duties which distinguishes it from other classifications in the area. Prevailing wages for apprentices and trainees are not issued on wage determinations, but their use is permitted in accordance with § 5.5(a)(4) of part 5.

§ 1.8 Reconsideration by the Administrator.

Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination. Such a request for reconsideration shall be in writing accompanied by a full statement of the interested person's views and any supporting wage data or other pertinent information. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30 day period that additional time is necessary.

§ 1.9 Review by Wage Appeals Board.

Any interested person may appeal to the Wage Appeals Board for a review of a wage determination or its application made under this part, after reconsideration by the Administrator has been sought pursuant to § 1.8 and denied. Any such appeal may, in the discretion of the Wage Appeals Board, be received, accepted, and decided in accordance with the provisions of 29 CFR Part 7 and such other procedures as the Board may establish.

Appendix A

Statutes Related to the Davis-Bacon Act Requiring Payment of Wages at Rates Predetermined by the Secretary of Labor

1. The Davis-Bacon Act (secs. 1–7, 46 Stat. 1494, as amended; Pub. L. 74–403, 40 U.S.C. 276a–276a–7).

2. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

3. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

4. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86–372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

5. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

6. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

7. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).

8. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

9. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91–230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92–318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

10. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113 as amended), see particularly the amendments in the Federal-Aid Highway Act of 1963 (Pub. L. 90–495, 82 Stat. 815).

11. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

12. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

13. Rehabilitation Act of 1973 (sec. 306(b)(5), 87 Stat. 384, 29 U.S.C. 776(b)(5)).

14. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 93 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

15. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

16. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

17. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

18. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).

19. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).

20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).

21. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 306(h)(2) thereof, 83 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).

22. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

23. Health Professions Education Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2256, 42 U.S.C. 293a(c)(7)).

24. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296e(b)(5)).

25. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).

26. Safe Drinking Water Act (sec. 2(a), see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j–9(e)).

27. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o–3(b)(1)(H)).

28. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).

29. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

30. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

31. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

32. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c–3).

33. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

34. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

35. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

36. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

37. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

38. Older Americans Act of 1965 (sec. 502, Pub. L. 89–73, as amended by sec. 501, Pub. L. 93–29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).

39. Public Works and Economic Development Act of 1965 (sec. 712, 79 Stat. 575 as amended; 42 U.S.C. 3222).

40. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

41. New Communities Act of 1968 (sec. 410.82 Stat. 516; 42 U.S.C. 3909).

42. Urban Growth and New Community Development Act of 1970. (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

43. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

44. Housing and Community Development Act of 1974 (secs. 110, 802(g), 83 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

45. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

46. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).

47. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

48. Energy Conservation and Production Act (sec. 45(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

49. Solid Waste Disposal Act (sec. 2, 90 Stat. 2828; 42 U.S.C. 6979).

50. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

51. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

52. Highway speed ground transportation study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

53. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

54. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281(i).

55. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat; 40 U.S.C. 682(b)(4).

Note.—Repealed Dec. 9, 1969 and labor standards incorporated in sec. 1–1431 of the District of Columbia Code).

56. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89–694, but not in the United States Code).

57. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87–328) (considered a statute for purposes of this part but not in the United States Code).

58. Energy Security Act (Sec. 175(c), Pub. L. 96–294, 94 Stat. 611; 42 U.S.C. 8701 note).

Appendix B

Boston Region

For the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, JFK Federal Building, Government Center, Room 1612C, Boston, Massachusetts 02203 (telephone: 617–223–5565).

New York Region

For the States of New Jersey and New York and for the Canal Zone, Puerto Rico, and the Virgin Islands:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1515 Broadway, Room 3300, New York, New York 10036 (telephone: 212–399–5443).

Philadelphia Region

For the States of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, and the District of Columbia:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Gateway Building, Room 15220, 3535 Market Street, Philadelphia, Pennsylvania 19104 (telephone 215–596–1193).

Atlanta Region

For the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1371 Peachtree Street, N.E., Room 305, Atlanta, Georgia 30309 (telephone: 404–881–4801).

Chicago Region

For the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, Illinois 60604 (telephone: 312–353–7249).

Dallas Region

For the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 555 Griffin Square Building, Young and Griffin Streets, Dallas, Texas 75202 (telephone: 214–767–6891).

Kansas City Region

For the States of Iowa, Kansas, Missouri, and Nebraska:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 2000, 911 Walnut Street, Kansas City, Missouri 64106 (telephone: 816–374–5386).

Denver Region

For the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 1440, 1961 Stout Street, Denver, Colorado 80294 (telephone: 304–837–4613).

San Francisco Region

For the States of Arizona, California, Hawaii, and Nevada:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 450 Golden Gate Avenue, Room 10353, San Francisco, California 94102 (telephone: 415–556–3592).

Seattle Region

For the States of Alaska, Idaho, Oregon, and Washington:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 4141, 909 First Avenue, Seattle, Washington 98174 (telephone: 206–442–1916).

Appendix C

Subject: Application Of The Standard Of Comparison "Projects Of A Character Similar" Under The Davis-Bacon And Related Acts

The purpose of this memorandum is to set forth policies of the Wage and Hour Division with regard to the determination of "projects of a character similar to the contract work" for wage determination purposes. The guidelines contained in the memorandum are to be used by the contracting agencies in selecting the proper schedule(s) of wage rates from the **Federal Register** and in instructing contractors regarding the application of multiple schedules. This memorandum supersedes All Agency Memorandum No. 68 (July 19, 1966), No. 130 (March 17, 1978), and No. 131 (July 14, 1978).

The Davis-Bacon and related Acts require the Secretary of Labor to determine the prevailing wage rates for corresponding classes of laborers and mechanics on projects in the area which are of a "character similar" to the proposed contract work to which the determination will be applied. The Department's Wage Appeals Board in a decision specifically relating to high-rise apartment buildings (WAB Case No. 76–11, dated January 27, 1977) stated:

"The test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or nonunion wages are paid or whether union or nonunion workers are employed. Since the 1935 amendments to the Davis-Bacon Act, the statutory focus has always been on the character of the project itself rather than on who was employed on the project or how much he or she was being paid."

Again, in a decision relating to a water treatment plant project (WAB Case No. 77–

20, dated September 30, 1977), the Board stated: "When it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy, or highway construction it is not necessary to resort to an area practice survey to determine the appropriate categorization of the project."

Where the proper category of construction is not clear, however, the Board has advised that the wages being paid may be considered to determine the appropriate category of construction, together with other characteristics, such as construction techniques, material and equipment used, and skills called for. WAB Case No. 77–23, dated December 30, 1977.

Generally, construction projects are classified as either Building, Heavy, Highway or Residential.[1] However, separate wage rate schedules are applied where a project includes structures in more than one category and the amount of construction in each category is substantial, either in relation to the overall project (approximately 20 percent or more of total project cost) or in dollar amount (approximately $250,000 or more). Separate schedules are common, for example, for water and sewage treatment plants, which generally include both buildings and non-building structures. On the other hand, water and sewer lines and paving on building projects are generally only incidental to a project, and therefore separate schedules are not ordinarily issued.[2]

Below are descriptions of the four major categories of construction, together with an illustrative list of the kinds of projects which are generally included within each category:

Building Construction

Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level, as well as incidental grading, utilities and paving. Additionally, such structures need not be "habitable" to be building construction. The installation of heavy machinery and/or equipment does not generally change the project's character as a building.

Examples

Alterations and additions to buildings
Apartment buildings (5 stories and above)
Arenas (enclosed)
Auditoriums
Automobile parking garages
Banks and financial buildings
Barracks
Churches
City halls
Civic centers
Commercial buildings
Court houses
Detention facilities
Dormitories
Farm buildings
Fire stations
Hospitals
Hotels
Industrial buildings
Institutional buildings
Libraries
Mausoleums
Motels
Museums
Nursing and convalescent facilities
Office buildings
Out-patient clinics
Passenger and freight terminal buildings
Police stations
Post offices
Power plants
Prefabricated buildings
Remodeling buildings
Renovating buildings
Repairing buildings
Restaurants
Schools
Service stations
Shopping centers
Stores
Subway stations
Theaters
Warehouses
Water and sewage treatment plants (buildings only)

Residential Construction

Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

Examples

Town or row houses
Apartment buildings (4 stories or less)
Single family houses
Mobile home developments
Multi-family houses
Married student housing

Heavy Construction

Heavy projects are those projects that are not properly classified as either "building", "highway", or "residential". Unlike these classifications, heavy construction is not a homogeneous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules issued. For example, separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

Examples

Antenna towers
Bridges (bascule, suspension and spandrel arch bridges; bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)
Breakwaters
Caissons (other than building or highway)
Canals
Channels
Channel cut-offs
Chemical complexes or facilities (other than buildings)
Cofferdams
Coke ovens
Dams
Dikes
Docks
Drainage projects
Dredging projects
Electrification projects (outdoor)
Flood control projects
Industrial incinerators (other than building)
Irrigation projects
Jetties
Kilns
Land drainage (not incidental to other construction)
Land leveling (not incidental to other construction)
Land reclamation
Levees
Locks, waterways
Oil refineries (other than buildings)
Pipe lines
Ponds
Pumping stations (prefabricated drop-in units)
Railroad construction
Reservoirs
Revetments
Sewage collection and disposal lines
Sewers (sanitary, storm, etc.)
Shoreline maintenance
Ski tows
Storage tanks
Swimming pools (outdoor)
Subways (other than stations and buildings)
Tipples
Tunnels
Unsheltered piers and wharves
Viaducts (other than highway)
Water mains
Waterway construction
Water supply lines (not incidental to building)
Water and sewage treatment plants (other than buildings)
Wells

Highway Construction

Highway projects include the construction, alteration or repair of roads, streets,

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[1] For wage determination purposes, a project generally consists of all construction necessary to complete a facility regardless of the number of contracts involved, so long as all contracts awarded are closely related in purpose, time and place. For example, demolition or site work preparatory to building construction is considered a part of the building project for wage determination purposes. In contrast, because of the extensive size of a rapid rail system or a highway, which is built over a period of years, each segment is considered a separate project. See *MARTA*, WAB Case No. 75–5, dated October 16, 1975. Similarly, a rest area on a highway is considered a separate project.

[2] In certain areas of the country different wage rates are paid for incidental paving and utilities than for the remainder of a building project. Accordingly, in such areas the Wage and Hour Division issues the rates which are paid on such work on building projects. See WAB Case No. 77–19, dated December 30, 1977.

highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Examples

Alleys
Base courses
Bituminous treatments
Bridle paths
Concrete pavement
Curbs
Excavation and embankment (for road construction)
Fencing (highway)
Grade crossing elimination (overpasses or underpasses)
Guard rails on highway
Highway signs
Highway bridges (overpasses; underpasses; grade separation)
Medians
Parking lots
Parkways
Resurfacing streets and highways
Roadbeds
Roadways
Runways
Shoulders
Stabilizing courses
Storm sewers incidental to road construction
Street Paving
Surface courses
Taxiways
Trails

Unless the Wage and Hour Division advises otherwise, as set forth below, the descriptions and classifications above are to be utilized by contracting agencies in selecting the appropriate wage schedule from the **Federal Register** and in determining the application of multiple schedules issued by the Wage and Hour Division. The advertised and contract specifications should identify as specifically as possible the structures to which the schedule applies and only the appropriate schedule(s) from the **Federal Register** should be incorporated into the specifications. Where multiple schedules are issued for a project by the Wage and Hour Division, they are to be utilized in the specifications and any applicable instructions regarding their use are to be observed.

To ensure that appropriate schedules are issued by the Wage and Hour Division, contracting agencies are reminded of their responsibility to provide a sufficiently detailed description of the project to enable the Wage and Hour Division to determine the character of the project. If structures in more than one category of construction are involved, such structures should be identified, together with an estimate of the cost of those structures in dollar amounts and in relation to total project cost.

Furthermore, contracting agencies have the authority only in the first instance to designate the appropriate wage schedule(s) from the **Federal Register** and, in the absence of instructions from the Wage and Hour Division, to determine the application of multiple schedules issued by the Wage and Hour Division in project wage determinations. It is recognized that in individual caes or with respect to specific areas of the country, application of these guidelines may not be appropriate, such as where the category of construction is not clear and a definitive area practice has developed. For example, major bridges are ordinarily heavy construction, but have attributes of both heavy and highway construction; accordingly, area practice may be of great significance. Similarly, pumping stations vary greatly in sophistication and construction techniques, requiring close examination.

In any instance where a contracting agency has a question regarding application of the guidelines to a specific case, or where a question is raised by interested parties concerning the appropriate schedule(s) to be applied to a contract, the question is to be referred to the Wage and Hour Division. This referral should include a complete description of the project, any evidence available regarding area practice of wages paid on similar projects, comments by interested parties which may have been submitted to the agency, and the agency's own view.

Agencies are advised that the U.S. Court of Appeals for the Fifth Circuit has ruled that where a party has objected to a Federal agency's application of a general wage determination to a project, the question must be submitted to the Department of Labor pursuant to the regulations, 29 CFR 5.13, and bid opening cannot proceed until the dispute is resolved by the Secretary. *North Georgia Building and Construction Trades, supra.* The Wage and Hour Division will endeavor to cooprate with the contracting agencies in acting expeditiously with a view towards procurement deadlines.

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Friday
January 16, 1981

Part VIII

Department of Labor

**Employment Standards Administration
Wage and Hour Division**

Service Contract Act; Labor Standards for Federal Service Contracts; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 4

Service Contract Act; Labor Standards for Federal Service Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This rule revises Regulations, Part 4, Labor Standards for Federal Service Contracts, issued under the Service Contract Act. These regulations represent the first thorough substantive updating and clarification of these regulations since 1968. Most changes are made to reflect longstanding policies, rulings, and interpretations developed in the course of our experience in administering and enforcing the Act over the years. Essentially, this revision codifies these policies, rulings, and interpretations for the information and guidance of various interested parties, including employees and their representatives, contractors or potential contractors and their associations and Federal procurement agencies.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Dorothy P. Come, Assistant Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: 202-523-8333.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a document was published in the **Federal Register** (44 FR 77036) proposing to revise, update, and clarify Regulations, 29 CFR Part 4, so that contracting agencies, contractors or potential contractors, and employees could be more fully apprised of their responsibilities and rights under the Service Contract Act and be provided with a current statement of the policies and interpretations followed by the Department of Labor in administering and enforcing the Act.

Numerous changes, clarifications, and revisions have been made to dispel misunderstandings and confusion that have arisen with respect to some of these policies.

In addition, several changes have been made which address certain concerns expressed by contracting agencies relative to the efficient administration of the Act as it relates to the procurement process. Many editorial and clarifying changes have also been made.

Persons interested in the proposed rulemaking were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the proposal in the **Federal Register.** On February 15, April 1, May 23, June 24, July 25, September 26, and October 24, 1980, notice was given in the **Federal Register** extending the time for public comment. The period for comments was terminated on November 24, 1980.

The April 1, 1980 extension was granted in order to allow the comment period for this Part to run concurrently with that for the related procedural rules in Parts 6 and 8 of this Title, published in proposed form on April 22, 1980. The other extensions were granted at the request of various interested parties who needed additional time to prepare their comments.

Overall, comments were received from approximately 450 interested parties, including Members of Congress, contracting agencies, labor unions and organizations, contractor associations, contractors, business organizations, and others.

Among those Federal agencies submitting comments were the Executive Office of the President—Office of Science and Technology Policy, the Department of Defense, the General Services Administration, the Department of Energy, the National Aeronautics and Space Administration, the Department of Agriculture, the Federal Aviation Administration and the Small Business Administration.

Contractor associations and business organizations submitting comments included the Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the National Council of Technical Service Industries, the National Star Route Mail Carriers' Association, the Scientific Apparatus Makers Association, and the Chamber of Commerce of the United States.

Among the individual firms who commented were Pan American World Airways, Inc., Datapoint Corporation, Northrop Corporation, Xerox Corporation, Trinidad Corporation, McDonald Douglas Corporation, Rockwell International, the Boeing Company, and attorneys representing the Bell and Howell Company, Southern Packaging and Storage Company, Inc., and Chromalloy Metals Tectonics Company.

Labor unions and organizations commenting on the proposal included the American Federation of Labor—Congress of Industrial Organizations (AFL-CIO) and its Department of Economic Research and Department of Professional Employees; and affiliated councils and unions of the AFL-CIO, including the International Brotherhood of Electrical Workers, the International Association of Machinists and Aerospace Workers, the American Federation of Government Employees, the Service Employees International Union, the International Union of Operating Engineers Local No. 3, and the United Brotherhood of Carpenters and Joiners of America, the Washington State Labor Council, the International Woodworkers of America, Seafarers International Union of North America, Laborers' International Union of North America, and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada—Motion Picture Laboratory Technicians Local 780. Comments were also received from the Center to Protect Workers' Rights and the Contract Loggers Employee Association.

Several general comments were received, usually either in support or opposition to the proposal, while several others requested that public hearings regarding the proposed changes to the Regulations be held and/or requested the preparation of a regulatory analysis.

Since the long extended public comment period has given all interested parties ample opportunity to submit their views, it was decided that public hearings were not necessary.

It has been determined that the amendments to these Regulations do not meet the criteria of Executive Order 12044 and the Department of Labor Guidelines (44 FR 5570) for a regulatory analysis. The revised portions of the regulations essentially clarify interpretations, policies, and procedures, and do not, in any event, cause major cost/price increases.

The following is an analysis of all the principal comments received and a description of the changes made to the proposed rule because of these comments. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major substantive comments and recommendations, the Department's findings as to whether or not suggested changes to the proposed rule would be in accord with the language and intent of the SCA, and a discussion of the substantive changes adopted, if any. Many minor editorial changes, spelling, and other necessary

typographical corrections have been made.

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Section 4.1b(a)—Effective Date of Variance Decisions

The AFL–CIO supported making decisions of substantial variance hearings effective on the date of issuance of an Administrative Law Judge's (ALJ) decision except where the decision results in the restoration of lost wages or fringe benefits, in which case the decision should be retroactive to the beginning of the contract, whereas DOD felt that a contractor should not be required to pay higher rates when a request for a variance hearing under section 4(c) of the Act has been made until the matter is resolved by an Administrative Law Judge. DOD also stated that a decision on substantial variance should not become effective until 10 days or more after the issuance of any new wage determination rather than the date of the ALJ's decision.

As set forth in § 4.163(c), the legislative history makes it clear that collectively bargained wages and fringe benefits must be honored "unless and until" they are found, after a hearing, to be at variance. Thus, the above suggestions cannot be adopted.

DOD also objected to the phrase "for the same location" as requiring successor contractors, regardless of where the service work will be performed, to pay wages and fringe benefits contained in a predecessor's collective bargaining agreement, and recommended using "at" or "in" the same location.

There is nothing in the Act indicating Congressional intent for such a strict limitation on section 4(c) of the Act. This point will be discussed in more detail under § 4.163.

Section 4.1b(b)—Limitations to the Applicability of Section 4(c) of the Act

The AFL–CIO, the Center to Protect Workers' Rights, and a number of other union organizations opposed what they perceived as additional limitations on the application of section 4(c) of the Act in the proposed adoption of different "cut off dates" for receipt of new or changed collective bargaining agreements in the case of negotiated procurements or contract extensions. The unions asserted that these proposed changes deprive workers of benefits which were insured by the 1972 Amendments to the Act.

The National Aeronautics and Space Administration, the Department of Energy, and several contractors argued that the rule for the application of new collective bargaining agreement rates in subparagraph (b)(2) should be tied to receipt of proposals (or best and final proposals), and not to contract award or commencement.

The General Services Administration (GSA) and NASA argued that the "30 day rule" in subparagraph (b)(2) would disrupt the procurement process because there would be legitimate reasons for delaying contract commencement for more than 30 days beyond the award date.

The Army and Air Force Exchange Service (AAFES) recommended a 90 day rule instead of the 30 day rule proposed in (b)(2), in order to allow phase-in procedures, since 60–90 days typically elapse between their contract awards and the contract commencement dates.

The time frame change in § 4.1b(b)(2) essentially moves back the date for recognition of new collective bargaining agreements from the current 10 days prior to the contract commencement, in the case of negotiated procurements, options or extensions, to the date of award—provided that the contract commences within 30 days after the award and that the predecessor contractor and collective bargaining representatives of the predecessor's employees are notified of all applicable procurement action dates, including, for example, commencement of negotiations, date of award and commencement of the contract. Otherwise, the "10 day prior to the commencement" rule becomes operative. While it is recognized that this change may take away 20 days from potential collective bargaining, it is deemed fair and equitable for all concerned, given the possible disruptions to the procurement process by the current 10-day rule. Conversely, tying the effectiveness of new bargaining agreements to the date on which contract proposals are received or the date of contract option, or extending the 30-day period to 90 days as suggested by some agencies, would provide too serve a limitation on the time available for meaningful collective bargaining with an incumbent contractor. For example, receipt of proposals often occurs many months before contract award or commencement.

The Computer and Business Equipment Manufacturers Association (CBEMA) objected to the provision in subparagraph (b)(3) that the limitations on the application of section 4(c) of the Act contained in subparagraphs (b) (1) and (2), concerning new collective bargaining agreement rates, are dependent upon the contracting officer notifying the predecessor contractor and the union of the applicable procurement dates.

This requirement, which has been in the Regulations since 1976, is necessary to give the affected parties fair and adequate notice, so that orderly bargaining may take place.

The Department of Defense recommended language changes in § 4.1b (b)(2) to refer to "contract start of performance" to prevent contractor evasion of the 30 day rule therein. This suggestion will be adopted.

Various commentators pointed out that in order to be effective, subparagraph (b)(3) must be clarified to specify that the incumbent contractor and the collective bargaining representative must be notified 30 days in advance of *all* applicable procurement dates. This subparagraph will be so clarified.

Section 4.4(a)—Notice of Intention To Make a Service Contract (SF–98)

The AFL–CIO; the Center to Protect Workers' Rights; the International Alliance of Theatrical Stage Employees, Local 780; the American Federation of Government Employees; and the International Brotherhood of Electrical Workers commented that the requirement for submitting SF–98s to the Department no less than 90 days prior to solicitation was necessary if DOL is to carry out its wage determination responsibilities more effectively, but suggested that the representatives of employees affected by the issuance of a wage determination (including Federal employees) also be notified.

The Department does not believe that the notification of employees' representatives that an SF–98 has been filed is a necessary or appropriate requirement. Employees are notified of their rights under the contract pursuant to § 4.6(e) in the contract clauses and union representatives are notified of agency procurement actions under § 4.1b (b)(3).

DOD and GSA objected to requiring earlier submissions of SF–98s for procurements which are not recurring and are not known of in advance. GSA noted that the reason for the longer advance time period was to accommodate appeals of wage determinations to the Board of Service Contract Appeals, and stated that it opposes, in spirit, the establishment of a Board because of the ensuing delays and complications which will accrue to the procurement process.

The National Aeronautics and Space Administration; the Department of Energy; the Department of Agriculture (Office of the Secretary, the Office of Operation and Finance, and the Forest

Service); the Naval Surface Weapons Center and the Chamber of Commerce also objected to the 90 day advance notice requirement as impairing the procurement process by increasing lead times for new requirements, thereby necessitating revisions of submitted data and an increase in costs. They argued that earlier submissions would also increase the incidence of changed collective bargaining agreements and would result in corresponding changes in wage determinations required by section 4(c) of the Act. NASA recommends retaining the current 30 day requirement and handling appeals which delay the issuance of a wage determination on a case by case basis.

As indicated above, the purpose of proposing an increase in the lead time for submission of SF–98s from 30 to 90 days was to provide adequate time for the review of wage determinations, if requested. (For the reasons stated in the preamble relating to 29 CFR Part 6, the Board of Service Contract Appeals is not being established, as proposed. Rather, a formal appeals procedure to the Secretary is being substituted.)

However, because of the degree of concern expressed by affected agencies, it has been decided to strike a balance by shortening this lead time to 60 days for submissions in the case of recurring, known procurements but retaining a 30 day submission period for unplanned and/or emergency actions. Appropriate changes will also be made in § 4.4(f).

GSA also took issue with the requirement in § 4.4(a) that agencies submit specific questions concerning the SCA's applicability to individual contracts to DOL, asserting that contracting officers, on advice of agency legal counsel, should retain authority to decide the applicability of the Service Contract Act in individual cases.

Since DOL has the responsibility for resolving questions of labor standards applicability (see the Opinion of the Attorney General, 43 Atty. Gen. Ops. (March 9, 1979)), it is proper to require the agencies to refer such matters for resolution.

Section 4.4(b)(1)

Two industry associations and one firm argued that the "5 employees" provision contained in this subsection should be interpreted as meaning 5 work years.

Because of the fluctuation in, and variety of staffing patterns on service contracts (e.g. a large number of employees used for a short time, a few used over the course of a year, etc.), it is not appropriate to establish any hard and fast rule on how to count the number of service employees, which is used by DOL to determine whether a wage determination is mandatory pursuant to section 10 of the Act. In any event, as required by section 10 and as set forth in § 4.3, DOL intends to issue wage determinations wherever possible, irrespective of whether more or less than 5 service employees will be utilized on a contract.

Section 4.4(f)

The Department of Defense objected to the 90 day rule for submission of SF–98s, and recommended a 30 day submission requirement for nonroutine procurements because of the need to meet emergency situations on a timely basis.

Such accommodation will be made in this subsection, as discussed above under § 4.4(a).

DOD also objected to the requirement that the contracting agency not award a contract with more than 5 service employees without an appropriate wage determination on the grounds that the agency should not have to hold up the award if the Department had not issued a wage determination within a reasonable time.

As noted in this subsection, the requirement that all contracts which involve the use of more than 5 service employees contain a wage determination carries out the mandate in section 10 of the Act and thus cannot be varied. The Department will do its utmost to issue timely wage determinations in response to the timely submissions of SF–98s.

Section 4.4(g)

DOD suggested that the requirement to contact DOL if a solicitation is delayed more than 30 days beyond the date indicated on the SF–98 to determine whether a wage determination is still current be changed to 60 days, in an effort to lessen the potential for unnecessary delays and disruption of the contracting process.

This is a reasonable suggestion, and will be adopted.

The National Aeronautics and Space Administration suggested that an expiration date be set forth in the wage determination in lieu of requiring the contracting agency to contact DOL if the procurement date exceeds the 30 day limitation, which they state is a common occurrence.

Given the large volume of wage determinations issued and revisions made, this is not a viable alternative.

Section 4.5(a)(2)—Inclusion of Revised Wage Determinations

The AFL–CIO; the Center to Protect Workers' Rights; the International Alliance of Theatrical Stage Employees, Local 780; the International Brotherhood of Electrical Workers; and the International Association of Machinists and Aerospace Workers objected to this provision as giving the contracting agencies too much discretion to use or reject revised wage determinations received less than 10 days prior to the date of bid opening in the case of competitive procurements, thereby inviting abuse. In addition, all of these parties recommend requiring the inclusion of an updated wage determination which is received by a contracting agency up to the date of contract commencement in the case of noncompetitive procurements.

NASA, the Army and Air Force Exchange Service (AAFES), the General Services Administration, the Department of Energy, the Computer and Business Equipment Manufacturers Association, and one contractor said the proposal would cause procurement problems by allowing insertion of wage determinations which were not contemplated in the original bidding competition. AAFES stated that a "90 day rule" for negotiated contracts would be preferable to the "30 day rule" proposed in this provision because of the nature of its contracts.

The Department of Defense suggested revising this subsection to substitute the term "contract start of performance" for "contract commencement." This change was adopted for the reasons set forth in § 4.1b(b).

The time frames for insertion of revised wage determinations provided in this section establish a fair and reasonable balance between the competitive aspects of the procurement process and providing for current prevailing wages and fringe benefits which will apply over the ensuing contract term (in most cases, a whole year). The "10 day rule" in the case of competitive procurements has been in the Regulations since 1968. The "30 day rule" in this proposed section replaces the current policy of requiring the inclusion of revised wage determinations up to the date of contract commencement with respect to negotiated (or option) procurement actions. This prior policy led to some serious difficulties. In addition, the new proposal dovetails with § 4.1b(b)(2) as it relates to revised collective bargaining agreements. No change will be made in this section other than the language changes proposed by DOD which are helpful.

Section 4.5(c)—Failure To File SF-98 on a Timely Basis; Erroneous Contracting Agency Determinations of Noncoverage

The Department of Defense (DOD) objected to the requirement that a contract agency either include the Service Contract Act provisions in a contract or cancel or terminate a contract, when DOL finds that the agency erroneously did not apply the Act to that contract. DOD believes that DOL should make allowances for good faith disagreements; it also contends that the court cases cited in this subsection do not indicate that DOL has the authority to require cancellation or termination of the contract.

The General Services Administration (GSA) opposed § 4.5(c)(2) on the ground that the potential for disruption of a contract far outweighs the "benefits" derived from the retroactive inclusion of the Service Contract Act in some situations. GSA argues that if the contract has been substantially performed, the decision whether to amend the contract should be left up to the contracting officer based upon the particular facts in the case, or at least, DOL should take this into consideration.

The Council of Defense and Space Industry Associations and the National Council of Technical Service Industries stated that the procedures in this section do not adequately protect the contractor by failing to require the contracting agency to reimburse the contractor for unanticipated costs.

The AFL-CIO, IATSE, the Center to Protect Workers' Rights, and the International Brotherhood of Electrical Workers all commented in favor of this section, stating that it would help insure the retroactive application of wage determinations to contracts where the agency has omitted the SCA requirements and would prevent employees from losing the protections of the Act.

In the case of a substantially completed contract, the Department of Labor has and will consider whether a contracting agency made a good faith decision not to include the required provisions of the Act in a particular contract and the possible disruptions to a procurement in deciding on remedies in each individual case. Accordingly, we do not believe that any changes in the regulation are justified.

The listed court cases are generally cases in which the courts have required incorporation of contract provisions required by law or considered such provisions to be incorporated as a matter of law. The Department of Labor does not have the authority to require an agency to reimburse a contractor for additional costs resulting from the inclusion of a wage determination or for other related procurement costs. These are matters for resolution within the context of the applicable procurement statutes and regulations and GAO directives. This section of the regulations sets out various possible alternative avenues of relief for the contracting agencies to consider and/or adopt so as to provide for equity to contractors while at the same time properly effectuating the remedial purposes of the SCA.

Section 4.5(d)

NASA and GSA objected to the requirement that agencies call the Department for guidance when an SF-98 has been timely filed but no wage determination has been issued, stating that this imposes delays on the contracting agencies but does not impose similar time limits on the Department. Both parties suggested that when a wage determination is not issued the wage determination applicable to the previous contract should be used or, if there was not a previous determination, the minimum wage standards contained in section 6(a)(1) of the Fair Labor Standards Act should apply.

This subsection is intended to provide an efficient and simplified procedure for the agencies and DOL to use in order to implement the mandatory requirement in section 10 of the Act for the issuance and, obviously, the inclusion of current, prevailing wage determinations in contracts. The failure to include a wage determination or the use of outdated wage determinations would be improper. Finally, this provision conforms to the instructions currently set forth on the reverse side of the SF-98.

Section 4.6(b)(1)—Contract Clauses

The Department of Energy (DOE) noted that the last sentence in this subparagraph does not specify that the length of service of a service employee with a predecessor contractor (which is used in determining wage and fringe benefits entitlements) must also have been performed on a predecessor contract. This section will be so amended.

Pan American World Airways agreed that length of service should be considered for fringe benefit entitlement but not for wage entitlements. However, length of service must be considered where required, as discussed in Subpart D of this title.

Section 4.6(b)(2)—Conforming Procedures

The AFL-CIO, the Center to Protect Workers' Rights, IATSE, and the International Brotherhood of Electrical Workers fully supported the proposed detailed changes in the conforming procedures. They believe that requiring the participation of the affected workers and involving the Department will prevent abuses such as redesigning jobs to evade the established wage determination classes and rates.

The Department of Energy (DOE) objected to the conforming procedures as potentially causing continuous disputes given the multitude of possible job function and responsibility combinations, and objected to the requirement that the contractor explain the conformance to the affected employees.

The Department of Defense objected to the requirement for review of all conformance actions by the Department on the grounds that it places additional burdens on the contracting agency, adds delays and paperwork requirements, and encroaches on the contracting officer's authority.

NASA proposed that new and different conformances procedures be established for contract modifications, options or extensions, new contract awards where there is no predecessor, and awards through recompetition, based upon maintaining a constant arithmetic relationship between the rates for conformed classes and those listed on a wage determination. In all cases, however, it was proposed that only the contracting agency and the Department be involved in the conformance.

The Council of Defense and Space Industry Associations (CODSIA) objected to the requirement for Departmental approval of conformances as interference in the collective bargaining process and as increasing the administrative burden on the Department. CODSIA and NCTSI also objected to the proposed time limits for conformance, and to the placing of the burden for conformance on the contractor. If the contractor "guesses wrong", CODSIA contended, he is subsequently held liable for violations based on the failure to conform rates properly. The Scientific Apparatus Makers Association and a number of contractors made similar observations.

The Computer and Business Equipment Manufacturers Association (CBEMA) and some other commentors asserted that the conforming procedures require either individual bargaining with each employee, which was termed

impractical, or forced collective bargaining contrary to the National Labor Relations Act.

NCTSI also stated that conformance actions should be appealable to the Board of Service Contract Appeals, and that subsequent to the completion of final action, the Department should issue a revised wage determination containing the additional rates in order to reduce subsequent conformance burdens.

The Department has wrestled for many years with this complex problem of conforming wage rates and classifications for contract work for which no wage data is available or about which the Department has not been informed by the agency on the SF-98. The proposed revisions to this procedure are intended to spell out and clarify existing methods. While we believe that the procedure for agreement the interested parties should continue to include the affected employees or their representatives, we intend to study, for possible future use, other alternatives, like the one proposed by NASA. In the meantime, this proposed subsection will be adopted. Moreover, we intend to take administrative steps to issue, to the extent possible, wage rates for all of the occupational classifications requested by the agencies, utilizing statistically valid benchmarks, slotting of jobs, etc. It is also noted that conformance actions will be appealable.

With respect to the proposed DOL review of all conforming actions, this requirement is deemed necessary because of significant past abuses and/or failure to observe the contract conforming requirements, which led to serious, protracted compliance problems when discovered during the course of investigations. However, it will be our policy not to modify agreements reached by the interested parties unless they are determined to be clearly erroneous.

Section 4.6(g)—Recordkeeping

NASA recommended review of the proposed requirement that the contractor's records include the employee's social security number because of the possible impact of the Privacy Act of 1974.

Since this agency computes and disburses wages to employees and taxes to the IRS from withheld funds, this provision is in accord with the Privacy Act.

National Star Route Mail Carrier's Association argued that the suspension of contract payments to a contractor for failing to provide payroll records might be appropriate in cases involving willful withholding of records, but not in situations where records were lost or simply not maintained.

This provision will be applied judiciously, with due regard for the facts in each case.

Section 4.6(i)—Withholding

NCTSI argued that contract fund withholding should be at the discretion of the contracting agency and should not take place in advance of due process hearings.

This policy on withholding is in accord with section 3(a) of the Act. See § 4.187(a) of this Part for an explanation of this matter.

Section 4.6(j)—Inclusion of Contract Clauses in Subcontracts

Several commentors suggested that the Department clarify the requirement that SCA clauses are only required to be inserted in subcontracts which are subject to the Service Contract Act.

Such amendatory language will be added.

Section 4.6(1)(2)—Seniority List

Several firms stated that the requirement to submit an employee seniority list to be used by successor contractors to determine vacation eligibility in certain cases was burdensome. The Computer and Business Equipment Manufacturers Association questioned whether this provision violated the Privacy Act and whether it was proper to require a firm to turn over business information to a competitor.

The National Council of Technical Service Industries (NCTSI) argued that the requirement to submit a list of employees during the last month of contract performance prior to the end of that month is impossible, since such a list could only be estimated at that time and requested this section be revised to require that the list be furnished within 30 days after completion of contract performance.

This proposal basically was made at the suggestion of a number of service contractors who had experienced difficulty in obtaining employee length of service data which is necessary in order for them to determine vacation entitlement amounts based on service with "predecessor" contractors where there is a succeeding contract (§ 4.173). This subsection will greatly assist successor contractors in obtaining this information and thus help insure greater voluntary compliance with the vacation fringe benefit provisions of the Act and wage determinations, as well as eliminating many serious and protracted enforcement problems in this area. NCTSI's suggestion would be unenforceable on a predecessor contractor, since the contract would have been completed, and thus no further contractual remedy would be available. The subsection only requires turning over the seniority list as it exists at the time stated. No valid reason for not adopting this proposal has been advanced.

Section 4.6(m)—Contract Clause: Incorporation of SCA Rulings and Interpretations by Reference

NASA and the Xerox Corporation objected to inclusion by reference of all rulings and interpretations of Part. 4. Xerox thought the contract clauses should stand alone.

Since all bidders and contractors must be governed by the same rules of compliance, it is appropriate that those rules be set forth as a contractual requirement. However, it is obviously not feasible or appropriate to include the entire regulation verbatim in the contract clauses. This provision, in substance, has been in the Regulations since 1968.

Section 4.6(n)—Certification of Eligibility

The AFL-CIO, the Center to Protect Workers' Rights, the Service Employees International Union, the International Association of Machinists and Aerospace Workers, and the International Brotherhood of Electrical Workers supported this provision as preventing fly-by-night contractors from obtaining further contracts after being debarred by merely changing their name or the name of their firm.

Several contractor associations (National Star Route Mail Carriers, CBEMA and NCTSI) objected to contractors being required to certify that each "official" is not debarred on the grounds that it is impossible to know whether each stockholder of a firm, including those with only minor investment, is on the debarred list.

This subsection does not require certification of eligibility with respect to every stockholder, but only those parties or officials with a "substantial interest" as set forth in Section 5 of the Act and as discussed in § 4.188(c).

Section 4.6(o)

The Department of Energy commented that the concept of formalized, approved programs for apprentices and trainees is almost foreign to the service industry and will force higher bids or no bids on Federal service contracts.

This section providing for enrollment in approved training programs in order to pay apprentices, student learners and handicapped workers less than the

applicable prevailing or minimum wage insures that bona fide training opportunities are present. It is our experience that there are many apprenticeship programs for workers in service occupations. This provision has been in the Regulations since 1968 and, to our knowledge, has caused no difficulties.

Section 4.6(p)—Apprenticeship and Training

The AFL–CIO, the Center to Protect Workers' Rights and the International Brotherhood of Electrical Workers generally supported the proposal as contributing to the upgrading and training of service workers but objected to the last sentence allowing "trainee" classifications to be included in wage determinations regardless of whether such "trainees" are enrolled in an approved program, claiming this would encourage contractors to underclassify service workers in order to justify the payment of lower wages. They suggested adding a requirement that trainee rates only be permitted when provided for in a *bona fide* apprenticeship program.

In response to these comments, we have deleted the last sentence of this section.

On the other hand, DOD, NASA, and the Northrop Corporation objected to trainee classifications being allowed only if included in the applicable wage determination on the grounds that many contractors use trainees and proposal's restrictive language would impair affirmative action and equal employment opportunity programs. DOD recommended that the same rules apply to both bona fide apprenticeship and training programs.

We have carefully considered the objections to this subsection. The Bureau of Apprenticeship and Training (and equivalent State agencies) approves apprenticeship programs for a wide variety of those service occupations which lend themselves to indentured skill progressions, and are open to any firm which desires a bona fide program and accommodates equal opportunity considerations. We therefore believe that this section as proposed (which retains the principles embodied in the regulations since 1968—see § 4.6(o)), does not restrict job opportunities in the service contract area, but through the registration/approval process for apprenticeship programs insures bona fide, meaningful training and provides protections necessary to prevent abuses of workers and unfair competitive bidding advantages.

Section 4.10—Substantial Variance Proceedings Under Section 4(c) of the Act

Several commentors, including the AFL–CIO, the Center to Protect Workers' Rights and the IBEW stated that the Act did not intend to require substantial variance proceedings based only on unsubstantiated claims, which cause unnecessary delay and expense. They recommended that this section be amended to require the charging party to present a *prima facie* case before a hearing is convened.

The provision in § 4.10(b)(2) requiring that a showing must be made that "there may be a substantial variance" is sufficient for the Department to eliminate frivolous complaints.

The IBEW and the Center to Protect Workers' Rights asserted that "interested parties" should include only the successor contractor, the contracting agency, and the affected employees or their collective bargaining representatives.

It is our view, however, that other prospective contractors and their representatives are clearly interested parties, and that they should be given the opportunity to participate in the process.

The Department of Defense objected to allowing the parties who are signatories to a bona fide collective bargaining agreement to challenge the agreement as being at variance.

As provided in § 4.10(b)(1), the signatories to a collective bargaining agreement are clearly interested parties under these proceedings, and there is nothing in the Act that indicates it would be inappropriate for them to request a hearing pursuant to this section.

Section 4.11—Arm's Length Proceedings

The AFL–CIO, the Center to Protect Workers' Rights, IATSE, and the IBEW all opposed the establishment of separate proceedings for substantial variance challenges and arm's length challenges. They commented that two separate procedures would result in repetitive litigation and unnecessary delay.

This section recognizes that these issues may, in fact, arise separately. However, where they are both present, §§ 4.10(c), 4.11(d) and Subpart E of 29 CFR Part 6 (§ 6.50) now provide for the consolidation of both issues in one proceeding. In addition, the time limits on requests for both types of hearings will preclude repetitious proceedings.

NASA recommended that other arrangements which would not meet the "arm's length negotiation" test be listed in proposed § 4.11(a), and stated that the test should be the National Labor Relations Board's "good faith bargaining" standard based upon an analysis of all facts in a particular case.

This is an appropriate suggestion and will be adopted in principle. However, since the NLRB and not DOL is the controlling agency on this issue, the changes will reflect this fact.

Section 4.51(b)—Prevailing in the Locality Determinations—Determination of Prevailing Rates

Several commentors, including CBEMA, NCTSI, SAMA, NASA and several individual firms, suggested that wage determinations should contain entry level wage rates and provide for the payment of a range of rates to the various employees within a given classification. These commentors argued that the issuance of a single prevailing wage rate for each classification would disrupt "merit pay" practices within "high technology" industries.

On several prior occasions, the Department by itself and in conjunction with an inter-agency task force has considered the possibility of issuing a rate range type of wage determination. On each occasion the Department concluded that the rate range and similar proposals would be clearly contrary to the statutory scheme and, therefore, would require legislation before such action could be implemented. Although the Department may use various different methods to collect and analyze data for the issuance of wage determinations under the SCA, a basic principle of this Act, as well as the Davis-Bacon Act, is that the prevailing wage rate established for each particular classification is the minimum floor permitted to be paid to *all* employees working in that classification on the Government contract. Nothing in the legislative history of the Act nor in any of the numerous hearings conducted subsequent to the passage of the SCA suggests any Congressional intent to depart from the traditional interpretation that a single prevailing rate must be determined for each classification of workers. In fact, establishment of a wage determination with a rate range would have the practical result of issuing a minimum wage, and not a prevailing wage. This is clearly contrary to the law.

For a further discussion of the circumstances under which the Department issues wage determinations for different levels in an occupational classification, see § 4.152.

Section 4.51(c)—Prevailing in the Locality Determinations—"Due consideration"

The AFL–CIO, the Center to Protect Worker's Rights, and the American Federation of Government Employees objected to the discretion which this section affords the Secretary in giving "due consideration" in the issuance of SCA wage determinations and they suggest that there should be mandatory criteria for applying due consideration. The AFGE recommends that, at a minimum, the Department should give proportional weight to the compensation received by Federal employees when issuing prevailing wage determinations. NASA and the Scientific Apparatus Makers Association on the other hand do not agree that the legislative history indicates that Congress intended to narrow the gap between wages paid to Federal employees and to service employees under SCA.

Although the legislative history of the 1972 Amendments to the Service Contract Act does not specifically define the purpose of the "due consideration" requirements of section 2(a)(5) of the Act, the report of the House Representatives, which accompanied the bill to amend the act did cite a number of serious problems including "a substantial disparity in wages and benefits which has developed between Federal wage board employees and their counterparts employed by service contractors". The purpose of the "due consideration" requirement is more clearly stated in an April 1975 report of the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor entitled "Congressonal Oversight Hearings: The Plight of the Service Worker Revisited".

In addition, the Department has previously considered implementation of a structured scheme for giving "due consideration". In many cases the Department gives due consideration in the manner suggested by AFGE; however, strict adherence to mandatory "due consideration" standards would serve to inhibit the exercise of even limited discretion, which is necessary to avoid anomalies in the wage determinations.

Therefore, no change in this section of the Regulation is warranted.

Section 4.53 Locality Basis of Wage and Fringe Benefit Determinations Where Place of Performance Is Unknown

Numerous commentors objected to the provision in proposed § 4.53(b) allowing the use of a large composite geographic area as the locality basis for devising wage determinations when the place of performance is not known at the time of bid advertising or requests for proposals. Those objecting included the AFL–CIO, the Center to Protect Workers' Rights, IBEW, CODSIA, NCTSI, DOD, NASA, DOE, GSA and several corporations. Many of these commentors cited the decision of the U.S. Court of Appeals in *Southern Packaging and Storage Co., Inc.* v. *United States*, 618 F. 2d 1088 (4th Cir., 1980). Some agency and industry commentors suggested a "two-step" procurement process (i.e., step one would identify the localities of all potential bidders and step two would be the issuance of wage determinations for all potential places of performance for inclusion in the solicitation). Other suggestions included variations of the "two-step" process, using the locality of the incombent contractor as the locality for all successors, and using the locality of the procuring agency or installation as the locality for the purpose of applying wage determinations. Some of the parties also objected to application of section 4(c) of the Act in situations where the location of the successor contractor is unknown at the time of bid solicitation.

While all of the comments on this section have been given careful review and consideration, none of the various suggestions has been sufficiently developed to allow immediate approval. For example, a formal "two-step" procurement process presents some practical administrative problems and would require concomitant changes in the procurement regulations. Accordingly, while the Department is continuing to give serious consideration to some variation of the "two-step" propopsal, it would be premature to reach any final conclusion without further review and opportunity for public and agency comment. This proposed subsection is therefore, being deleted.

In the meantime, the Department is applying the principles set forth in *Southern Packaging* and is examining each procurement on an individual basis when the place of performance is unknown at the time of bid advertising to determine the appropriate locality or localities. This practice is reflected in the final regulation.

With respect to the application of section 4(c) to situations where the place of performance is unknown at the time of bid advertising, the clear language of the Act requires that the provisions of Section 4(c) apply to *all* successor contracts, regardless of place of performance. This issue has been considered on numerous previous occasions including in Congressional oversight hearings in 1974 and 1975 and rulemaking hearings in 1975 and the proposal has been rejected as being contrary to the statute. This is further discussed in the analysis of comments regarding proposed § 4.163(i).

Section 4.55(a) Review and Reconsideration of Wage Determinations—Review by the Administrator

Comments were received from the AFL–CIO, AFGE, and others as to who should be considered "interested parties" with standing to request review of a wage determination by the Administrator. In essence, the commentors were seeking to avoid frivolous requests for review while at the same time being sure that all parties with a bona fide interest had the right to seek review by the Administrator. The Scientific Apparatus Makers Association (SAMA) suggested placing a burden on the petitioner to present a "prima facie" case before the Administrator would accept a request for review. In addition, some industry and agency commentors were concerned about the time frames applicable to requests for review and reconsideration. Some considered the time requirements too restrictive while others felt that additional time limits should be established to insure prompt, timely reviews by the Administrator.

Because a formal wage determination review procedure is being newly established under these Regulations, the Department has made every effort to insure that no interested party is excluded from the process. In the fifteen years since the statute was enacted, the Department has entertained numerous informal requests for reconsideration, but we have never attempted to preclude reconsideration based on the petitioning parties standing or interest in the matter. The Department's objective is the issuance of the most accurate wage determinations possible, and, in order to achieve that goal, we consider all pertinent evidence, regardless of its source. Accordingly, the Department does not support restricting the standing of any possible interested party. With respect to time frames, the Department endeavors to conduct a prompt and expeditious review process; however, since any review is dependent on other aspects of the wage determination process, the establishment of more specific time constraints in this section is not possible.

Section 4.55(b) Review by the Board of Service Contract Appeals

A number of labor organizations opposed the review of wage determinations by an appellate board. These comments will be discussed in conjunction with proposed Part 6 of this title.

Section 4.110 What Contracts Are Covered

The General Services Administration, the Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, the National Council of Technical Service Industries, the McDonnell Douglas Corporation, the Bell and Howell Company, Xerox Corporation, and Datapoint Corporation objected to SCA coverage of separate bid specifications which are principally for the furnishing of services through the use of service employees, asserting that the "principal purpose" test for coverage under the Act can only be applied to contracts in their entirety. Several of these commentors noted similar objections to other sections of the proposed Regulations delineating SCA coverage of separate bid specifications, such as § 4.132. GSA contended that the term "(and any bid specification therefor)" in section 2(a) of the SCA merely refers to the documents in a solicitation for bids, rather than a separate line item or work requirement within a bid solicitation or a contract as interpreted in the proposed Regulations. Essentially following GSA's line of reasoning, Bell and Howell argued that the SCA should not be applied to GSA Federal Supply Service "schedule" contracts for the furnishing of equipment and what it termed "incidental" services to maintain and repair that equipment.

NCTSI commented that SCA coverage of separate specifications within a contract would create significant administrative problems because of the application of different labor standards obligations.

The legislative history of the SCA contains no definition nor discussion of the term "bid specification" in section 2(a) of the Act. In the absence of such guidance, the Department of Labor has had to interpret this term in the fashion determined to be most consistent with the statutory language and the remedial purposes of the Act. Following these precepts, the Department has held since 1966 that a contract containing a separate bid specification which is principally for the furnishing of services through the use of service employees is subject to the Act regardless of the principal purpose of the other specifications of the contract as a whole. The Department's position that the SCA applies to a separate bid specification within a procurement which also calls for the furnishing of supplies is set forth in § 4.132 of the current Regulations. The position on SCA coverage of separate specifications is also explicity stated in § 4.116(c) of the current Regulations, which codifies SCA coverage of service specifications in contracts which also contain separate specifications for construction work.

Sections 4.116(c) and 4.132 of the current Regulations were formally adopted in 1968 after being published as part of the proposed 29 CFR Part 4 with opportunity for comment. At that time, no procurement agency and only one association expressed objections to the application of the "principal purpose" test to separate service specifications. It should also be pointed out that the Department's position on specifications subject to differing labor standards is clearly reflected in section 12-1002.1 of the Defense Acquisition Regulation which controls Department of Defense procurement. DAR 12-106 and FPR 1-18.701-2 contain a discussion of similar principles.

SCA coverage of separate bid specifications does not extend to incidental services performed under contracts also calling for the furnishing of nonlabor items, but only to requirements calling for substantial and segregable amounts of services, thus avoiding any overlapping of labor standards protections. With respect to the comment by Bell and Howell, it should be pointed out that, according to figures supplied by GSA, the cost, for example, of services performed under maintenance specifications in combined lease/purchase and maintenance contracts for automatic data processing and related equipment alone amounts to several hundred million dollars per year. This volume of work can hardly be characterized as "incidental". To view contracts only in their entirety for the purpose of determining SCA coverage would remove much of the protections intended by the Act.

Accordingly, since no new arguments have been presented as to why this longstanding position should be reversed at this time, we do not believe it appropriate to change any of the provisions in this or other sections of the proposed Regulations delineating SCA coverage of separate bid specifications for services.

Section 4.111 Contracts "To Furnish Services"

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the National Council of Technical Service Industries, the Department of Defense, the Department of Energy, the National Aeronautics and Space Administration, the Rockwell International Corporation, the McDonnell Douglas Corporation, and the Trinidad Corporation all objected to the provision in proposed § 4.111(a) stating that the "principal purpose" test for coverage under the Act applies only in determining whether a contract (or bid specification) is principally for services. These commentors essentially asserted that the proper application of "principal purpose" is threefold: whether a contract is principally for services, is principally performed in the United States, and is principally performed through the use of service employees.

Under section 2(a) of the SCA, the Act applies to (e)very contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services in the United States through the use of service employees." Since the legislative history does not specifically state how the principal purpose language of the Act should be applied, the Department had to decide what construction of the term was intended by the statutory scheme.

In enacting the SCA, Congress evidenced a clear intent to "close the gap" between labor standards protections already in place for workers on construction contracts and supply contracts under the Davis-Bacon Act and the Walsh-Healey Public Contracts Act. See § 4.111(b). The Department, starting in 1966, has adhered to the position that the "principal purpose" test is used only to determine whether a contract is principally for services as opposed to one for supplies or construction activity. Thus, if a contract in the United States is determined to be principally for the purpose of furnishing services, it is subject to the SCA if it is performed "through the use of service employees" as discussed in § 4.113.

No new reasons have been advanced to support a change in this longstanding position which has been set forth in the Regulations since 1968. Such a change would amount to a significant "roll back" in labor standards protections.

Section 4.112 Contracts To Furnish Services "In the United States"

The AFL-CIO and the Seafarers International Union, addressing the

issue of SCA coverage of contracts for services performed on marine vessels, stated that all United States flag vessels are considered United States territory wherever such vessels travel, and recommended that the Regulations be changed to provide coverage even when such vessels enter non-American waters. The AFL–CIO also recommended that the reference to the Outer Continental Shelf Lands Act be replaced with the tests of the Fishery Conservation and Management Act of 1976, which provides for a 200 mile limit.

The definition in section 8(d) of the statute regarding the geographic scope of the Act is explicit, expressly excluding any territory other than those specifically set forth therein. Also, the use of the Outer Continental Shelf Lands Act standard is specifically provided for in the statute. Accordingly, these suggestions cannot be adopted by regulation.

The Computer and Business Equipment Manufacturers Association, DOD, and one firm argued that services performed on a vessel must be principally performed in the United States to be covered by the Service Contract Act.

As discussed in the analysis of 4.110, we do not consider this objection to comport with the Act's principal purpose test.

Section 4.113(a)(2) Contracts To Furnish Services "Through the Use of Service Employees"

The AFL–CIO and the Center to Protect Workers' Rights noted their agreement with the language of § 4.113(a)(2) specifying that the SCA applies to contracts principally for the furnishing of services and under which service employees are used to a significant or substantial extent, terming this provision necessary to protect the rights of service employees and in keeping with the remedial purposes of the Act.

The Computer and Business Equipment Manufacturers Association, the Council of Defense and Space Industry Associations, the Chamber of Commerce, the Scientific Apparatus Makers Association, the General Services Administration, the Department of Defense, the National Aeronautics and Space Administration, and several companies objected to our application of the "principal purpose" test.

All contended that the Congressional intent was that services must be furnished principally by service employees, in order for the Act to apply.

The Department's position on the "principal purpose" test is fully discussed in the analysis of comments under § 4.111. The language of this section has been revised, however, to make it clear that while the Act applies to any service contract in which there are any service employees performing contract work, the Department, under its authority to issue tolerances, does not require application of the Act to situations where the use of service employees is only a minor factor in the performance of the contract. Moreover, in response to comments by NASA and the Chamber of Commerce, we have added a new subparagraph (3)(ii) which sets forth the factors which the Department considers in determining whether the use of service employees is only a minor factor or is significant or substantial.

Numerous Federal agencies, business firms and associations, universities, and law firms objected to the statement in the second paragraph of § 4.113(a)(2) of the Regulations that under the principles discussed in this subsection many contracts for research and development (R & D) are subject to the Act. Those objecting included the Office of Science and Technology Policy of the Executive Office of the President; the Department of Agriculture; the Department of Housing and Urban Development; the Under Secretary of Defense for Research and Engineering; the National Science Foundation; NASA; CODSIA; NCTSI; the Chamber of Commerce; Booz-Allen and Hamilton; ITT Research Institute; the Rand Corporation; Digital Equipment Corporation; Planning Research Corporation; the National Association of College and University Business Officers; Harvard University; Yale University; John Hopkins University; Duke University; the University of Michigan; and the University of California.

Many of these commentors argued that the Department's assertion of SCA coverage of R & D contracts represents a new and unwarranted expansion of the Act's coverage.

In fact, as is clear from a comparison of the present and propsed Regulations, the principle of SCA coverage of R & D contracts has been stated in §§ 4.110–4.113, and in particular, § 4.113(a)(2), since 1968. With the exception of a few minor editorial changes, the current text of that subsection was carried over in total to the proposed § 4.113(a)(2). While a new subparagraph was added, it simply amplifies the principles already contained in the Regulations, and cites R&D as an example of a type of contract which has in the past been subject to the SCA where the usual tests of coverage have been met. Because it has been clear to contracting agencies as well as to the Department of Labor that a large number of R & D contracts fall within any reasonable criteria for coverage by the SCA, many contracting agencies have requested wage determinations for them.

Indeed, R & D contracts are categorized under the DOD procurement regulations as service contracts (DAR 22–101(b)(xxii)). Even statistics compiled by the Office of Management and Budget (Federal Procurement Data System), which our evidence indicates are understated, indicate that 16.39 percent of contracts which have an "R & D" label contain these SCA provisions.

Several commentors also objected to SCA coverage of R & D contracts on the grounds that their principal purpose is the furnishing of research, not services, while others objected because R & D contracts often involve the furnishing of tangible end items such as a prototype, a set of specifications for a product, or a feasibility study in the form of a written report.

As discussed in § 4.111 of the proposed Regulations and the analysis of comments regarding that section, under the statutory scheme, virtually all types of Government contracts not specifically exempted may be subject to the labor standards provisions of the Davis-Bacon Act, and/or the Walsh-Healey Act and/or the Service Contract Act. It must be emphasized that coverage is independent of the designation, nomenclature or characterization of any particular contract under the procurement system of a contracting agency. Thus, while "R & D" is often only a budgetary designation which encompasses a very broad spectrum of contracts, the applicability of the SCA to R & D contracts—as well as to all other types of contracts—depends on whether or not the statutory tests for coverage have been met in each particular case. While numerous R & D contracts have been subject to the SCA because they meet the usual coverage tests for service contracts, SCA is not required to be applied to many other contracts categorized as "R & D" by the procurement agencies, either because service employees are a minor factor in their performance or because the contracts really involve the furnishing of goods or construction to the Government. Thus, for example, a contract to furnish prototypes of a new weapons system would not be covered under the SCA, but rather under the Walsh-Healey Act. Likewise, a contract to build a pilot coal gasification plant would be subject to the Davis-Bacon Act

rather than the SCA. However, as discussed in § 4.131 (a) and (e), the furnishing of such tangible items as written reports does not remove a contract for R & D or other services from the coverage of the SCA, as such items are considered to be of secondary importance to the services which it is the principal purpose of the contract to procure.

Several commentors, notably universities, objected to SCA coverage of R & D contracts for a variety of reasons relating to the belief that SCA wage determinations would cause severe disruptions in the pay systems of universities, some of which are established and controlled by State laws mandating pay levels for all university employees whether employed on Government contracts or not.

The Department recognizes that special problems of compliance with the terms of SCA wage determinations may arise when colleges and universities compete for Government contracts, and every effort will be made to develop wage determinations reflecting the pay practices of such institutions where appropriate.

Some firms commented that many R & D contracts are of the "cost-reimbursement" variety, under which contractors are compensated for all reasonable costs. Thus, it was argued, the SCA should not apply since R & D contractors have no incentive to engage in "wage busting" against service employees, and such employees do not need the protections of the Act.

The Department's position on this matter is that the presence or absence of "wage busting" is not an appropriate basis for determining coverage under the SCA. Adopting this criterion would cause severe administrative problems and require the Department to make arbitrary judgments concerning contractors' pay practices, which the statute does not authorize DOL to do, and the end result would be a patchwork of coverage.

Section 4.114 Subcontractors

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, the National Council of Technical Service Industries, the Department of Energy, the National Aeronautics and Space Administration, and several firms objected to the provision in § 4.114(b) holding prime contractors jointly liable for SCA violations committed by their subcontractors. Some commentors argued that there was no statutory or judicial basis for such a liability to be placed on the prime contractor.

The provision that the prime contractor is liable in the event its subcontractors fail to comply with the Act by breaching the contract clauses, has been in the regulations since their inception, and follows precedent under the Davis-Bacon and Walsh-Healey Acts. (See, for example, Decision of the Armed Services Board of Contract Appeals, A. Jeris, Inc., 67-1 BCA par. 6241, March 22, 1967; Decision of the Comptroller General, B-162034, October 4, 1967; JBL Construction Co. Inc. Decision of the Administrator, CCH Lab. L. Rep., Wages Hours parr. 31,239 September 22, 1978; Ernest Simpson d.b.a. Ernest Simpson Construction Co., Decision of the Administrative Law Judge, 23 WH cases 1064 (1978).)

The Act and the contract clauses require the prime contractor to agree that the prescribed labor standards will be observed with respect to all employees on the contract. Therefore, this is primarily a matter of contract law (privity of contract). Specifically, the principal enforcement remedy in section 3 of the law is the withholding of contract funds in the case of violation. The Government can only withhold funds from the prime contractor, not from a subcontractor. To change this essential policy could invite prime contractors to broker subcontracts to fly-by-night firms, thereby nullifying labor standards protections enforcement of the Act.

Section 4.115 Exemptions and Exceptions

Paragraph (b) of the proposed regulation has been deleted since this section only concerns statutory exemptions, and the Secretary's authority to issue exemptions and variances is discussed elsewhere in § 4.123; therefore this paragraph was deemed unnecessary.

Section 4.116 Contracts for Construction Activity

Local No. 3 of the International Union of Operating Engineers objected to the proposed removal from coverage of construction projects on Guam which are not subject to the Davis-Bacon Act because the geographic scope of the Act does not extend beyond the 50 states and the District of Columbia, asserting that the Department should continue to protect the rights of construction workers in Guam.

We carefully reviewed this matter as a result of questions previously raised, and concluded that it would not be in accord with the law to continue the regulatory policy of asserting that construction contracts become subject to the Service Contract Act solely because such contracts are performed outside the geographic scope of the Davis-Bacon Act.

NASA and GSA objected to the discussion in proposed § 4.116(b) of contracts involving the demolition, removal, and sale of salvage materials as an example of a type of covered service contract not subject to the exemption in section 7(1) of the Act.

This position has been in the Regulations since 1968 and no convincing reasons have been advanced challenging its validity or propriety.

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, and the McDonnell Douglas Corporation objected to § 4.116(c) which, in the case of a contract containing requirements for construction and nonconstruction work, limits the application of the exemption in section 7(1) of the Act to those separate specifications or segregable portions of the contract which call for the construction work, and thereby provides for SCA coverage of other contract requirements which are principally for services.

This position has been contained in these Regulations since 1968, as well as in both the Federal Procurement Regulations and the Defense Acquisition Regulations for many years. It also is in accord with the principles contained in §§ 4.110 and 4.132.

Section 4.123 Administrative Limitations, Variances, Tolerances, and Exemptions

The Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, and several individual firms recommended the adoption of an exemption for contracts for "commercial product support services". This request had already been submitted to the Department and is not being dealt with in the revision of this Regulation. Our position regarding coverage by the Act of such contracts is discussed under § 4.130.

Section 4.130 Types of Covered Service Contracts Illustrated

GSA objected to the listing of "computer services", as it may be construed to cover some activities arguably not subject to the Act. A large variety of "computer services" are covered by the Act where they are principally for services and involve the use of service employees, as discussed in sections 4.111 and 4.113. Furthermore, such contracts were specifically

mentioned as being covered in the President's statement upon signing the 1972 SCA amendments.

The Computer and Business Equipment Manufacturers Association, SAMA, and a firm contended that the Act should not apply to employees of firms which furnish "commercial product support services," both Government and private sector customers, either because the procurement is not principally for services or because the wage protections provided by the Act are not necessary since marketplace pressures maintain a relatively high level of wages.

The concepts of whether maintenance/repair services are performed on "commercially available" products or by firms which service both the Federal and private sectors are immaterial and irrelevant to SCA coverage.

There is no indication in the statute or the legislative history that contracts for "commercial product support services" are not covered. On the contrary, except for the specific exemptions in section 7, the Act by its express terms applies to "(e)very contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services * * *". Further, the legislative history as discussed in § 4.111(b) also clearly indicates this all encompassing purpose and intent.

The law was enacted "to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies". Congress explained that service contracts were "the only remaining category of Federal contracts to which no labor standards protections apply." See S. Rep. 798, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 948, 89th Cong., 1st Sess. 1 (1965).

Following these guidelines, the Department has, since 1966, consistently held that the maintenance and repair of *all* types of equipment, including ADP equipment, scientific and medical apparatus, office and business machines, and "other high technology" equipment, are covered under the SCA, regardless of whether the equipment is commercially available.

Since almost all services are commercially offered or are in support of commercial products or equipment, from linen supply to automobile and vending machine servicing, any such exemption would, in effect, administratively nullify a significant portion of the Service Contract Act.

NCTSI and Northrop Corporation asserted that the addition of a number of examples to the list represents a significant expansion of the Act's coverage, and includes contracts that are professionally oriented, especially subsection (a)(16), citing electronic equipment maintenance and operation (which is listed in the § 4.130(h) of the current Regulations) and engineering support services.

Such contracts, like other service contracts, are clearly subject to the Act if the criteria in §§ 4.111–4.113 are met, and many "professional" contracts listed are of the type contemplated by the 1972 and 1976 amendments to the Act. For example, during the House debate preceding passage of the 1976 amendments, the Chairman of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor explained that the purpose of those amendments was to clarify Congressional intent that the SCA applies to white collar employees, and specifically mentioned "clerical personnel, office machine operators, and persons engaged in data processing" as employees intended to be covered by the Act. See 122 Cong. Rec. 31575 (1976).

Section 4.131(f) Contracts Under Which the Contractor Receives Tangible Items from the Government in Return for Services—Timber Sales

A significant number of the comments received related to the application of the SCA to so-called "timber sales" contracts as discussed in this proposed subsection. Commentors included Members of Congress, forest industry associations, logging contractor associations, numerous lumber companies, labor organizations, the U.S. Departments of Agriculture and Interior, the Small Business Administration, the U.S. Navy, State and local government bodies, law firms, and individuals. The arguments regarding coverage of timber sales/removal contracts fell into several main categories, as follows:

It is argued that services provided under timber sales contracts are only incidental to the principal purpose of the contract which is the sale of timber by the Government. Some commentors cited the Organic Act of 1897 (16 U.S.C. section 475), which provided that "No national forest shall be established except to improve and protect the forest * * * and to furnish a continuous supply of timber for the use and necessities of citizens of the United States * * *" to support their argument.

The National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, was also cited by the commentors, who asserted that this legislation (which details how national forests are to be managed) has as its main purpose the providing of timber. Further, they stated that nowhere in this legislation was there a suggestion that timber sales contracts were predominantly service oriented or that Congress desired such sales to be included under the Service Contract Act.

The United Brotherhood of Carpenters and Joiners of America, arguing in support of coverage, stated that the National Forest Management Act of 1976 requires that the national forests be maintained by the Forest Service for multiple uses, i.e., "coordination of outdoor recreation, range, timber, watershed, wildlife and wilderness." (Section 6(e)1 of the National Forest Management Act of 1976, 16 U.S.C. 1604). They concluded that the sale of timber by the Forest Service is not undertaken primarily to dispose of Government property, but as part of an overall forest management program.

The Chairman of the Subcommittee on Labor-Management Relations, House Committee on Education and Labor, the Washington State Labor Council (AFL–CIO), the International Woodworkers of America, and the Contract Loggers Association commented in favor of the application of the Act to timber sales. These commentors argued that coverage was necessary to protect the wages and fringe benefits of the forest products industry employees.

It appears that the difficulty is with the terminology "timber sales." Although § 4.116(b) of the existing regulations, promulgated in 1968, sets forth the Department's position that contracts for timber clearing are subject to SCA, proposed §§ 4.130 and 4.131(f) stated for the first time the Department's longstanding interpretation that timber sales contracts *per se* are covered.

In determining the application of the SCA, it is necessary to examine the substance of a contract and its underlying purpose. Thus, as provided in the existing regulations as well as the regulations herein at §§ 4.131 and 4.141, the form of the contract and the fact that a contractor pays the Government under the terms of the contract do not control SCA coverage.

The Department has thoroughly reviewed the various statutes relating to the National Forests, the legislative histories, the regulations and handbooks issued thereunder, sample, timber sales contracts, and related material, in conjunction with the comments.

After this analysis, it is the Department's conclusion that certain contracts for timber sales (as distinguished from service specifications thereunder, discussed below) would not be principally for services and therefore would not be subject to the Act. On the other hand, under contracts styled as

"timber sales" contracts, trees are frequently removed for the purpose of opening up the forest for public use, such as camping; for construction projects, such as roads or reservoirs (covered by the Davis-Bacon Act); because the trees suffer from insect infestations or have been damaged by disasters such as forest fires or volcanic eruptions; or for other forest management purposes. The Department has determined that under such contracts (when not subject to the Davis-Bacon Act), the principal purpose is the furnishing of services, and the contracts are subject to SCA.

It is also apparent from our review of the contracts, that those timber sales contracts which are not principally for services, generally do contain a number of specifications principally for services. These specifications include, for example, the building of temporary roads, firefighting and control, erosion control, slash removal and trimming, and the removal of diseased or injured trees. Pursuant to § 4.132, such specifications are subject to SCA.

In addition to the comments concerning coverage of timber sales contracts, many commentators, including the forest products associations, objected to the recordkeeping requirements which they contend the application of the Act would impose upon the timber products industry, especially with respect to small companies. However, the SCA does not require maintenance of records beyond those already required under the Fair Labor Standards Act (which is applicable to most firms), except that if an employee receives less than the rate on the applicable wage determination for hours spent on commerical work not subject to the Service Contract Act, the employer's records must be segregated to show separately the time spent on contract work. Thus, in the Department's view, no excessive recordkeeping burden exists because of SCA coverage.

Most industry commentors also alleged that the application of SCA to timber sales would be highly inflationary. Wage determinations issued pursuant to the Act only reflect the wages and fringe benefits found to be prevailing in the locality, i.e., those wages and fringe benefits found to be most predominant in the area where the contract work is performed. The Department of Labor knows of no unique features of the timber products industry which would cause the Service Contract Act to have any significant impact upon it.

The National Forest Products Association and several logging companies commented that bonding requirements would be increased by application of the Act, thereby having a harmful effect, especially upon small contractors. However, neither the Service Contract Act nor these regulations require bonding.

Accordingly, § 4.131(f) has been revised to clarify the circumstances in which SCA applies to timber sales contracts.

Section 4.133 Beneficiary of Contract Services

As a result of comments regarding the scope of the contracts which are not subject to the SCA under this provision, the Department issued a new proposal on this section for comment. A final regulation is anticipated in the near future.

Section 4.134 Contracts Outside the Act's Coverage

The General Services Administration (GSA) objected to the provision in § 4.134(b) of the proposed Regulations denoting SCA coverage of service requirements contained in contracts for the lease of building space under certain circumstances. GSA contended that this provision would be contrary to the position expressed in an exchange between Solicitor of Labor Donahue and Senator Prouty during the 1965 Congressional hearings which led to enactment of the SCA, and would have a significant impact on the ability of GSA's Public Building Services to continue leasing building space in its present manner.

We do not agree with GSA's objections. Nothing in the exchange between the then Solicitor and Senator Prouty dealt with specifications in a contract which specifically require certain levels and frequencies of janitorial or other services. Moreover, janitorial workers are among the types of workers to whom Congress specifically intended the Act would apply.

Section 4.152 Employees Subject to Prevailing Compensation Provisions

The National Council or Technical Service Industries, NASA, and the Northrop Corporation commented that position descriptions are seldom attached to wage determinations, and recommended that DOL actually do so in all cases.

The Department will endeavor to supply position descriptions where necessary to inform users of the scope of duties included in a classification. However, as noted in the proposed § 4.152(b), this is not needed for some classifications where the title and duties have commonly understood meanings.

With respect to proposed § 4.152(c), NCTSI, the Scientific Apparatus Makers Association, the Council of Defense and Space Industry Associations, NASA, McDonnell Douglas Corporation, and Northrop asserted that contractors should be allowed to establish lower level classifications, variously described as entry level, trainee, or intermediate level, if no such classifications are listed on an applicable wage determination. Several of these commentors claimed that the prohibition against the use of such lower classifications hampers equal employment opportunity and affirmative action efforts, and is contrary to industry practice.

It would not be appropriate nor in accord with the law to change our longstanding position and adopt any of the recommendations regarding the establishment of lower level subclassifications. Basic to prevailing wage statutes is the principle that the prevailing wage rate be the *minimum* permitted to be paid to *all* covered employees in the classification on the Government contract. There is no indication of any intent by Congress to apply any other principle in the SCA. If Congress had intended anything different, it would have so provided, as it did in the Walsh-Healey Act, which requires that the Secretary determine "the prevailing minimum wages for persons employed on similar work." Thus, House Report No. 948, 89th Cong., 1st Sess. (1965), accompanying the bill as enacted in 1965, states at page 3: "Service employees must be paid no less than *the rate* determined by the Secretary of Labor to be *prevailing* in the locality" (emphasis added). See also S. Rep. No. 798, 89th Cong., 1st Sess. 2 (1965).

Congress was certainly aware that in the thirty years in which the Department of Labor had been issuing wage determinations under the Davis-Bacon Act, the Department had been interpreting that Act as requiring that a single prevailing rate be determined for each classification of workers. The legislative hearings prior to enactment of the SCA in 1965 clearly indicate that the Department would follow Davis-Bacon principles in administering the SCA wage determination functions. In addition, during the numerous oversight hearings conducted subsequent to passage of the Act, Congress has never suggested that the Department of Labor's procedures for determining prevailing rates are contrary to its intent.

Obviously, all contractors have their own individual and differing pay

structures, no one of which would usually be prevailing in a locality. However, the language of section 2(a) of the Act makes it absolutely clear that all service employees performing the duties of a given classification must be paid at least the prevailing wages and fringe benefits listed for that class on the wage determination. Further, a lower rate of pay for such employees cannot be established through the conforming procedures in § 4.6(b)(2) of the Regulations, as those procedures can only be used where the duties of an unlisted class constitute a separate and distinct job category. Appropriate variations have been provided in § 4.6(o) for apprentices, student learners and handicapped workers. Moreover, as discussed in § 4.152(c), a wage determination will list a series of classes within a job classification family (e.g., Technician Classes A, B, and C) where the practice prevails in the industry and where bona fide differences in the work performed exist. In such situations, the lowest level listed is considered to be the entry level and the establishment of a lower level (or intermediate levels) through conformance or otherwise is not permissible. To allow individual contractors to arbitrarily "carve out" any number of subclassifications without restriction in these situations would subvert the statutory intent of the Act to provide *prevailing* labor standards protections for all service employees (nonminority and minority) and to remove wages as a factor in the competitive procurement process. Indeed, to adopt these suggestions would make any wage determination meaningless and in effect nullify the prevailing wage provisions of the Act. The prohibition against "carving out" subclassifications under the SCA has been upheld in numerous administrative proceedings. See *Triple B Builders, Inc.*, Case No. SCA–974, Decision of the Assistant Secretary, March 28, 1970; *Fischer and Associates Technical Consultants, Inc.*, Case No. SCA–662, Decision of the Administrator, August 18, 1978; *Collins Radio Company, et al.*, Case No. SCA–430, May 27, 1976.

Section 4.163(a) Section 4(c) of the Act

The Service Employees International Union, IATSE, the AFL–CIO, the Center to Protect Workers Rights, and the IBEW objected to limiting the obligation of a successor contractor to the wage and fringe benefit provisions of the predecessor contractor's collective bargaining agreement because items excluded under this proposed subsection, such as work rules, and overtime premiums and other economic benefits, are negotiable under collective bargaining pursuant to the National Labor Relations Act. These commentors argued that Congress did not intend to narrowly limit the meaning of wages and fringe benefits under section 4(c) of the SCA so as to exclude these negotiable items, and that successor contractors should be required to observe such provisions called for under the predecessor's collective bargaining agreement.

As set forth in section 2(a)(2) of the Act, only the types of benefits enumerated therein and benefits of a similar nature are considered bona fide fringe benefits for purposes of meeting the compensation requirements of that section as well as the successorship provisions of section 4(c) of the Act. (A discussion of the criteria which must be met in order for any fringe benefit to be considered "bona fide" is contained in § 4.171.) While it is recognized that there are other bona fide fringe benefits, it is clear from section 2(a)(2) that items such as seniority, work rules, guaranteed workweek, overtime premiums, and other collectively bargained provisions of an economic or noneconomic nature which are nof of the type enumerated in section 2(a)(2) are not wages or fringe benefits for purposes of the Act. See *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250 (1978). The fact that such items may be negotiated pursuant to the National Labor Relations Act is not material in determining the obligations of successor contractors under section 4(c) of the SCA. Daily or weekly premium overtime compensation benefits are provided by other statutes. (See §§ 4.180 and 4.181.) Accordingly, no change will be made in this section.

Section 4.163(b)

The Department of Energy (DOE), GSA, and NASA commented that this subsection should delineate who is a successor contractor under section 4(c) of the Act and recommended that the traditional National Labor Relations Board tests for determining who is a successor contractor be adopted.

In the 1972 amendments to the Act, Congress carved out a special definition for "successorship" in SCA contracts as a result of the decision in *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), which makes the NLRB definition irrelevant here.

The Computer and Business Equipment Manufacturers Association (CBEMA), the Scientific Apparatus Makers Association (SAMA), and Technicolor Graphic Services, Inc., all objected to section 4(c) obligations being deemed self-executing. SAMA and Technicolor commented that it is the Department of Labor's responsibility to issue determinations specifying the wage and fringe benefit obligations of successor contractors pursuant to section 4(c), and that unless the wages and fringe benefits contained in the predecessor contractor's collective bargaining agreement are reflected in a wage determination issued for the new contract, the successor contractor should not be obligated to pay them.

The statutory language of section 4(c) makes it clear that its provisions are self-executing whether or not all of the wage and fringe benefit requirements of a contractor's collective bargaining agreement are reflected in the wage determination issued for the successor contract. While the Department issues wage determinations for successor contracts accurately reflecting, to the extent possible, all of the wage and fringe benefit requirements, an occasional failure to do so (generally because the necessary data has not been furnished to the Department) cannot eliminate the successor contractor's statutory obligations under section 4(c) of the Act. A footnote notifying all bidders of their obligations in this regard is contained in all wage determinations issued pursuant to section 4(c). Accordingly, no change in this subsection would be appropriate.

Section 4.163(c)

The American Bar Association (ABA) and Rockwell International Corporation objected to the principle that decisions that collectively bargained wage rates and/or fringe benefits are substantially at variance with those prevailing in the locality are not made effective retroactively to the beginning of a contract.

The National Council of Technical Service Industries contended that if a variance proceeding is held, the difference in wages at issue should be held in escrow pending a decision on the matter.

The discussion of the legislative history of the 1972 amendments to the Act in this subsection makes it clear that collectively bargained wages and fringe benefits payable under section 4(c) of the Act must be honored "unless and until" a finding of substantial variance is made. Thus, variance hearing decisions cannot be applied retroactively, nor can an amount of wages or fringe benefits in dispute be held in escrow pending such a decision. However, every effort will be made to insure that variance decisions are rendered on a timely basis, in accordance with the time frames set forth in Regulations, Part 6.

Section 4.163(d)

The Department of Defense took issue with the requirement that sections 2(a) and 4(c) of the SCA must be read in conjunction, contending that the language of section 2(a) of the SCA provides that where a successor contractor has a bona fide collective bargaining agreement at his or her own plant, the contractor can pay employees in accordance with that agreement and be in compliance with the Act without having to observe the terms of a predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act.

The legislative history of the 1972 amendments to the SCA, which added both section 2(a) and section 4(c) to the Act, makes it absolutely clear that sections 2(a) and 4(c) must be read in conjunction with each other, and the DOD interpretation on this point is in error.

Section 4.163(e)

The Department of Defense disagreed with the provision in this subsection that a contractor may succeed itself for purposes of the application of section 4(c) of the Act in noncompetitive situations (i.e., contract options or extensions), as well as in cases involving the recompetition of a contract. DOD claimed that, in noncompetitive situations, a contractor will have an incentive to increase collectively bargained wages and fringe benefits when it knows the agency will reimburse the costs of such an increase.

The legislative history of the 1972 amendments and the Act itself contemplate that collectively bargained wages and fringe benefits may increase over time, and such increases should be honored. To adopt DOD's restrictive suggestion would freeze wages for a number of years in the case of multi-year contracts. Section 4(d) of the Act precludes such a result. The "substantial variance" provisions of section 4(c) serve to preclude any abuses of the type foreseen by DOD.

Section 4.163(g)

The General Services Administration, the Department of Energy, and the National Aeronautics and Space Administration objected to the breadth of the provision requiring the payment of wages and fringe benefits provided for in a predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act in the case of contract reconfigurations, claiming that in some situations the follow-on-contract may not be subject to the Act, e.g., in the case of a minor use of service employees in a contract for professional services. In effect, it was claimed, the term "identifiable contract work" as used in this subsection narrows the scope of the concept of a successor contract under 4(c) of the Act from one in which substantially the same services are furnished to one in which any single class of service work previously furnished is rendered under the reconfigured contract.

The Department of Defense recommended that a variance or exemption be provided for reconfiguration situations where two contracts are combined and, as a result, two employees working side by side may perform identical work but receive two different rates of pay.

A successor contract must meet the general tests of SCA coverage set forth in section 2(a) of the Act before the provisions of section 4(c) can be applied. Thus, section 4(c) only applies to identifiable portions of a successor contract which is otherwise subject to the Act. The contracting agency must, in the first instance, make a good faith determination as to what constitutes "identifiable contract work", which, it is assumed, would involve more than one class of service employees in the usual case. Furthermore, our experience has shown that "substantially the same services" are furnished in a continuing, reconfigured succeeding contract. The interpretation in question is necessary to prevent contractural reconfigurations from being used to evade or defeat the remedial purposes of section 4(c). It thus would not be appropriate to grant a variation as recommended by DOD.

The National Council of Technical Service Industries argued that the provisions of this subsection create administrative difficulties as the successor contractor would not, it was claimed, receive notification of its wage obligations.

In actual practice, where contract reconfigurations are involved, successor contractors receive notification of their obligations under section 4(c) of the Act through the issuance of appropriate wage determinations by the Department. It should also be noted that the provisions of this subsection have been implemented for several years as a matter of policy, and we are not aware of its having resulted in any administrative difficulties such as those foreseen by NCTSI. Accordingly, no substantive changes will be made in this subsection.

Section 4.163(i)

The American Bar Association, the Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturer's Association, the National Council of Technical Service Industries, the Department of Defense, the Department of Energy, the National Aeronautics and Space Administration and Southern Packaging and Storage Co., Inc. objected to the application of section 4(c) of the SCA to successor contractors irrespective of the place of performance by the successor contractor.

Most of these commentors stated that Congress did not intend section 4(c) to apply where there was a change in the place of contract performance between the predecessor and successor contracts, while DOD asserted that section 4(c) should not apply to any contract performed at the contractor's plant (as opposed to a Government facility). Several of these commentors also claimed that this provision would necessitate numerous variance hearings caused by the conflict between "imported" collectively bargained wage rates and wage rates prevailing at the location of the successor contractor, and noted that variance hearings were not intended to correct problems caused by substantial differences between wage rates in different geographic locations.

The attorney for Southern Packaging and Storage Co., Inc. stated that this provision will prevent contractors in low wage areas from bidding on contracts currently performed in high wage areas pursuant to a collective bargaining agreement.

The language of section 4(c) of the SCA contains no provisions restricting its applicability to contracts performed at a Government facility generally or only to those procurements where the location of the successor contractor's place of performance is the same as the predecessor's. No such restriction is contained in the current Regulations, the relevant portions of which were promulgated in 1972.

Proposed revisions to 29 CFR Part 4 published for comment in April 1975, if adopted, would have limited the application of section 4(c) to those successor contracts performed at the same location as the predecessor contract. Subsequent to this proposal, oversight hearings were held by the House Subcommittee on Labor-Management Relations and public hearings were held by the Department of Labor. Congress specifically repudiated such a limitation, noting that:

> The GAO has advanced an interpretation of section 4(c) that it is to be applied only where the same employees and same locality continue under a succeeding contract.* * * The subcommitte rejects this interpretation of section 4(c). No such qualification exists on the face of the statute and nothing in the

legislative history would support the restrictive GAO reading of the successor obligations of section 4(c). (House Subcommittee on Labor-Management Relations, Committee on Education and Labor, *Congressional Oversight Hearings: The Plight of the Service Worker Revisited*, 94th Cong., 1st Sess. 7 (Comm. Print, 1975)).

In those hearings, Congressional intent as to the proper issuance of wage determinations pursuant to section 4(c) of the Act was stated as follows:

> * * * Section 4(c) requires that the wages and fringe benefits, including prospective increases contained in a predecessor's collective bargaining contract, form the basis for the Secretary's determination for successor contracts whether performed at the same site or at a different site. (*Oversight Hearings*, p. 10).

On the basis of those hearings, during which the statute and its legislative history were carefully reviewed, it was decided to withdraw this proposed limitation.

Section 4.163(j)

The DOE objected to the requirement that a successor contractor is obligated to observe the wage rates and fringe benefit provisions of the predecessor contractor's collective bargaining agreement which the Department of Labor failed to include in an applicable wage determination.

As discussed in § 4.163(b), the provisions of section 4(c) of the SCA are self-executing, and thus, the occasional omission of a wage or fringe benefit provision contained in the predecessor contractor's collective bargaining agreement from the wage determination issued for a successor contract cannot relieve the successor contractor of the direct statutory obligation under section 4(c) to observe such provisions.

The National Council of Technical Service Industries and DOE asserted that to follow the requirement that any interpretation of the wage and fringe benefit provisions of the predecessor contractor's collective bargaining agreement must be based on the intent of the parties to that agreement would be difficult. They remarked that intent may not be expressed in the agreement and the parties to the agreement may not be available to provide explanation.

In the majority of cases, the intent of the parties to a predecessor contractor's collective bargaining agreement is clear from the language of the agreement, the wage and fringe benefit provisions thereof are accurately reflected in the wage determination attached to the successor contract, and the successor contractor can rely upon the body of interpretations contained in this subpart. However, in those rare instances where the intent or meaning of a wage or fringe benefit provision in a predecessor contractor's collective bargaining agreement cannot be determined by a successor contractor, the Department of Labor will assist in obtaining interpretative guidance from the parties to that agreement.

Section 4.165 Wage Payments and Fringe Benefits—in General

The National Council of Technical Service Industries, the Computer and Business Equipment Manufacturers Association (CBEMA), and the Scientific Apparatus Makers Association (SAMA) objected to the provision in § 4.165(b) setting a semi-monthly pay period as the longest allowable under the SCA. SAMA stated that this provision may cause problems because many firms calculate fringe benefits on a monthly basis. CBEMA asserted that a requirement to obtain employee approval of a bi-weekly or semi-monthly pay period would contravene section 7 of the National Labor Relations Act by mandating collective bargaining.

The proposal in this subsection to reduce the longest permissible pay period under the Act from monthly to semi-monthly is deemed necessary to insure timely payment of wages to service employees, who are often low paid and do not have the financial resources to cover expenses incurred over an entire month in which they receive no wage payments without suffering undue hardships. This change is also necessary for effective enforcement of the Act to protect against those situations where contractors receive their final payment from the contracting agency before the last payroll comes due and fail to meet that payroll. However, as there may be individual cases where a showing can be made that a monthly payroll period is necessary and can be implemented without adversely affecting the employees, the Administrator will give consideration to specific requests for a waiver from this provision in order to allow a monthly pay period.

This proposed requirement will not restrict a contractor's ability to make fringe benefit contributions to bona fide plans on a monthly basis, as believed by SAMA. As set forth in § 4.175(d)(1), such contributions may be made on any periodic basis which is not less often than quarterly. While we do not believe that employee approval of a bi-weekly or semi-monthly pay period would contravene the National Labor Relations Act we have determined upon further study that it would be appropriate to withdraw the employee approval provision from the final rule and replace it with a provision requiring contractors only to advise employees when such pay periods are used.

The Department of Defense and NCTSI opposed the requirement in § 4.165(c) to pay wage rates contained in an applicable wage determination which are higher than the rates contained in the contractor's collective bargaining agreement.

As discussed in § 4.163(d), an incumbent (successor) contractor may not adhere to the terms of its own collective bargaining agreement where they conflict with the terms of an otherwise applicable prevailing wage determination.

Section 4.169 Wage Payments—Work Subject to Different Rates

The Northrop Corporation argued that lower skilled employees should be allowed to be assigned to work in more highly skilled and highly paid job classifications for training purposes. Northrop recommended that recognition of what was termed a "long established practice" be made by establishing a tolerance allowing a service employee to work in a more highly skilled job classification up to 25 percent of the time without having to be paid the higher wage determination rate for such time.

Section 2(a) of the Act makes it clear that the various classes of service employees must be paid *at least* the established corresponding wage determination rates while performing on a covered contract. It follows from this statutory language and the general principle under the Act that the duties which an employee actually performs govern the rate(s) of pay to which he or she is entitled, and that where a single employee performs work in more than one classification, he or she must be paid at least the corresponding wage determination rate for the time spent performing in each classification. To grant the tolerance suggested by Northrop would be clearly contrary to the statutory intent to protect prevailing wages by allowing contractors to pay less than the applicable wage determination rate for substantial periods of time. Accordingly, no change will be made in this section, which has been in the Regulations since 1968.

Section 4.170 Furnishing fringe benefits or equivalents

The Bell & Howell Company and Editorial Experts, Inc. commented that the Department should not prohibit the cross-crediting of wages and fringe benefits in proposed § 4.170(a).

The statutory language of section 2(a) of the Service Contract Act

differentiates between payments for wages and payments for fringe benefits and does not provide for the cross-crediting of one against another. Consequently, since 1968, the Regulations have prohibited such cross-crediting. However, section 2(a)(2) of the Act and § 4.170(a) of both the current and proposed Regulations provide that contractors may discharge their obligation to furnish specified fringe benefits by making equivalent or differential payments in cash to employees.

Section 4.171 "Bona Fide" Fringe Benefits

The AFL–CIO commented that the definition of a bona fide fringe benefit as provided in this section is too restrictive, asserting that it should not exclude such benefits as supplemental unemployment plans and prepaid legal plans.

While not specifically enumerated in this section, supplemental unemployment plans and prepaid legal plans are considered "bona fide" fringe benefits for purposes of the Act.

The Computer and Business Equipment Manufacturers Association and Pan American World Airways, Inc. commented in opposition to § 4.171(a)(5), which requires that bona fide fringe benefit plans comply with section 401(a) of the Internal Revenue Code. CBEMA stated that section 401(a) of the tax code only relates to stock bonus, pension, and profit sharing plans, and addresses only the tax consequences of employer contributions to such plans, and not whether they provide benefits of value to employees.

Since section 401(a) of the Internal Revenue Code only covers certain types of fringe benefit plans, only plans of the types listed in section 401(a) must meet the requirements of that section. The final rule has been amended accordingly.

CODSIA, CBEMA, and NASA objected to the exclusion in § 4.171(b) of self-insured benefit plans from the definition of bona fide fringe benefits. They commented that many self-insured plans satisfy the requirements of the Employment Retirement Income Security Act of 1974. Rockwell International Corporation, Xerox Corporation, Pan American World Airways, Inc., and Frank B. Hall Consulting Company made similar comments.

The purpose of § 4.171(b) is to preclude those situations (e.g., as in unfunded plans) where monies allegedly allocated by a contractor to provide fringe benefits may be used for other purposes or may be recouped without actually furnishing any benefits. The Department does not intend to prohibit self-insured plans where irrevocable payments are made pursuant to a trust or other funded arrangement and the other conditions of § 4.171 are met. The final Regulations have been amended to clarify this point.

Section 4.173 Meeting Requirements for Vacation Fringe Benefits

The Computer and Business Equipment Manufacturers Association (CBEMA) and Datapoint Corporation took issue with the requirement in § 4.173(a)(1) to consider prior service with a predecessor contractor(s) in computing vacation benefits on the grounds that prior service is often difficult to determine.

Vacation eligibility is often accrued on the basis of length of service with an employer. However, service employees on many Government contracts, who typically perform work at a single Federal facility for several years, in many cases could not gain vacation eligibility with any single employer since employing contractors frequently change, often on an annual basis. In recognition of this characteristic, the Regulations have since 1968 required that service employees receive credit for prior service with a predecessor contractor(s) at the same facility in order to insure that the employees actually receive the prevailing vacation benefits. In addition, as discussed in § 4.173(a), it is necessary to credit employees for prior contract service in order to avoid placing the incumbent contractor at a competitive disadvantage by making it, but not other bidders, liable for vacation benefits based upon length of prior service in performing the contract work.

Subsection 4.6(l)(2) of the Regulations requires that the incumbent contractor provide the contracting officer with a list of all the contractor's employees on the payroll during the last month of contract performance and their anniversary dates. This should eliminate problems in gathering length of service data.

CBEMA asserted that this requirement should not apply in the case of "commercial product support services" on the grounds that such services are generally not performed by "successor" contractors as that term is used under the Act and the Regulations.

The requirement to consider prior service with a predecessor contractor(s) in determining vacation eligibility does not generally apply to contractors furnishing so-called "commercial product support services" under General Services Administration-Federal Supply Service "schedule" contracts because it is almost impossible to trace or identify any specific contract work requirements from a "predecessor" to a "successor" contractor.

The AFL–CIO, the American Federation of Government Employees, and NASA opposed the provision in § 4.173(a)(3) excluding prior service as a Federal employee from being counted toward an employee's eligibility for vacation benefits under the SCA. They argued that this policy discriminates against Federal employees whose jobs are contracted out and is contrary to Federal policy and intent as outlined in OMB Circular A–76.

Employees' prior service on a predecessor service *contract* must be considered by a successor contractor in determining vacation eligibility under this subsection. Since Federal employees have not worked on prior service *contracts*, prior service as a Federal employee need not be considered for this purpose. We do not believe that this provision discourages contractors from hiring former Federal employees whose jobs are contracted out.

NASA, commenting on § 4.173(b)(1), stated that DOL should establish criteria for determining what constitutes a break in service for purposes of eligibility for vacation benefits. Northrop Corporation and NASA requested clarification of the term "temporary layoff" in § 4.173(b)(2). Northrop also sought clarification as to whether a firm's administrative policy or collective bargaining agreement in this area is controlling.

As discussed in § 4.173(b), whether or not there is a break in service is dependent upon all the facts in a particular case, the primary factor being the reason(s) for an employee's absence from work rather than the length of that absence. It would not be practicable to establish more detailed criteria as to what constitutes a break in service or list every possible factual circumstance under which a break would or would not have occurred. Accordingly, the general guidelines and specific examples contained in § 4.173(b)(1) are considered to be sufficient guidance and no amendment is made to the regulation. Questions regarding continuous service for vacation eligibility should be referred to the Department for a determination. In all such cases, the rulings and interpretations of the Department contained in this subpart or issued in accordance with § 4.101(g) of the Regulations will take precedence over a contractor's own administrative policy or collective bargaining agreement. However, where a successor contractor is subject to the wage and

fringe benefit provisions of the predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act, the terms of that agreement pertaining to fringe benefit entitlement, including those relating to continuous service for vacation eligibility, are binding upon the successor contractor as provided in § 4.163(j) of the Regulations.

The AFL–CIO and NCTSI commented that the vesting of vacation benefits and the liability therefor should be prorated for portions of years worked, in accordance with what they termed the prevailing practice in private industry and the Federal Government, rather than being based solely on an employee's anniversary date of employment as required under §§ 4.173(c) and (d)(1).

Most SCA wage determinations have provided for employee vesting of vacation fringe benefits and contractor liability therefor on the basis of employee anniversary dates since the Act's inception and have not provided for prorating either vesting or liability. This policy was adopted by the Department after careful consideration of the alternatives and in view of the characteristics of Government service procurement relating to employee length of service and contractor turnover, as discussed above. Under this scheme, employees who continue to provide the same contract services are assured of receiving their full vacation benefits annually without regard to any change in contractors. This longstanding policy does not porvide a windfall or burden for either predecessor or successor contractors, since in most cases the vacation liabilities of both predecessors and contractors even out over time by the random distribution of employee anniversary dates. Although the preamble to the proposed Regulations invited comments on the possible adoption of an accrual (or pro rata) method for providing vacation benefits, no viable plan for doing so has been presented. Accordingly, the current policy will be maintained.

Section 4.174 Meeting Requirements for Holiday Fringe Benefits

The Department of Defense objected to the provision in § 4.174(a)(1) that an employee is entitled to holiday pay if the employee performs any work during the workweek in which a named holiday occurs. DOD recommended that the section be revised to provide for payment of holiday pay only if the employee works the day before and the day after the holiday.

NASA, DOE, CBEMA, and Datapoint Corporation objected to the requirement in § 4.174(b) which provides for the payment of holiday pay to an employee who is hired during the first week of a contract but does not begin work until after the named holiday. This requirement is a limited exception to the general rule that the contractor is not required to compensate a newly hired employee for a holiday occurring prior to hiring of the employee.

CBEMA, DOD and Datapoint objected to the requirement in § 4.174(c)(4) for payment of holiday pay to an employee who works during the holiday workweek but terminates prior to the named holiday.

Because a contractor has the right to assign work in any way it deems appropriate to meet the requirements of the contract, there is the potential for a contractor to avoid the requirements of paying benefits for holidays listed in a wage determination by manipulating work schedules. Thus, the Department has for many years followed the policy which is now codified. An employee is entitled to holiday pay if the employee performs any work during the workweek in which a named holiday occurs, in order to prevent the contractor from gerrymandering work days in order to avoid the payment of holiday fringe benefits to employees. This rule avoids the problems of having to determine whether an employee voluntarily quit or was fired, voluntarily took off the day before or the day after the holiday or was directed to take off by the contractor, etc. The experience of the Department in administering the law has been that the longstanding policies set forth in § 4.174 are equitable and fair to contractors and to the rights of employees.

The requirement in § 4.174(b) to provide benefits for a holiday occurring during the first week of a contract to employees hired during that week but not until after the named holiday is necessary to insure that employees receive their full entitlement to holiday benefits. This specific requirement is also necessary to prevent incumbent contractors who retain their current workforce from being placed at a competitive disadvantage with respect to other prospective contractors who would be newly hiring employees during the first week of a contract. No substantive changes will be made in this section.

Section 4.175 Meeting Requirements for Health, Welfare, and/or Pension Benefits

The Council of Defense and Space Industry Associations, Northrop Corporation, McDonnel Douglas Corporation, and the Seafarers International Union commented that the requirement in § 4.175(a)(2) to make differential payments where a contractor is able to obtain a specified fringe benefit for less than the amount stated on an applicable wage determination eliminates any incentive to obtain the benefit at a lower cost by, for example, negotiating lower premiums with an insurance carrier. Essentially, these commentors recommended that the standard by which compliance with fringe benefit obligations should be measured should be the level of benefits provided, rather than the monetary costs incurred.

As set forth in §§ 4.170 and 4.171 of the current Regulations, the Department has consistently required that fringe benefit compliance be measured by the monetary cost incurred by the contractor in furnishing such benefits. Compliance with fringe benefit requirements on the basis of the level of benefits provided is not practical because of the impossibility of measuring the relative merits and value to individual employees of the multitude of fringe benefit plans, which typically contain substantial variations in the types and amounts of benefits provided. The statutory provision in section 2(a)(2) allowing contractors to substitute *equivalent* fringe benefits and cash payments in lieu of the benefits specified in an applicable wage determination would preclude adoption of a level of benefits standard. No one has developed a feasible method for determining what fringes are prevailing in terms of the level of benefits provided. Thus, there is no means of informing contractors as to how they would comply with a requirement to furnish such benefits. Even if contractors could be so advised, if a given contractor desired a pension plan rather than a health insurance plan, it would be impossible to determine if the level of benefits were equivalent, and thus there would be no way to determine compliance with the Act.

CBEMA expressed concern over the requirement in § 4.175(c) that employees who are excluded from a plan must receive equivalent fringe benefits. In the view of the Department this provision is required by the statutory scheme under which each worker must be paid the prescribed minimum wage and furnished the prescribed fringe benefit or its equivalent. The fringe benefits are stated on the wage determinations as either a specified amount of payments or, in appropriate circumstances, in terms of average cost [see subsection 4.175(b)].

Section 4.187 Recovery of Underpayments

The Datapoint Corporation and the National Star Route Mail Carriers' Association asserted that the definition of "party responsible" in § 4.187(e) could result in imposing personal liability on most management and administrative officials of contractors.

The criteria for determining who is a "party responsible" as set forth in this section are based upon the authoritative administrative and judicial precedents cited therein. These criteria do not necessarily include most officials of a firm found to be in violation, but rather are limited to those who are responsible for controlling the firm, administering the contract or the firm's employment policies or are otherwise responsible for the violations by causing or permitting them to occur.

The Department of Defense (DOD) and the National Council of Technical Service Industries questioned whether the Department's procedures pertaining to disputes regarding violations of the Act in § 4.187(f) may be in conflict with the requirements of the Contract Disputes Act of 1978.

Section 14 of the Contract Disputes Act of 1978 sets forth the specific amendments made by the Congress to existing statutes. Significantly, no change, repeal or amendment, or reference was made to the SCA. Furthermore, Section 6(a) of the Contract Disputes Act states in part that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures *prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine*" (emphasis supplied). Therefore, DOL's explicit and exclusive statutory authority to resolve disputes set forth in section 4 of the SCA is unchanged.

In addition, logic dictates that the authority to resolve labor disputes should more properly reside in the agency which has, in addition to the statutory enforcement authority, the prerequisite expertise in administering the law and the regulations necessary to insure the effective and consistent implementation of such labor standards provisions.

This rule was drafted under the supervision and direction of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. (202-523-6191).

Accordingly, 29 CFR Part 4 is revised as set forth below.

Signed at Washington, D.C., this 12th day of January 1981.

Donald Elisburg,

Assistant Secretary of Labor, Employment Standards Administration.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

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Authority: 41 U.S.C. 351, et seq., 79 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358; 41 U.S.C. 38 and 39; and 5 U.S.C. 301.

Subpart A—Service Contract Labor Standards Provisions and Procedures

§ 4.1 Purpose and scope.

This part contains the Department of Labor's rules relating to the administration of the McNamara-O'Hara Service Contract Act of 1965, as amended, referred to hereinafter as the Act. Rules of practice for administrative proceedings under the Act and for the review of wage determinations are contained in Part 6 of this chapter. See Part 1925 of this title for the safety and health standards applicable under the Service Contract Act.

§ 4.1a Definitions and use of terms.

As used in this part, unless otherwise indicated by the context—

(a) "Act," "Service Contract Act," McNamara-O'Hara Act, or "Service Contract Act of 1965" shall mean the Service Contract Act of 1965 as amended by Public Law 92-473, 86 Stat. 789, effective October 9, 1972, Pub. L. 93-57, 87 Stat. 140, effective July 6, 1973, and Pub. L. 94-489, 90 Stat. 2358, effective October 13, 1976 and any subsequent amendments thereto.

(b) "Secretary" includes the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, and their authorized representatives.

(c) "Administrator" means the Administrator of the Wage and Hour Division, or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making of wage determinations and the enforcement of the Service Contract Act of 1965, as amended, and this part.

(d) "Office of Government Contract Wage Standards" or "OGCWS" means the organizational unit in the Wage and Hour Division, Employment Standards Administration, to which is assigned the performance of functions of the Secretary under the Service Contract Act of 1965 as amended.

(e) "Contract" includes any contract subject wholly or in part to provisions of the Service Contract Act of 1965 as amended, and any bid specification or subcontract of any tier thereunder. (See §§ 4.107-4.134.)

(f) "Contractor" includes a subcontractor whose subcontract is subject to provisions of the Act. Also, the term "employer" means, and is used interchangeably with, the terms "contractor" and "subcontractor" in various sections in this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of compliance with the provisions of the Act.

(g) "Affiliate" or "affiliated person" includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with a contractor or subcontractor as a parent, subsidiary, or otherwise; and an officer or agent of such corporation. An affiliation is also deemed to exist where, directly or indirectly, one business concern or individual controls or has the power to control the other or where a third party controls or has the power to control both.

(h) "Wage determination" includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of sections 2(a) and 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of $2,500 which is subject to the provisions of the Service Contract Act of 1965.

§ 4.1b Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract.

(a) Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished for the same location. Section 4(c) provides that no such contractor or subcontractor shall pay any service employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. If, however, the Secretary finds after a hearing in accordance with the regulations set forth in § 4.10 of this subpart and Part 6 of this title that in any of the foregoing circumstances such wages and fringe benefits are substantially at variance with those which prevail for service of a character similar in the locality, those wages and/or fringe benefits in such collective bargaining agreement which are found to be substantially at variance shall not apply, and a new wage determination shall be issued.

If the contract has been awarded and work begun prior to a finding that the wages and/or fringe benefits in a collective bargaining agreement are substantially at variance with those prevailing in the locality, the payment obligation of such contractor or subcontractor with respect to the wages and fringe benefits contained in the new

wage determination shall be applicable as of the date of the Administrative Law Judges' decision. (See also § 4.163(c).)

(b) Pursuant to section 4(b) of the Act, the application of section 4(c) is made subject to the following variation in the circumstances and under the conditions described: The wage rates and fringe benefits provided for in any collective bargaining agreement applicable to the performance of work under the predecessor contract which is consummated during the period of performance of such contract shall not be effective for purposes of the successor contract under the provisions of section 4(c) of the Act or under any wage determination implementing such section issued pursuant to section 2(a) of the Act, if—

(1) In the case of a successor contract for which bids have been invited by formal advertising, notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening of bids, provided that the contracting agency finds that there is not reasonable time still available to notify bidders; or

(2) Notice of the terms of a new or changed collective bargaining agreement is received by the agency after award of a successor contract to be entered into pursuant to negotiations or as a result of the execution of a renewal option or an extension of the initial contract term, provided that the contract start of performance is within 30 days of such award or renewal option or extension. If the contract does not specify a start of performance date which is within 30 days from the award, and/or performance of such procurement does not commence within this 30-day period, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under section 4(c); and

(3) The limitations in paragraph (b) (1) or (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative written notification at least 30 days in advance of all applicable estimated procurement dates, including issue of bid solicitation, bid opening, date of award, commencement of negotiations, receipt of proposals, or the commencement date of a contract resulting from a negotiation, option, or extension, as the case may be.

§ 4.2 Payment of minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 under all service contracts.

Section 2(b)(1) of the Service Contract Act of 1965 provides in effect that, regardless of contract amount, no contractor or subcontractor performing work under any Federal contract the principal purpose of which is to furnish services through the use of service employees shall pay any of his employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended ($2.65 per hour beginning January 1, 1978, $2.90 per hour beginning January 1, 1979, $3.10 per hour beginning January 1, 1980, and $3.35 per hour after December 31, 1980).

§ 4.3 Wage determinations.

(a) The minimum monetary wages and fringe benefits for service employees which the Act requires to be specified in contracts and bid specifications subject to section 2(a) thereof will be set forth in wage determinations issued by the Administrator. Wage determinations shall be issued as soon as administratively feasible for all contracts subject to section 2(a) of the Act, and will be issued for all contracts entered into under which more than 5 service employees are to be employed.

(b) Such wage determinations will set forth for the various classes of service employees to be employed in furnishing services under such contracts in the appropriate localities, minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of such contracts, including, where appropriate under the Act, provisons for adjustments in such minimum rates and benefits to be placed in effect under such contracts at specified future times. The wage rates and fringe benefits set forth in such wage determinations shall be determined in accordance with the provisions of sections 2(a)(1), (2), and (5), 4(c) and 4(d) of the Act from those prevailing in the locality for such employees, with due consideration of the rates that would be paid for direct Federal employment of any classes of such employees whose wages, if federally employed, would be determined as provided in 5 U.S.C. 5341 or 5 U.S.C. 5332, or from pertinent collective bargaining agreements with respect to the implementation of section 4(c). The wage rates and fringe benefits so determined for any class of service employees to be engaged in furnishing covered contract services in a locality shall be made applicable by contract to all service employees of such class employed to perform such services in the locality under any contract subject to section 2(a) of the Act which is entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure.

(c) Wage determinations will be available for public inspection during business hours at the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and copies will be made available on request at Regional Offices of the Wage and Hour Division.

§ 4.4 Notice of intention to make a service contract.

(a) For any contract exceeding $2,500 which may be subject to the Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. With respect to recurring or known requirements, such notices shall be filed not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) prior to (1) any invitation for bids, (2) request for proposals, (3) commencement of negotiations, (4) exercise of option or contract extension, (5) annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress, or (6) each bi-annual anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division. (See § 4.4(d).) Notices with regard to solicitations where such planning is not feasible shall be submitted as soon as possible, but not later than 30 days prior to the above contracting actions. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a Service Contract, and Standard Form 98–A or a statement containing the information in paragraph (b) of this section and shall be completed in accordance with the instruction provided and shall be supplemented by the information required under paragraphs (c) and (d) of this section. Supplies of Standard Forms 98 and 98–A are available in all GSA supply depots under stock numbers 7540–926–8972 and 7540–118–1008, respectively. If there exists any question or doubt as to the possible application of the Act to a particular procurement, the contracting agency shall submit such question in a

timely manner to the Administrator for determination.

(b) The contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) either a Standard Form 98-A or a statement in writing, containing the following information concerning the service employees expected by the agency to be employed by the contractor and any subcontractors in performing the contract:

(1) The number of such employees of all classes, or a statement indicating whether such number will or will not exceed 5, the number for which the inclusion of a wage determination in the contract is mandatory under the provisions of section 10 of the Act as set forth in § 4.3(a); and

(2) A listing of those classes of service employees expected to be employed under the contract which, if employed by the agency, would be subject to the wage provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332, together with a specification of the rates of wages and fringe benefits that would be paid by the Government to employees of each such class if such statute were applicable to them. (Under section 2(a)(5) of the Act and § 4.6 the inclusion of such a statement in the service contract is also required.)

(c) If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply for one or more locations, the agency shall identify the locations to which such agreements have application. If the collective bargaining agreement does not apply to all service employees under the contract, the agency shall identify the employees and/or work subject to the collective bargaining agreement. In the event that the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arm's-length negotiations, a full statement of the facts so indicating shall be transmitted with the copy of such agreement. See § 4.11. If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Office of Government Contract Wage Standards and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10 at the time of filing the Notice of Intention to Make a Service Contract (Form SF-98).

(d) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall file with its Standard Form 98 a statement in writing concerning the type of funding and the contemplated term of the proposed contract. Unless otherwise advised by the Wage and Hour Division that a Standard Form 98 must be filed on the annual anniversary date, a new Standard Form 98 shall be submitted on each bi-annual and anniversary date of the proposed multi-year contract in the event its term is for a period in excess of two years.

(e) Any Standard Form 98 submitted by a contracting agency without the information required under paragraphs (b), (c), or (d) of this section will be returned to the agency for further action.

(f) If exceptional circumstances prevent the filing of the notice of intention and supplemental information required by this section on a date at least 60 days (or 30 days in the case of unplanned procurements) prior to any invitation for bids, request for proposals, or commencement of negotiations, the notice shall be submitted to the Office of Government Contract Wage Standards as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission. In the event the proposed contract involves performance by more than 5 service employees and an emergency situation requires an immediate award, the contracting agency shall contact the Office of Government Contract Wage Standards, Wage and Hour Division, by telephone for guidance prior to any such award. In no event may a contract subject to the act on which more than 5 service employees are contemplated to be employed be awarded without an appropriate wage determination. (Section 10 of the Act.)

(g) If any invitation for bids, request for proposals, bid opening, or commencement of negotiations for a proposed contract for which a wage determination was provided in response to a Standard Form 98 has been delayed, for whatever reason, more than 60 days from the date of such procurement action as on the submitted Standard Form 98, the contracting agency shall contact the Office of Government Contract Wage Standards, Wage and Hour Division, for the purpose of determining whether the wage determination issued pursuant to the initial submission is still current. Any revision of a wage determination received by the contracting agency as a result of such communication or upon discovery by the Department of Labor of a delay, shall supersede and replace the earlier response as the wage determination applicable to such procurement, subject to the time frames set forth in § 4.5(a)(2).

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(a) Any contract in excess of $2,500 shall contain an attachment specifying the minimum wages and fringe benefits for service employees to be employed thereunder, as determined in the applicable currently effective wage determination, including the applicable wage determination contained in any document referred to in paragraphs (a)(1) or (2) of this section:

(1) Any communication from the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the notice required by § 4.4; or

(2) Any revision of a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations, or which changes previously determined minimum wage rates and fringe benefits for service employees employed on covered contracts in the locality. However, revisions received by the Federal agency later than 10 days before the opening of bids, in the case of contracts entered into pursuant to competitive bidding procedures, shall not be effective if the Federal agency finds that there is not a reasonable time still available to notify bidders of the revision. In the case of procurements entered into pursuant to negotiations (or in the case of the execution of an option or an extension of the initial contract term), revisions received by the agency after award (or execution of an option or extension of term, as the case may be) of the contract shall not be effective *provided* that the contract start of performance is within 30 days of such

award (or execution of an option or extension of term). If the contract does not specify a start of performance date which is within 30 days from the award, and/or if performance of such procurement does not commence within this 30-day period, the Department of Labor shall be notified and any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective. In situations arising under section 4(c) of the Act, the provisions in § 4.1b(b) apply.

(b)(1) The following exemption from the compensation requirements of section 2(a) of the Act applies, subject to the limitations set forth in paragraphs (b) (2), (3), and (4) of this section: To avoid serious impairment of the conduct of Government business it has been found necessary and proper to provide exemption from the determined wage and fringe benefits section of the Act (section 2(a) (1), (2)) but not the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (section 2(b) of this Act), of contracts under which five or less service employees are to be employed, and for which no such wage or fringe benefit determination has been issued;

(2) The exemption provided in paragraph (b)(1) of this section, which was adopted pursuant to section 4(b) of the Act prior to its amendment by Public Law 92–473, does not extend to undetermined wages or fringe benefits in contracts for which one or more, but not all, classes of service employees are the subject of an applicable wage determination. The procedure for determination of wage rates and fringe benefits for any classes of service employees engaged in performing such contracts whose wages and fringe benefits are not specified in the applicable wage determination is set forth in § 4.6(b).

(3) The exemption provided in paragraph (b)(1) of this section does not exempt any contract from the application of the provisions of section 4(c) of the Act as amended, concerning successor contracts.

(c)(1) If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall, through the exercise of any and all of its power and authority that may be needed (including, where necessary, its authority to negotiate, its authority to pay any necessary additional costs, and its authority under any provision of the contract authorizing changes), include in the contract any wage determinations communicated to it by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, within 30 days of the receipt of such wage determination(s).

(2) Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, shall include in the contract the stipulations contained in § 4.6 and any applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). *(G. L. Christian & Associates* v. *U.S.*, 312 F. 2d 418 (Ct. Cl. 1963), rearg. denied 320 F. 2d 345, cert. denied 375 U.S. 954; (53 Comp. Gen. 412, (1973); *Curtiss-Wright Corp.* v. *McLucas*, 381 F. Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2* v. *Military Sealift Command*, 86 CCH Labor Cases ¶33,782 (D DC 1979); *Brinks, Inc.* v. *Board of Governors of the Federal Reserve System*, 466 F. Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979). (See also 32 CFR 1–403.)

(d) In cases where the contracting agency has filed its SF–98 within the time limits discussed in § 4.4(a) and has not received a response from the Department of Labor, the contracting agency shall, with respect to any contract for which section 10 of the Act and § 4.3 of this Part mandate the inclusion of an applicable wage determination, contact the Office of Government Contract Wage Standards, Wage and Hour Division by telephone for guidance.

§ 4.6 Labor standards clauses for Federal service contracts exceeding $2,500.

The clauses set forth in the following paragraphs shall be included in full by the contracting agency in every contract (and any bid specification therefor) entered into by the United States or the District of Columbia, in excess of $2,500, or in an indefinite amount, the principal purpose of which is to furnish services through the use of service employees:

(a) Service Contract Act of 1965, as amended: This contract, is subject to the Service Contract Act of 1965, as amended (41 U.S.C. 351) and is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor issued thereunder (29 CFR Part 4).

(b)(1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract. Unless specified otherwise in the wage determination, the contractor, where relevant, must consider an employee's length of service with the contractor or with the predecessor contractor(s) on the predecessor contract, if any, in determining the employee's wage and fringe benefit entitlements.

(2)(i) If there is such a wage determination attached to this contract, the contracting officer shall require that any class of service employee which is not listed therein and which is to be employed under the contract, be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees shall be paid the monetary wages and furnished the fringe benefits as are determined by bona fide agreement of the interested parties, who shall be deemed to be the contracting officer, the contractor, and any authorized representative of the unlisted class of employees or, where there is no authorized representative, the employees in the unlisted class who will perform on the contract.

(ii) Such conforming procedure shall be initiated by the contractor at the time of the contract commencement date, or prior to the performance of contract work by such unlisted class of employee if a need for an additional class(es) arises, and shall be concluded no later than 30 days after such unlisted class of employees performs any contract work. A written report of the proposed conforming action, including evidence in writing of the agreement of the authorized representative of the employees involved or, where there is no authorized representative, the employees themselves, shall be promptly submitted by the contractor to the contracting officer who shall review this action, and if he or she agrees, shall promptly submit a report of the action to the Office of Government Contract

Wage Standards, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. The Office of Government Contract Wage Standards will approve or disapprove the action within 30 days of receipt or will notify the contracting officer within 30 days of receipt that additional time is necessary. If the conforming procedure cannot be concluded within the 30-day time period, the contracting officer shall submit an explanation of the special circumstances which prevent a timely agreement to the Office of Government Contract Wage Standards together with a request for additional time for resolution of the matter.

(iii) If the parties do not reach an agreement or acknowledge disagreement within this 30-day period on a proper classification which is, in fact, conformable, the contracting officer shall promptly submit the question, together with his or her recommendations and all pertinent information, including the positions of employees if in disagreement, to the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, of the Department of Labor for final determination. The Office of Government Contract Wage Standards will render a determination within 30 days of receipt or will notify the contracting officer within 30 days of receipt that additional time is necessary.

(iv) The process of establishing wage rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(v) Failure to pay such unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Office of Government Contract Wage Standards retroactive to the date such class of employees commenced contract work shall be a violation of the Act and this contract.

(vi) No employee engaged in performing work on this contract shall in any event be paid less than the currently applicable minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(vii) Failure by the contractor to comply with its responsibilities in sections (b)(2) (i) through (vi) of this section shall also be a violation of the Act and this contract. Upon discovery of such violation, the Office of Government Contract Wage Standards shall then make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work.

(viii) Any agreement reached by the interested parties will not be considered a bona fide agreement unless the affected employees in the unlisted classification(s) have been provided with a full explanation of the conformance procedures and the basis for arriving at the proposed conformed classification (and wage rate and/or fringe benefits). The affected employees shall be afforded an opportunity to agree or disagree without threat of job reprisal. Upon final determination of this action by the Office of Government Contract Wage Standards, each affected employee shall be furnished by the contractor with a written copy of such determination or it shall be posted as a part of the wage determination.

(3) If, as authorized pursuant to section 4(d) of the Service Contract Act of 1965 as amended, the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 year and not less often than once every 2 years, pursuant to wage determinations to be issued by the Wage and Hour Division, Employment Standards Administration of the Department of Labor as provided in such Act.

(c) The contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined conformably thereto by furnishing any equivalent combinations of bona fide fringe benefits, or by making equivalent or differential payments in cash in accordance with the applicable rules set forth in Subpart D of 29 CFR Part 4, and not otherwise.

(d)(1) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcontractor under this contract shall pay any person performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of § 4.16(b) of 29 CFR Part 4 apply or unless the Secretary of Labor or his authorized representative determines, after a hearing as provided in § 4.11 of 29 CFR Part 4, that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations, or finds, after a hearing as provided in § 4.10 of 29 CFR Part 4 that the wages and/or fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality. Where the Secretary finds after a hearing in accordance with the review procedures provided in 29 CFR 4.10 and Part 6 that some or all of the wages and/or fringe benefits contained in a predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality, the Department will issue a new or revised wage determination setting forth the applicable wage rates and fringe benefits. Such determination shall be

made part of the contract or subcontract, in accordance with the decision of the Administrative Law Judge, or the Secretary, as the case may be irrespective of whether such issuance occurs prior to or after the award of a contract or subcontract. 53 Comp. Gen. 401 (1973).

(e) The contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post the wage determination attached to this contract. The poster provided by the Department of Labor (Publication WH 1313) shall be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of section 2(a)(4) of the Act and of this contract.

(f) The contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the contractor or subcontractor which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish these services, and the contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(g) The contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified in paragraphs (g)(1) through (5) of this section for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor:

(1) Name and address and social security number of each employee.

(2) The correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation of each employee.

(3) The number of daily and weekly hours so worked by each employee.

(4) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

(5) A list of monetary wages and fringe benefits for those classes of service employees not included in the wage determination attached to this contract but for which such wage rates or fringe benefits have been determined by the interested parties or by the Administrator or authorized representative pursuant to the labor standards clause in paragraph (b) of this section. A copy of the report required by the clause in paragraph (b)(2)(ii) of this section shall be deemed to be such a list.

(6) Any list of the predecessor contractor's employees which had been furnished to the contractor pursuant to § 4.6(l)(2).

(7) The contractor shall also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(8) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of the Department of Labor and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases.

(h) The contractor shall unconditionally pay to each employee subject to the Act all wages due free and clear and without subsequent deduction (except as otherwise provided by law or Regulations, 29 CFR Part 4), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

(i) The contracting officer shall withhold or cause to be withheld from the Government prime contractor under this or any other Government contract with the prime contractor such sums as an appropriate official of the Department of Labor requests or such sums as the contracting officer decides may be necessary to pay underpaid employees employed by the contractor or subcontractor. In the event of failure to pay any employees subject to the Act all or part of the wages or fringe benefits due under the Act, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of these clauses relating to the Service Contract Act of 1965, may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(j) The contractor agrees to insert these clauses in this section relating to the Service Contract Act of 1965 in all subcontracts subject to the Act. The term "contractor" as used in these clauses in any subcontract, shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

(k)(1) As used in these clauses, the term "service employee" means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(2) The following statement is included in contracts pursuant to section 2(a)(5) of the Act and is for *informational purposes only:*

The following classes of service employees expected to be employed under the contract with the Government would be subject, if employed by the contracting agency, to the provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332 and would, if so employed, be paid not less than the following rates, of wages and fringe benefits:

Employee class	Monetary wage-fringe benefits

(l)(1) If wages to be paid or fringe benefits to be furnished any service employees employed by the Government prime contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government prime contractor shall report such fact to the contracting officer, together with full information as to the application and accrual of such wages and fringe

benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, such agreements shall be reported promptly after negotiation thereof.

(2) Not less than 10 days prior to completion of any contract being performed at a Federal facility where service employees may be retained in the performance of the succeeding contract and subject to a wage determination which contains vacation or other benefit provisions based upon length of service with a contractor (predecessor) or successor (§ 4.173 of Regulations, 29 CFR Part 4), the incumbent prime contractor shall furnish to the contracting officer a certified list of the names of all service employees on the contractor's or subcontractor's payroll during the last month of contract performance. Such list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each such service employee. The contracting officer shall turn over such list to the successor contractor at the commencement of the succeeding contract.

(m) All rulings and interpretations of the Service Contract Act of 1965, as amended, expressed in Regulations, 29 CFR Part 4 are hereby incorporated by reference in this contract.

(n)(1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has a substantial interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Act.

(2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract pursuant to section 5 of the Act.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(o) Notwithstanding any of the clauses in paragraphs (b) through (m) of this section relating to the Service Contract Act of 1965, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act prior to its amendment by Public Law 92–473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(i) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical, or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Service Contract Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of that Act, in accordance with the conditions and procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (29 CFR Parts 520, 521, 524, and 525).

(ii) The Administrator will issue certificates under the Service Contract Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR Parts 520, 521, 524, and 525).

(iii) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in Parts 525 and 528 of Title 29 of the Code of Federal Regulations.

(p) Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State Apprenticeship Agency which is recognized by the U.S. Department of Labor, or if no such recognized agency exists in a State, under a program registered with the Bureau of Apprenticeship and Training, Employment and Training Administration, U.S. Department of Labor. Any employee who is not registered as an apprentice in an approved program shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed. The wage rates paid apprentices shall not be less than the wage rate for their level of progress set forth in the registered program, expressed as the appropriate percentage of the journeyman's rate contained in the applicable wage determination. The allowable ratio of apprentices to journeymen employed on the contract work in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program.

(q) An employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips may have the amount of tips credited by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act in accordance with section 3 (m) of the Fair Labor Standards Act and Regulations, 29 CFR Part 531: Provided, however, That the amount of such credit may not exceed $1.24 per hour beginning January 1, 1980, and $1.34 per hour after December 31, 1980. To utilize this proviso:

(1) the employer must inform tipped employees about this tip credit allowance before the credit is utilized;

(2) the employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received);

(3) the employer must be able to show by records that the employee receives at least the applicable Service Contract Act minimum wage through the combination of direct wages and tip credit;

(4) the use of such tip credit must have been permitted under any predecessor collective bargaining agreement applicable by virtue of section 4(c) of the Act.

§ 4.7 Labor standards clause for Federal service contracts not exceeding $2,500.

Every contract with the Federal Government which is not in excess of $2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Service Contract Act. Except to the extent that an exemption, variation or tolerance would apply if this were a contract in excess of $2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. All regulations and interpretations of the Service Contract Act of 1965 expressed in 29 CFR Part 4 are hereby incorporated by reference in this contract.

§ 4.8 Notice of awards.

Whenever an agency of the United States or the District of Columbia awards a contract subject to the Act which may be in excess of $2,500, it shall furnish the Office of Government Contract Wage Standards, Wage and Hour Division, ESA, an original and one copy of Standard Form 99, Notice of Award of Contract. The form shall be completed as follows:

(a) Items 1 through 7 and 12 and 13: Self-explanatory;

(b) Item 8: Enter the notation "Service Contract Act;"

(c) Item 9: Leave blank;

(d) Item 10: (1) Enter the notation "Major Category," and indicate beside this entry the general service area into which the contract falls (e.g., food services, grounds maintenance, computer services, installation or facility support services, custodial-janitorial service, garbage collection, insect and rodent control, laundry and drycleaning services, etc.);

(e) Item 11: Enter the dollar amount of the contract, or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite," or "not to exceed $——." Supplies of Standard Form 99 are available in all GSA supply depots under stock number 7540–634–4049.

§ 4.9 [Reserved]

§ 4.10 Substantial variance proceedings under section 4(c) of the Act.

(a) *Statutory provision.* Under section 4(c) of the Act, and under corresponding wage determinations made as provided in section 2(a)(1) and (2) of the Act, contractors and subcontractors performing contracts subject to the Act generally are obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would have been entitled under a collective bargaining agreement if they were employed on like work under a predecessor contract. (See §§ 4.1b, 4.3, 4.6(d)(2).) Section 4(c) of the Act provides, however, that "such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality".

(b) *Prerequisites for hearing.* (1)(i) A request for a hearing under this section may be made by the contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards, and shall include the following:

(A) The number of any wage determination at issue, the name of the contracting agency whose contract is involved, and a brief description of the services to be performed under the contract;

(B) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contact award, commencement date of the contract or its follow-up option period;

(C) A statement of the applicant's case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe benefits, attaching available data concerning wages and/or fringe benefits prevailing in the locality;

(D) Names and addresses (to the extent known) of interested parties.

(ii) If the information in paragraph (b)(1)(i) of this section is not submitted with the request, the Administrator may deny the request or request supplementary information, at his/her discretion. No particular form is prescribed for submission of a request under this section.

(2) No hearing will be provided pursuant to this section and section 4(c) of the Act unless the Administrator determines from information available or submitted with a request for such a hearing that there may be a substantial variance between some or all of the wage rates and/or fringe benefits provided for in a collective bargaining agreement to which the service employees would otherwise be entitled by virtue of the provisions of section 4(c) of the Act, and those which prevail for services of a character similar in the locality.

(3) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c) *Referral to the Chief Administrative Law Judge.* When the Administrator determines from the information available or submitted with a request for a hearing that there may be a substantial variance, the Administrator on his own motion or on application of any interested person may by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such a fact finding hearing as may be necessary to render a decision solely on the issue of whether the wages and/or fringe benefits contained in the collective bargaining agreement which was the basis for the wage determination at issue are substantially at variance with those which prevail for services of a character similar in the locality. However, in situations where there is also a question as to whether the collective bargaining agreement was reached as a result of "arm's-length negotiations" (see § 4.11), the referral shall include both issues for resolution in one proceeding. No authority is delegated under this section to hear and/or decide any other issues pertaining to the Service Contract Act. As provided in section 4(a) of the Act, the provisions of §§ 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6, Subpart B.

(d) The Administrator shall be an interested party and shall have the opportunity to participate in the proceeding to the degree he/she considers appropriate.

§ 4.11 Arm's length proceedings.

(a) *Statutory provision.* Under Section 4(c) of the Act, the wages and fringe benefits provided in the predecessor contractor's collective bargaining agreement must be reached "as a result of arm's-length negotiations." This provision precludes arrangements by parties to a collective bargaining agreement who, either separately or together, acted with an intent to manipulate, exploit or otherwise take advantage of the wage determination scheme provided for in Sections 2(a) and 4(c) of the Act, or situations where it has been determined by the National Labor Relations Board that "good faith" bargaining did not occur. If the National Labor Relations Board makes such a finding, the Administrator shall issue a decision based on that finding and that decision shall be final and not subject to

appeal. A finding as to whether a collective bargaining agreement or particular wages and fringe benefits therein are reached as a result of arm's-length negotiations may be made through investigation, hearing or otherwise pursuant to the Secretary's authority under Section 4(a) of the Act.

(b)(1) A request for a determination under this section may be made by a contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards. Although no particular form is prescribed for submission of a request under this section, such request shall include the following information:

(i) A statement of the applicant's case setting forth in detail the reasons why the applicant believes that the wages and fringe benefits contained in the collective bargaining agreement were not reached as a result of arm's-length negotiations;

(ii) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(iii) Names and addresses (to the extent known) of interested parties.

(2) Pursuant to Section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of arm's-length negotiations.

(2) If the Administrator determines that there may not have been arm's-length negotiations, but finds that there is insufficient evidence to render a final decision thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with subsection (d).

(3)(i) If the Administrator finds that the collective bargaining agreement or wages and fringe benefits at issue were reached as a result of arm's-length negotiations or that arm's-length negotiations did not take place, the interested parties, including the parties to the collective bargaining agreement, will be notified of the Administrator's findings, which shall include the reasons therefor, and such parties shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of arm's-length negotiations.

(ii) Such parties shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in paragraph (c)(3)(ii) of this section above, the Administrator's ruling shall be final, and, in the case of a finding that arm's-length negotiations did not take place, a new wage determination will be issued for the contract. If a hearing is requested, the decision of the Administrator shall be inoperative.

(d) Referral to the Chief Administrative Law Judge. The Administrator on his/her own motion, under paragraph (c)(2) or upon a request for a hearing under paragraph (c)(3)(ii) where the Administrator determines that material facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge for designation of an Administrative Law Judge, who shall conduct such hearings as may be necessary to render a decision solely on the issue of arm's-length negotiations. However, in situations where there is also a question as to whether some or all of the collectively bargained wage rates and/or fringe benefits are substantially at variance (see § 4.10), the referral shall include both issues for resolution in one proceeding. As provided in Section 4(a) of the Act, the provisions of Sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(e) Referral to the Secretary. When a party requests a hearing under paragraph (c)(3)(ii) and the Administrator determines that no material facts are in dispute, the Administrator shall refer the issue and the record compiled thereon to the Secretary to render a decision solely on the issue of arm's-length negotiations. Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

§ 4.12 Substantial interest proceedings

(a) *Statutory provision.* Under Section 5(a) of the Act, no contract of the United States (or the District of Columbia) shall be awarded to the persons or firms appearing on the list distributed by the Comptroller General giving the names of persons or firms who have been found to have violated the Act until 3 years have elapsed from the date of publication of the list. Section 5(a) further states that "no contract of the United States shall be awarded * * * to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest * * * ." A finding as to whether persons or firms whose names appear on the debarred bidders list have a substantial interest in any other firm, corporation, partnership, or association may be made through investigation, hearing, or otherwise pursuant to the Secretary's authority under Section 4 (a) of the Act.

(b) *Ineligibility.* See § 4.188 of this part for the Secretary's rulings and interpretations with respect to substantial interest.

(c)(1) A request for a determination under this section may be made by any interested party, including contractors or prospective contractors, and associations of contractors, representatives of employees, and interested Government agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards.

(2) The request shall include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the debarred bidders list has a substantial interest in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia. No particular form is prescribed for the submission of a request under this section.

(d)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of substantial interest.

(2) If the Administrator determines that there may be a substantial interest, but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with subsection (e).

(3) If the Administrator finds that no substantial interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(4)(i) If the Administrator finds that a substantial interest exists, the person or firm affected will be notified of the Administrator's finding, which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of substantial interest.

(ii) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in subparagraph (ii) above, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the decision of the Administrator shall be inoperative unless and until the Administrative Law Judge or the Secretary issues an order that there is a substantial interest.

(e) *Referral to the Chief Administrative Law Judge.* The Administrator on his/her own motion, or upon a request for a hearing where the Administrator determines that relevant facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of substantial interest. As provided in Section 4(a) of the Act, the provisions of Sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceedings, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(f) Referral to the *Secretary.* When the person or firm requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Secretary to render a decision solely on the issue of substantial interest. Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

Subpart B—Wage Determination Procedures

§ 4.50 Types of wage and fringe benefit determinations.

The Administrator specifies the minimum monetary wages and fringe benefits to be paid as required under the Act in two types of determinations:

(a) *Prevailing in the Locality.* Determinations that set forth minimum monetary wages and fringe benefits determined to be prevailing for various classes of service employees in the locality (sections 2(a)(1) and 2(a)(2) of the Act) after giving "due consideration" to the rates applicable to such service employees if directly hired by the Federal Government (section 2(a)(5) of the Act); and

(b) *Collective Bargaining Agreement—(Successorship).* Determinations that set forth the wage rates and fringe benefits, including accrued and prospective increases, contained in a collective bargaining agreement applicable to the service employees under the predecessor contract.

§ 4.51 Prevailing in the locality determinations.

(a) *Information considered.* The minimum monetary wages and fringe benefits set forth in determinations of the Secretary are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made. Such information is most frequently derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel. Information may also be obtained from Government contracting officers and from other available sources, including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in collective bargaining agreements where they have been determined to prevail in a locality for specified occupational class(es) of employees.

(b) *Determination of Prevailing Rates.* Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail. The wage rates and fringe benefits in a collective bargaining agreement covering 2,001 janitors in a locality, for example, prevail if it is determined that no more than 4,000 workers are engaged in such janitorial work in that locality. In the case of information developed from surveys, statistical measurements of central tendency such as a median (a point in a distribution of wage rates where 50 percent of the surveyed workers receive that or a higher rate and an equal number receive a lesser rate) or the mean (average) are considered reliable indicators of the prevailing rate. Which of these statistical measurements will be applied in a given case will be determined after a careful analysis of the overall survey, separate classification data, patterns existing between survey periods, and the way the separate classification data interrelate. Use of the median is the general rule. However, the mean (average) rate may be used in situations where, after analysis, it is determined that the median is not a reliable indicator. Examples where the mean may be used include situations where:

(1) The number of workers studied for the job classification constitutes a relatively small sample and the computed median results in an actual rate that is paid to few of the studied workers in the class;

(2) Statistical deviation such as a skewed (bimodal or multimodal) frequency distribution biases the median rate due to large concentrations of workers toward either end of the distribution curve and the computed median results in an actual rate that is paid to few of the studied workers in the class; or

(3) The computed median rate distorts historic wage relationships between job levels within a classification family, (i.e., Electronic Technician Classes A, B, and C levels within the Electronic technician classification family), between classifications of different skill levels (i.e., a maintenance electrician as compared with a maintenance carpenter), or, for example, yields a wage movement inconsistent with the pattern shown by the survey overall or with related and/or similarly skilled job classifications.

(c) *Due consideration.* In making wage and fringe benefit determinations, section 2(a)(5) of the Act requires that due consideration be given to the rates that would be paid by the Federal agency to the various classes of service employees if § 5341 or § 5332 of Title 5, United States Code, were applicable to them. Section 5341 refers to the Wage Board or Coordinated Federal Wage System for "blue collar" workers and § 5332 refers to the General Schedule pay system for "white collar" workers. The term "due consideration" implies the exercise of discretion on the basis of the facts and circumstances surrounding each determination, recognizing the legislative objective of narrowing the gap between the wage rates and fringe

benefits prevailing for service employees and those established for Federal employees. Each wage determination is based on a survey or other information on the wage rates and fringe benefits being paid in a particular locality and also takes into account those wage rates and fringe benefits which would be paid under Federal pay systems.

§ 4.52 Collective bargaining agreement (successorship) determinations.

Determinations based on the collective bargaining agreement of a predecessor contractor set forth by job classification each provision relating to wages (such as the established straight time hourly or salary rate, cost-of-living allowance, and any shift, hazardous, and other similar pay differentials) and to fringe benefits (such as holiday pay, vacation pay, sick leave pay, life, accidental death, disability, medical, and dental insurance plans, retirement or pension plans, severance pay, supplemental unemployment benefits, saving and thrift plans, stock-option plans, funeral leave, jury/witness leave, or military leave) contained in the predecessor's collective bargaining agreement, as well as conditions governing the payment of such wages and fringe benefits. Accrued wages and fringe benefits and prospective increases therein are also included. Each wage determination is limited in application to a specific contract succeeding a contract which had been performed by a contractor with a collective bargaining agreement, and contains a notice to prospective bidders regarding their obligations under section 4(c) of the Act.

§ 4.53 Locality basis of wage and fringe benefit determinations.

(a) Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees "in the locality". Although the term "locality" has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. In addition, in *Southern Packaging & Storage Co.* v. *United States*, 618 F.2d 1088 (4th Cir. 1980), the court held that a nationwide wage determination normally is not permissible under the Act, but postulated that "there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition.

(b) Where the wage rates and fringe benefits contained in a collective bargaining agreement applicable to the predecessor contract are set forth in a determination, locality in such a determination is typically described as the geographic area in which the Federal facility is situated. The determination applies to any sucessor contractor, regardless of place of performance and whether the place of performance is known at the time of bid advertising.

§ 4.54 Issuance and revision of wage determinations.

(a) Section 4.4 of Subpart A requires that the awarding agency file a notice of intention to make a service contract which is subject to the Act with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, prior to any invitation for bids or the commencement of negotiations for any contract exceeding $2,500. Upon receipt of the notice, the Office of Government Contract Wage Standards may issue a new determination of minimum monetary wages and fringe benefits for the classes of service employees who will perform work on the contract or may revise a determination which is currently in effect.

(b) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in revised determinations. For example, in a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement(s) applicable in that locality, and such agreement(s) specifies increases in such rates to be effective on specific dates, the determinations would be revised to reflect such changes as they become effective. Revised determinations shall be applicable to contracts in accordance with the provisions of § 4.5(a)(2) of Subpart A.

(c) Determinations issued by the Office of Government Contract Wage Standards with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of Subpart A. In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work. These requirements are, of course, the same for all bidders so none will be placed at a competitive disadvantage.

§ 4.55 Review and reconsideration of wage determinations.

(a) *Review by the Administrator.* (1) Any interested party affected by a wage determination issued under section 2(a) of the Act may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Any such request must be accompanied by supporting evidence. In no event shall a request for review of any aspect of a wage determination, including its accuracy or its applicability, be considered after the opening of bids in the case of a competitively advertised procurement, or after the commencement of a contract in the case of a negotiated procurement. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

(2) The Administrator shall, upon receipt of a request for reconsideration, review the data sources relied upon as a basis for the wage determination, the evidence furnished by the party requesting review or reconsideration, and, if necessary to resolve the matter, any additional information found to be relevant to determining prevailing wage rates and fringe benefits in a particular locality. The Administrator, pursuant to a review of available information, may issue a new wage determination, may cause the wage determination to be revised, or may affirm the wage determination issued, and will notify the requesting party in writing of the action taken. The Administrator will render a decision within 30 days of receipt of the request or will notify the requesting party in writing within 30 days of receipt that additional time is necessary.

(b) *Review by the Secretary.* Any decision of the Administrator under paragraph (a) of this section may be appealed to the Secretary within 20 days of issuance of the Administrator's decision. Any such appeal shall be in accordance with the provisions of Part 6 of this title.

Subpart C—Application of the McNamara-O'Hara Service Contract Act

Introductory

§ 4.101 Official rulings and interpretations in this subpart.

(a) The purpose of this subpart is to provide, pursuant to the authority cited in § 4.102, official rulings and interpretations with respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, subcontractors, and employees who perform work under such contracts.

(b) These rulings and interpretations are intended to indicate the construction of the law and regulations which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or by authoritative ruling of the courts, or if it is concluded upon reexamination of an interpretation that it is incorrect. See for example, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Roland Co.* v. *Walling*, 326 U.S. 657 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507–509 (1943); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128 (1940); *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956). The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility for administering and interpreting the Act, including making determinations of coverage. See *Woodside Village* v. *Secretary of Labor*, 611 F. 2d 312 (9th Cir. 1980); *Nello L. Teer Co.* v. *United States*, 348 F.2d 533, 539–540 (Ct. Cl. 1965), cert. denied, 383 U.S. 934 (Davis-Bacon Act); *North Georgia Building & Construction Trades Council* v. *U.S. Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga. 19075) (Davis-Bacon Act); *Zachry Co.* v. *United States*, 344 F.2d 352 (Ct. Cl. 1965) (Davis-Bacon Act); *Curtiss-Wright Corp.* v. *McLucas*, 364 F. Supp. 750, 769–72 (D.N.J. 1973); and 43 Atty. Gen. Ops. —— (March 9, 1979); 53 Comp. Gen. 647, 649–51 (1974); 57 Comp. Gen. 501, 506 (1978).

(c) Court decisions arising under the Act (as well as under related remedial labor standards laws such as the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act) which support policies and interpretations contained in this part are cited where it is believed that they may be helpful. On matters which have not been authoritatively determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). In order that these positions may be made known to persons who may be affected by them, official interpretations and rulings are issued by the Administrator with the advice of the Solicitor of Labor, as authorized by the Secretary (Secretary's Order No. 16–75, Nov. 21, 1975, 40 FR 55913; Employment Standards Order No. 2–76, Feb. 23, 1976, 41 FR 9016). These interpretations are a proper exercise of the Secretary's authority. *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190, 208 (1966), reh. den. 383 U.S. 963 (1966). References to pertinent legislative history, decisions of the Comptroller General and of the Attorney General, and Administrative Law Judges' decisions are also made in this part where it appears they will contribute to a better understanding of the stated interpretations and policies.

(d) The interpretations of the law contained in this part are official interpretations which may be relied upon. The Supreme Court has recognized that such interpretations of the Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (*Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). Interpretations of the agency charged with administering an Act are generally afforded deference by the courts. (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965).) Some of the interpretations in this part relating to the application of the Act are interpretations of provisions which appeared in the original Act before its amendments in 1972 and 1976. Accordingly, the Department of Labor considers these interpretations to be correct, since there were no amendments of the statutory provisions which they interpret. (*United States* v. *Davison Fuel & Dock Co.*, 371 F.2d 705, 711–12 (C.A. 4, 1967).)

(e) On and after final publication of this part in the **Federal Register**, the interpretations contained herein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces certain interpretations previously published in the **Federal Register** and Code of Federal Regulations as Part 4 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part, to the extent they are inconsistent with the rules herein stated, are superseded, rescinded, and withdrawn.

(f) Principles governing the application of the Act as set forth in this subpart are clarified or amplified in particular instances by illustrations and examples based on specific fact situations. Since such illustrations and examples cannot and are not intended to be exhaustive, or to provide guidance on every problem which may arise under the Act, no inference should be drawn from the fact that a subject or illustration is omitted.

(g) It should not be assumed that the lack of discussion of a particular subject in this subpart indicates the adoption of any particular position by the Department of Labor with respect to such matter or to constitute an interpretation, practice, or enforcement policy. If doubt arises or a question

exists, inquiries with respect to matters other than safety and health standards should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, or to any regional office of the Wage and Hour Division. Safety and health inquiries should be addressed to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210, or to any OSHA regional office. A full description of the facts and any relevant documents should be submitted if an official ruling is desired.

§ 4.102 Administration of the Act.

As provided by section 4 of the Act and under provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 38, 39) which are made expressly applicable for the purpose, the Secretary of Labor is authorized and directed to administer and enforce the provisions of the McNamara-O'Hara Service Contract Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act. The Secretary is also authorized to make reasonable limitations and to make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from provisions of the Act (except section 10), but only in special circumstances where it is determined that such action is necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business and is in accord with the remedial purposes of the Act to protect prevailing labor standards. The authority and enforcement powers of the Secretary under the Act are coextensive with the authority and powers under the Walsh-Healey Act. *Curtiss Wright Corp.* v. *McLucas* 364 F. Supp. 750, 769 (D N] 1973).

§ 4.103 The Act.

The McNamara-O'Hara Service Contract Act of 1965 (Pub. L. 89–286, 79 Stat. 1034, 41 U.S.C. 351 et seq.), hereinafter referred to as the Act, was approved by the President on October 22, 1965 (1 Weekly Compilation of Presidential Documents 428). It establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into with the Federal Government and the District of Columbia. It applies to contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after January 20, 1966. It has been amended by Pub. L. 92–473, 86 Stat. 798; by Pub. L. 93–57, 87 Stat. 140; and by Pub. L. 94–489, 90 Stat. 2358.

§ 4.104 What the Act provides, generally.

(a) The provisions of the Act apply to contracts, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees. Under its provisions, every contract subject to the Act (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 must contain stipulations as set forth in § 4.6 of this Part requiring (a) that specified minimum monetary wages and fringe benefits determined by the Secretary of Labor (based on wage rates and fringe benefits prevailing in the locality or, in specified circumstances, the wage rates and fringe benefits contained in a collective bargaining agreement applicable to employees who performed on a predecessor contract) be paid to service employees employed by the contractor or any subcontractor in performing the services contracted for; (b) that working conditions of such employees which are under the control of the contractor or subcontractor meet safety and health standards; and (c) that notice be given to such employees of the compensation due them under the minimum wage and fringe benefits provisions of the contract. Contractors performing work subject to the Act thus enter into competition to obtain Government business on terms of which they are fairly forewarned by inclusion in the contract. (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507 (1943).) The Act's purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment. (See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2–3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. 3–4 (1965).) The Act does not permit the monetary wage rates specified in such a contract to be less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, as amended (29 U.S.C. 206(a)(1)). In addition, it is a violation of the Act for any contractor or subcontractor under a Federal contract subject to the Act, regardless of the amount of the contract, to pay any of his employees engaged in performing work on the contract less than such Fair Labor Standards Act minimum wage. Contracts of $2,500 or less are not, however, required to contain the stipulations described above. These provisions of the Service Contract Act are implemented by the regulations contained in this Part 4 and are discussed in more detail in subsequent sections of Subparts C, D, and E.

§ 4.105 The Act as amended.

(a) The provisions of the Act (see §§ 4.102–4.103) were amended, effective October 9, 1972, by Public Law 92–473, signed into law by the President on that date. By virtue of amendments made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see §§ 4.159–4.179) were revised to impose on successor contractors certain requirements (see § 4.1b) with respect to payment of wage rates and fringe benefits based on those agreed upon for substantially the same services for the same location in collective bargaining agreements entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length). The Secretary of Labor is to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act. A new paragraph (5) added to section 2(a) of the Act requires a statement in the government service contract of the rates that would be paid by the contracting agency in the event of its direct employment of those classes of service employees to be employed on the contract work who, if directly employed by the agency, would receive wages determined as provided in 5 U.S.C. 5341. The Secretary of Labor is directed to give due consideration to such rates in determining prevailing monetary wages and fringe benefits under the Act's provisions. Other provisions of the 1972 amendments include the addition of a new section 10 to the Act to insure that wage determinations are issued by the Secretary for substantially all service contracts subject to section 2(a) of the Act at the earliest administratively feasible time; an amendment to section 4(b) of the Act to provide, in addition to the conditions previously specified for issuance of administrative limitations, variations, tolerances, and exemptions (see § 4.123), that administrative action in this regard shall be taken only in special circumstances where the Secretary determines that it is in accord with the remedial purpose of the Act to protect prevailing labor standards; and a new subsection (d) added to section 4 of the Act providing for the award of service contracts for terms not more than 5 years with provision for periodic adjustment of minimum wage rates and fringe benefits payable thereunder by

the issuance of wage determinations by the Secretary of Labor during the term of the contract. A further amendment to section 5(a) of the Act requires the names of contractors found to have violated the Act to be submitted for the debarment list (see § 4.188) not later than 90 days after the hearing examiner's finding of violation unless the Secretary recommends relief, and provides that such recommendations shall be made only because of unusual circumstances.

(b) The provisions of the Act were amended by Pub. L. 93–57, 87 Stat. 140, effective July 6, 1973, to extend the Act's coverage to Canton Island.

(c) The provisions of the Act were amended by Pub. L. 94–489, 90 Stat. 2358, approved October 13, 1976, to extend the Act's coverage to white collar workers. Accordingly, the minimum wage protection of the Act now extends to all workers, both blue collar and white collar, other than persons employed in a bona fide executive, administrative, or professional capacity as those terms are used in the Fair Labor Standards Act and in Part 541 of Title 29. Pub. L. 94–489 accomplished this change by adding to Section 2(a)(5) of the Act a reference to 5 U.S.C. 5332, which deals with white collar workers, and by amending the definition of service contract employee in Section 8(b) of the Act.

(d) Included in this Part 4 and in Part 6 of this subtitle are provisions to give effect to the amendments mentioned in this section.

§ 4.106 [Reserved]

Agencies Whose Contracts May Be Covered

§ 4.107 Federal contracts.

(a) Section 2(a) of the Act covers contracts (and any bid specification therefor) "entered into by the United States" and section 2(b) applies to contracts entered into "with the Federal Government." Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to authority derived from the Constitution and laws of the United States. The Act does not authorize any distinction in this respect between such agencies and instrumentalities on the basis of their inclusion in or independence from the executive, legislative, or judicial branches of the Government, the fact that they may be corporate in form, or the fact that payment for the contract services is not made from appropriated funds. Thus, contracts of wholly owned Government corporations, such as the Postal Service, and those of nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces, or of other Federal agencies, such as Federal Reserve Banks, are included among those subject to the general coverage of the Act. (*Brinks, Inc.* v. *Board of Governors of the Federal Reserve System*, 466 F. Supp. 116 (D DC 1979); 43 Atty. Gen. Ops. ——— (September 26, 1978).) Contracts with the Federal Government and contracts entered into "by the United States" within the meaning of the Act do not, however, include contracts for services entered into on their own behalf by agencies or instrumentalities of other Governments within the United States, such as those of the several States and their political subdivisions, or of Puerto Rico, the Virgin Islands, Guam, or American Samoa.

(b) Where a Federal agency exercises its contracting authority to procure services desired by the Government, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States. Such contracts may be entered into by the United States either through a direct award by a Federal agency or through the exercise by another agency (whether governmental or private) of authority granted to it to procure services for or on behalf of a Federal agency. Thus, sometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor which has the responsibility for all work to be done in connection with the operation and management of a Federal plant, installation, facility, or program, together with the legal authority to act as agency for and on behalf of the Government and to obligate Government funds in the procurement of all services and supplies necessary to carry out the entire program of operation. The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are deemed to be contracts entered into by the United States and contracts with the Federal Government within the meaning of the Act. However, service contracts entered into by State or local public bodies with purveyors of services are not deemed to be entered into by the United States merely because such services are paid for with funds of the public body which have been received from the Federal Government as a grant under a Federal program. For example, a contract entered into by a municipal housing authority for tree trimming, tree removal, and landscaping for an urban renewal project financed by Federal funds is not a contract entered into by the United States and is not covered by the Service Contract Act. Similarly, contracts let under the Medicaid program which are financed by Federally-assisted grants to the States, and contracts which provide for insurance benefits to a third party, under the Medicare program are not subject to the Act.

§ 4.108 District of Columbia contracts.

Section 2(a) of the Act covers contracts (and any bid specification therefor) in excess of $2,500 which are "entered into by the * * * District of Columbia." The contracts of all agencies and instrumentalities which procure contract services for or on behalf of the District or under the authority of the District Government are contracts entered into by the District of Columbia within the meaning of this provision. Such contracts are also considered contracts entered into with the Federal Government or the United States within the meaning of section 2(b), section 5, and the other provisions of the Act. The legislative history indicates no intent to distinguish District of Columbia contracts from the other contracts made subject to the Act, and traditionally, under other statutes, District Government contracts have been made subject to the same labor standards provisions as contracts of other agencies and instrumentalities of the United States.

§ 4.109 [Reserved]

Covered Contracts Generally

§ 4.110 What contracts are covered.

(a) The Act covers service contracts of the Federal agencies described in §§ 4.107–4.108. Except as otherwise specifically provided (see §§ 4.115 et seq.), all such contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, are subject to its terms. This is true of contracts entered into by such agencies with States or their political subdivisions, as well as such contracts entered into with private employers. Contracts between a Federal or District of Columbia agency and another such agency are not within the purview of the Act; however, "subcontracts" awarded under "prime contracts" between the Small Business

Administration and another Federal agency pursuant to various preferential set-aside programs, such as the 8(a) program, are covered by the Act. It makes no difference in the coverage of a contract whether the contract services are procured through negotiation or through advertising for bids. Also, the mere fact that an agreement is not reduced to writing does not mean that the contract is not within the coverage of the Act. The amount of the contract is not determinative of the Act's coverage, although the requirements are different for contracts in excess of $2,500 and for contracts of a lesser amount. The Act is applicable to the contract if the principal purpose of the contract is to furnish services, if such services are to be furnished in the United States, and if service employees will be used in providing such services. These elements of coverage will be discussed separately in the following sections.

(b) *"Contract" as including "any bid specification".* The Act, by its express terms, applies to "every contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services in the United States through the use of service employees". Thus, as noted in subsequent sections discussing the application of the Act to particular contracts, the Act's provisions may be applicable to separate specifications for services in a contract but not to other contract specifications such as construction or supply specifications. Accordingly, except where otherwise noted, the term "contract" as used in this part shall be deemed to include any contract subject wholly or in part to the provisions of the Act. (See § 4.1a(e).)

§ 4.111 Contracts "to furnish services."

(a) *"Principal purpose" as criterion.* Under its terms, the Act applies to a "contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services * * *." The principal purpose criterion applies only in determining whether a contract or bid specification is for services. Covered contracts need not be performed "principally in the United States" or "principally through the use of service employees." (See §§ 4.112 and 4.113.) If the principal purpose is to provide something other than services of the character contemplated by the Act and any such services which may be performed are only incidental to the performance of a contract or bid specification for another purpose, the Act does not apply. However, as will be seen by examining the illustrative examples of covered contracts in §§ 4.130 et seq., no hard and fast rule can be laid down as to the precise meaning of the term "principal purpose". This remedial Act is intended to be applied to a wide variety of contracts, and the Act does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services. Further, the nomenclature, type, or particular form of contract used by procurement agencies is not determinative of coverage. Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. Even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case. This principle is illustrated by the examples set forth in § 4.131.

(b) *Determining whether a contract is for "services", generally.* Except indirectly through the definition of "service employee" the Act does not define, or limit, the types of "services" which may be contracted for under a contract "the principal purpose of which is to furnish services". As stated in the congressional committee reports on the legislation, the types of service contracts covered by its provisions are varied. Among the examples cited are contracts for laundry and dry cleaning, for transportation of the mail, for custodial, janitorial, or guard service, for packing and crating, for food service, and for miscellaneous housekeeping services. Covered contracts for services would also include those for other types of services which may be performed through the use of the various classes of service employees included in the definition in section 8(b) of the Act (see § 4.113). Examples of some such contracts are set forth in §§ 4.130 et seq. In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for "services" those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act. The Committee reports in both the House and Senate, and statements made on the floor of the House, took note of the labor standards protections afforded by these two Acts to employees engaged in the performance of construction and supply contracts and observed: "The service contract is now the only remaining category of Federal contracts to which no labor standards protections apply" (H. Rept. 948, 89th Cong., 1st Sess., p. 1; see also S. Rept. 798, 89th Cong., 1st Sess., p. 1; daily Congressional Record Sept. 20, 1965, p. 23497). A similar understanding of contracts principally for "services" as embracing contracts other than those for construction or supplies is reflected in the statement of President Johnson upon signing the Act (1 Weekly Compilation of Presidential Documents, p. 428).

§ 4.112 Contracts to furnish services "in the United States."

(a) The Act covers contract services furnished "in the United States, including" any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Islands, Eniwetok Atoll, Kwajalein Atoll and Johnston Island. The definition expressly excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country. Services to be performed on a vessel operating exclusively in international or foreign waters outside the geographic areas named in section 8(d) would not be services furnished "in the United States" within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographic limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. However, if a service contract is to be performed in part within and in part without these geographic limits, the stipulations required by § 4.6 or § 4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case, the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

§ 4.113 Contracts to furnish services "through the use of service employees".

(a) *Use of "service employees" in a contract performance.* (1) As indicated in § 4.110, the Act covers service contracts only where "service employees" will be used in performing the services which it is the purpose of the contract to procure. A service contract otherwise subject to the Act ordinarily will meet this condition if any of the services which it is the principal

purpose of the contract to obtain will be furnished through the use of any service employee or employees. Even where it is contemplated that the services (of the kind performed by service employees) will be performed individually by the contractor, the contract cannot be considered outside the reach of the Act unless it is known in advance that the contractor or any subcontractor will in no event use any service employee during the term of the contract in furnishing the services called for. If the contracting officer knows when advertising for bids or concluding negotiations that no such employee will be used by the contractor in any event in providing the contract services, the Act will not be deemed applicable to the contract and the contract clauses required by § 4.6 or § 4.7 may be omitted. The fact that the required services will be performed by municipal employees or employees of a State would not remove the contract from the purview of the Act, as this Act does not contain any exemption for contracts performed by such employees. Also as discussed in subparagraph (2) of this paragraph where the services the Government wants under the contract are of a type that will require the use of service employees as defined in section 8(b) of the Act, the contract is not taken out of the purview of the Act by the fact that the manner in which the services of such employees are performed will be subject to the continuing overall supervision of professional personnel to whom the Act does not apply.

(2) The coverage of the Act does not extend, however, to contracts which have as their principal purpose the procurement of a type of service in the furnishing of which no service employees will be used. A contract for medical services by professional medical personnel is an example of such a contract. So are other contracts under which the desired services called for by the Government are to be performed exclusively by bona fide executive, administrative, or professional personnel as defined in Part 541 of this title (see paragraph (b) of this section).

(3)(i) In addition to the types of contracts discussed in subparagraph (2) of this part, the Department does not require application of the Act to any contract for professional services which is performed essentially by professional employees, with the use of service employees being only a minor factor in the performance of the contract. This tolerance does not extend to a contract for professional services which may involve the use of service employees to a significant or substantial extent even though there is some use of professional employees in the performance of the contract. This tolerance is issued pursuant to section 4(b) of the Act. It has been found to be necessary and proper in the public interest and to be in accord with the remedial purpose of the Act.

(ii) In applying this tolerance, if service employees constitute less than 10 percent of the total projected employment or staff years under a contract, the Act will not be applied to such contract. If service employees constitute 20 percent or more of the total projected employment or staff years under the contract, the Act will be required to be applied, since this would clearly be a significant use of service employees. Where the projected use of service employees is between 10 and 20 percent, the Department of Labor should be consulted, since such situations require consideration of other factors such as the nature of the contract work, the type of work performed by service employees, how necessary the work is to contract performance, the amount of contract work performed by service employees vis-a-vis professional employees, and the total number of service employees employed on the contract.

(4) Under these principles, the Act applies to many contracts for research and development, statistical surveys, engineering research and designing, computer services, etc., because the contracts may involve the use of a significant number of service employees. Laboratory technicians, interviewers, draftsmen, computer operators, and data entry personnel are a few examples of the classes of service employees that may be employed on such contracts. While the work of such service employees may be performed under the supervision and direction of professional personnel and the final analysis and reporting may be performed by professionals, nevertheless, the work performed by the service employees is a significant and important part of the overall contract requirements.

(b) *"Service employees" defined.* In determining whether or not any of the contract services will be performed by service employees, the definition of "service employee" in section 8(b) of the Act is controlling. It provides:

> The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

It will be noted that the definition expressly excludes those employees who are employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title and as discussed further in § 4.156. Some of the specific types of service employees who may be employed on service contracts are noted in other sections which discuss the application of the Act to employees.

§ 4.114 Subcontracts.

(a) *"Contractor" as including "subcontractor."* Except where otherwise noted or where the term "Government prime contractor" is used, the term "contractor" as used in this Part 4 shall be deemed to include a subcontractor. The term "contractor" as used in the contract clauses required by Subpart A in any subcontract under a covered contract shall be deemed to refer to the subcontractor, or, if in a subcontract entered into by such a subcontractor, shall be deemed to refer to the lower level subcontractor. (See § 4.1a(f).)

(b) *Liability of Prime Contractor.* When a contractor undertakes a contract subject to the Act, the contractor agrees to assume the obligation that the Act's labor standards will be observed in furnishing the required services. This obligation may not be relieved by shifting all or part of the work to another, and the prime contractor is jointly and severally liable with any subcontractor for any acts, omissions, or underpayments on the part of a subcontractor which would constitute a violation of the prime contract. The prime contractor is required to include the prescribed contract clauses (§§ 4.6–4.7) and applicable wage determination in all subcontracts and the appropriate enforcement sanctions provided under the Act may be invoked against both the prime contractor and the subcontractor in the event of failure to comply with any of the Act's requirements.

Specific Exclusions

§ 4.115 Exemptions and exceptions generally.

(a) The Act, in section 7, specifically excludes from its coverage certain contracts and work which might otherwise come within its terms as procurements the principal purpose of

which is to furnish services through the use of service employees.

(b) The statutory exemptions in section 7 of the Act are as follows:

(1) Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healy Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals;

(7) Any contract with the Post Office Department, (now the U.S. Postal Service) the principal purpose of which is the operation of postal contract stations.

§ 4.116 Contracts for construction activity.

(a) *General scope of exemption.* The Act, in paragraph (1) of section 7, exempts from its provisions "any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works." This language corresponds to the language used in the Davis-Bacon Act to describe its coverage (40 U.S.C. 276a). The legislative history of the McNamara-O'Hara Service Contract Act indicates that the purpose of the provision is to avoid overlapping coverage of the two acts by excluding from the application of the McNamara-O'Hara Act those contracts (and any bid specification therefor) to which the Davis-Bacon Act is applicable and in the performance of which the labor standards of that Act are intended to govern the compensation payable to the employees of contractors and subcontractors on the work. (See H. Rept. 798, pp. 2, 5, and H. Rept. 948, pp. 1, 5, also Hearing, Special Subcommittee on Labor, House Committee on Education and Labor, p. 9 (89th Cong., 1st sess.).) The intent of section 7(1) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe benefits are determinable under the Davis-Bacon Act.

(b) *Contracts not within exemption.* Section 7(1) does not exempt contracts which, for purposes of the Davis-Bacon Act, are not considered to be of the character described by the corresponding language in that Act, and to which the provisions of the Davis-Bacon Act are therefore not applied. Such contracts are accordingly subject to the McNamara-O'Hara Act where their principal purpose is to furnish services in the United States through the use of service employees. For example, a contract for clearing timber or brush from land or for the demolition or dismantling of buildings or other structures located thereon may be a contract for construction activity subject to the Davis-Bacon Act where it appears that the clearing of the site is to be followed by the construction of a public building or public work at the same location. If, however, no further construction activity at the site is contemplated the Davis-Bacon Act is considered inapplicable to such clearing, demolition, or dismantling work. In such event, the exemption in section 7(1) of the McNamara-O'Hara Act has no application and the contract will be subject to the Act in accordance with its general coverage provisions. It should be noted that the fact that a contract may be labeled as one for the sale and removal of property, such as salvage material, does not negate coverage under the Act even though title to the removable property passes to the contractor. While the value of the property being sold in relation to the services performed under the contract is a factor to be considered in determining coverage, the principal purpose of removal, dismantling, and demolition contracts is to furnish services through the use of service employees and thus these contracts are subject to the Act. (See also § 4.131.)

(c) *Partially exempt contracts.* (1) Instances may arise in which, for the convenience of the Government, instead of awarding separate contracts for construction work subject to the Davis-Bacon Act and for services of a different type to be performed by service employees, the contracting officer may include separate specifications for each type of work in a single contract calling for the performance of both types of work. For example, a contracting agency may invite bids for the installation of a plumbing system or for the installation of a security alarm system in a public building and for the maintenance of the system for one year, under separate bid specifications. In such a case, the exemption provided by section 7(1) will be deemed applicable only to that portion of the contract which calls for construction activity subject to the Davis-Bacon Act. The contract documents are required to contain the clauses prescribed by § 4.6 for application to the contract obligation to furnish services through the use of service employees, and the provisions of the McNamara-O'Hara Act will apply to that portion of the contract.

(2) *Supply, services, or maintenance contracts involving construction work.* The provisions of both the Davis-Bacon Act and the Service Contract Act would generally apply to contracts involving construction and service work. The exemption provided by section 7(1) of the Act would be applicable to construction contract work in such hybrid contracts where

(i) The contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work (hereinafter referred to as construction) or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract (the word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and

(ii) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract.

§ 4.117 Work subject to requirements of Walsh-Healey Act [Reserved]

§ 4.118 Contracts for carriage subject to published tariff rates.

The Act, in paragraph (3) of section 7, exempts from its provisions "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect". In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is actually governed by published tariff rates in effect pursuant to State or Federal law for such carriage.

The contracts excluded from the reach of the Act by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the transportation contract between the Government and the carrier is evidenced by a bill of lading citing the published tariff rate. An administrative exemption has been provided for certain contracts where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act. See § 4.123(d). It should be noted further that only such contracts for the carriage of "freight or personnel" are exempt. Further, the exemption cannot apply where the contracts are principally for packing, crating, handling, loading, and/or storage of goods, with local drayage constituting an incidental part of the contract work. Also this exemption thus does not exclude any contracts for the transportation of mail from the application of the Act, because the term "freight" does not include the mail. (For an administrative exemption of certain contracts with common carriers for carriage of mail, see § 4.123(d)).

§ 4.119 Contracts for services of communications companies.

The Act, in paragraph (4) of section 7, exempts from its provisions "any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934." This exemption is applicable to contracts with such companies for communication services regulated under the Communications Act. It does not exempt from the Act any contracts with such companies to furnish any other kinds of services through the use of service employees.

§ 4.120 Contracts for public utility services.

The Act, in paragraph (5) of section 7, exempts from its provisions "any contract for public utility services, including electric light and power, water, steam, and gas." This exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local, or Federal law governing operations of public utility enterprises. Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to such rate regulation, are not exempt from the Act. Among the contracts included in the exemption would be those between Federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities and State agencies engaged in the transmission and sale of electric power and energy.

(See H. Rept. No. 948, 89th Cong., 1st sess., p. 4)

§ 4.121 Contracts for individual services.

The Act, in paragraph (6) of section 7, exempts from its provisions "any employment contract providing for direct services to a Federal agency by an individual or individuals." This exemption, which applies only to an "employment contract" for "direct services," makes it clear that the Act's application to Federal contracts for services is intended to be limited to service contracts entered into with independent contractors. If a contract to furnish services (to be performed by a service employee as defined in the Act) provides that they will be furnished directly to the Federal agency by the individual under conditions or circumstances which will make him an employee of the agency in providing the contract service, the exemption applies and the contract will not be subject to the Act's provisions. The exemption does not exclude from the Act any contract for services of the kind performed by service employees which is entered into with an independent contractor whose individual services will be used in performing the contract, but as noted earlier in § 4.113, such a contract would be outside the general coverage of the Act if only the contractor's individual services would be furnished and no service employee would in any event be used in its performance.

§ 4.122 Contracts for operation of postal contract stations.

The Act, in paragraph (7) of section 7, exempts from its provisions "any contract with the Post Office Department, [now the U.S. Postal Service], the principal purpose of which is the operation of postal contract stations." The exemption is limited to postal service contracts having the operation of such stations as their principal purpose. A provision of the legislation which would also have exempted contracts with the U.S. Postal Service having as their principal purpose the transportation, handling, or delivery of the mails was eliminated from the bill during its consideration by the House Committee on Education and Labor (H. Rept. 948, p. 1, 89th Cong., 1st sess.).

§ 4.123 Administrative limitations, variances, tolerances, and exemptions.

(a) *Authority of the Secretary.* Section 4(b) of the Act as amended in 1972 authorizes the Secretary to "provide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than § 10), but only in special circumstances where he determines that such limitation, variation, tolerances, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards." This authority is similar to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

(b) *Administrative action under section 4(b) of the Act.* The authority conferred on the Secretary by section 4(b) of the Act will be exercised with due regard to the remedial purpose of the statute to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards. Administrative action consistent with this statutory purpose may be taken under section 4(b) with or without a request therefor, when found necessary and proper in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a request for exemption from the Act's provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards. If the request for administrative action under section 4(b) is not made by the headquarters office of the contracting agency to which the contract services are to be provided, the views of such office on the matter should be obtained and submitted with the request or the contracting officer may forward such a request through channels to the agency headquarters for submission with the latter's views to the Administrator of the Wage and Hour

Division, Department of Labor, whenever any wage payment issues are involved. Any request relating to an occupational safety or health issue shall be submitted to the Assistant Secretary for Occupational Safety and Health, Department of Labor.

(c) *Documentation of official action under section 4(b).* All papers and documents made a part of the official record of administrative action pursuant to section 4(b) of the Act are available for public inspection in accordance with the regulations in 29 CFR Part 70. Limitations, variations, tolerances and exemptions of general applicability and legal effect promulgated pursuant to such authority are published in the **Federal Register** and made a part of the rules incorporated in this Part 4. For convenience in use of the rules, they are generally set forth in the sections of this part covering the subject matter to which they relate. (See, for example, the exemption provided in §§ 4.5(b), 4.6(o), and the limitations set forth in §§ 4.115 et seq.) Any rules that are promulgated under section 4(b) of the Act relating to subject matter not dealt with elsewhere in this Part 4 will be set forth immediately following this paragraph.

(d) In addition to the statutory exemptions in § 7 of the Act (see § 4.115(c)), the following types of contracts have been exempted from all the provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident.

(3) Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

§§ 4.124—4.129 [Reserved]

Particular Application of Contract Coverage Principles

§ 4.130 Types of covered service contracts illustrated.

(a) The types of contracts, the principal purpose of which is to furnish services through the use of service employees, are too numerous and varied to permit an exhaustive listing. The following list is illustrative, however, of the types of services called for by such contracts that have been found to come within the coverage of the Act. Other examples of covered contracts are discussed in other sections of this subpart.

(1) Aerial spraying
(2) Aerial reconnaissance for fire detection
(3) Ambulance service
(4) Barber and beauty shop services
(5) Cafeteria and food service
(6) Carpet laying (other than part of construction) and cleaning
(7) Cataloging services
(8) Chemical testing and analysis
(9) Clothing alteration and repair
(10) Computer services
(11) Concessionaire services
(12) Custodial, janitorial, and housekeeping services
(13) Data collection, processing, and/or analysis services
(14) Demolition, dismantling and/or removal of buildings and other real property (other than part of construction)
(15) Drafting and illustrating
(16) Electronic equipment maintenance and operation and engineering support services
(17) Exploratory drilling (other than part of construction)
(18) Film processing
(19) Fire fighting and protection
(20) Fueling services
(21) Furniture repair and rehabilitation
(22) Geological field surveys and testing
(23) Grounds maintenance
(24) Guard and watchman security service
(25) Inventory services
(26) Keypunching and keyverifying contracts
(27) Laboratory analysis services
(28) Landscaping (other than part of construction)
(29) Laundry and dry cleaning
(30) Linen supply services
(31) Lodging and/or meals
(32) Mail hauling
(33) Mailing and addressing services
(34) Maintenance and repair of all types of equipment, e.g., aircraft, engines, electrical motors, vehicles, and automated data processing, electronic, telecommunications, office and related business, and construction equipment
(35) Mess attendant services
(36) Mortuary services
(37) Motor pool operation
(38) Nursing home services
(39) Operation, maintenance, or logistic support of a Federal facility
(40) Packing and crating
(41) Parking services
(42) Pest control
(43) Property management
(44) Snow removal
(45) Stenographic reporting
(46) Support services at military installations
(47) Surveying and mapping services (preliminary but not directly related to construction)
(48) Taxicab services
(49) Telephone and field interview services
(50) Timber removal/sale contracts
(51) Tire and tube repairs
(52) Transporting property or personnel (except as explained in § 4.118)
(53) Trash and garbage removal
(54) Vending machine services
(55) Visual and graphic arts
(56) Warehousing or storage

§ 4.131 Furnishing services involving more than use of labor.

(a) If the principal purpose of a contract is to furnish services in the performance of which service employees will be used, the Act will apply to the contract, in the absence of an exemption, even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services called for by its terms. The Act is concerned with protecting the labor standards of workers engaged in performing such contracts, and is applicable if the statutory coverage test is met, regardless of the form in which the contract is drafted. The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible nonlabor items in performing the contract obligations will be considered but are not necessarily determinative. A procurement that requires tangible items to be supplied to the Government or the contractor as a part of the service furnished is covered by the Act so long as the facts show that the contract is chiefly for services, and that the furnishing of tangible items is of secondary importance.

(b) Some examples of covered contracts illustrating these principles may be helpful. One such example is a contract for the maintenance and repair of typewriters. Such a contract may require the contractor to furnish typewriter parts, as the need arises, in

performing the contract services. Since this does not change the principal purpose of the contract, which is to furnish the maintenance and repair services through the use of service employees, the contract remains subject to the Act.

(c) Another example of the application of the above principle is a contract for the recurrent supply to a Government agency of freshly laundered items on a rental basis. It is plain from the legislative history that such a contract is typical of those intended to be covered by the Act. S. Rept. 798, 89th Cong., 1st Sess., p. 2; H. Rept. 948, 89th Cong., 1st Sess., p. 2. Although tangible items owned by the contractor are provided on a rental basis for the use of the Government, the service furnished by the contractor in making them available for such use when and where they are needed, through the use of service employees who launder and deliver them, is the principal purpose of the contract.

(d) Similarly, a contract in the form of rental of equipment with operators for the plowing and reseeding of a park area is a service contract. The Act applies to it because its principal purpose is the service of plowing and reseeding, which will be performed by service employees, although as a necessary incident the contractor is required to furnish equipment. For like reasons the contracts for aerial spraying and aerial reconnaissance listed in § 4.130 are covered, even though the use of airplanes, an expensive item of equipment, is essential in performing such services. In general, contracts under which the contractor agrees to provide the Government with vehicles or equipment on a rental basis with drivers or operators for the purpose of furnishing services are covered by the Act. Such contracts are not considered contracts for furnishing equipment within the meaning of the Walsh-Healey Public Contracts Act. On the other hand, contracts under which the contractor provides equipment with operators for the purpose of construction of a public building or public work, such as road resurfacing or dike repair, even where the work is performed under the supervision of Government employees, would be within the exemption in section 7(1) of the Act as contracts for construction subject to the Davis-Bacon Act. (See § 4.116.)

(e) Contracts for data collection, statistical surveys, computer services, and the like are within the general coverage of the Act even though the contractor may be required to furnish such tangible items as written reports or computer printouts, since items of this nature are considered to be of secondary importance to the services which it is the principal purpose of the contract to procure.

(f) Contracts under which the contractor receives tangible items from the Government in return for furnishing services (which items are in lieu of or in addition to monetary consideration granted by either party) are covered by the Act where the facts show that the furnishing of such services is the principal purpose of the contracts. For example, so-called "timber sales" contracts are subject to the Act where removal of trees is accomplished for the purpose of forest management, such as removal of diseased or damaged trees; to open up the forest for public use, such as camping; or for similar services. Similarly, even where the removal of trees is not accomplished for the purpose of forest management or some other service, such contracts generally contain service specifications which are subject to the act, such as building of temporary roads, firefighting and control, erosion control, slash removal and trimming, and removal of diseased or injured trees. Under these contracts, the fact that a contractor will receive a substantial amount of timber is of secondary importance to the services which it is the principal purpose of the Government contract (or specification) to procure. The same principle applies with respect to so-called property removal or disposal contracts which involve demolition of buildings or other structures.

§ 4.132 Services and other items to be furnished under a single contract.

If the principal purpose of a contract or bid specification (i.e., a line item in a bid or contract) is to furnish services through the use of service employees within the meaning of the Act, the contract to furnish such services is not removed from the Act's coverage merely because, as a matter of convenience in procurement, it is combined in a single contract document with specifications for the procurement of different or unrelated items. For example, a contracting agency may invite bids for supplying a quantity of new typewriters and for the maintenance and repair of the typewriters under separate bid specifications. The principal purpose of the latter, but not the former, would be the furnishing of services through the use of service employees; however, the specifications for each might be included in a single contract with a typewriter company for the convenience of the parties. In such a case, the contract obligation to furnish the maintenance and repair services would be subject to the provisions of the Act. The "principal purpose" test would be applicable to the specification for such services rather than to the combined contract. The Act would not apply in such case to the contract obligation to furnish new typewriters, although its performance would be subject to the provisions of the Walsh-Healey Public Contracts Act if the amount was in excess of $10,000. With respect to contracts which contain separate specifications for the furnishing of services and construction activity, see § 4.116(c).

§ 4.133 [Reserved]

§ 4.134 Contracts outside the Act's coverage.

(a) Contracts entered into by agencies other than those of the Federal Government or the District of Columbia as described in §§ 4.107–4.108 are not within the purview of the Act. Thus, the Act does not cover service contracts entered into with any agencies of Puerto Rico, the Virgin Islands, American Samoa, or Guam acting in behalf of their respective local governments. Similarly, it does not cover service contracts entered into by agencies of States or local public bodies, not acting as agents for or on behalf of the United States or the District of Columbia, even though Federal financial assistance may be provided for such contracts under Federal law or the terms and conditions specified in Federal law may govern the award and operation of the contract.

(b) Further, as already noted in §§ 4.111–4.113, the Act does not apply to Government contracts or bid specifications which do not have as their principal purpose the furnishing of services, or which call for no services to be furnished within the United States or through the use of service employees as those terms are defined in the Act. Clearly outside the Act's coverage for these reasons are such contracts as those for the purchase of tangible products which the Government needs (e.g. vehicles, office equipment, and supplies), for the logistic support of an air base in a foreign country, or for the services of a lawyer to examine the title to land. Similarly, where the Government contracts for a lease of building space for Government occupancy and the building owner furnishes general janitorial and other building services on an incidental basis through the use of service employees, the leasing of the space rather than the furnishing of the building services is the principal purpose of the contract, and the Act does not apply. However, if the

contract contains a separate line item or items which requires the contractor to furnish specified levels and frequencies of janitorial, security, or other maintenance services, the requirement for such services is considered to be a separate specification the principal purpose of which is the furnishing of services, and as set forth in § 4.132, the Act would apply to such specification. Another type of contract which is outside the coverage of the Act because it is not for the principal purpose of furnishing services may be illustrated by a contract for the rental of parking space under which the Government agency is simply given a lease or license to use the contractor's real property. Such a contract is to be distinguished from contracts for the storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles.

(c) There are a number of types of contracts which, while outside the Act's coverage in the usual case, may be subject to its provisions under the conditions and circumstances of a particular procurement, because these may be such as to require a different view of the principal purpose of the contract. Thus, the ordinary contract for the recapping of tires would have as its principal purpose the manufacture and furnishing of rebuilt tires for the Government rather than the furnishing of services through the use of service employees, and thus would be outside the Act's coverage. Similarly, contracts calling for printing, reproduction, and duplicating ordinarily would appear to have as their principal purpose the furnishing in quantity of printed, reproduced or duplicated written materials rather than the furnishing of reproduction services through the use of service employees. However, in a particular case, the terms, conditions, and circumstances of the procurement may be such that the facts would show its purpose to be chiefly the furnishing of services (e.g. repair services, typesetting, photocopying, editing, etc.), and where such services require the use of service employees the contract would be subject to the Act unless excluded therefrom for some other reason.

§§ 4.135–4.139 [Reserved]

Determining Amount of Contract

§ 4.140 Significance of contract amount.

As set forth in § 4.104 and in the requirements of §§ 4.6–4.7, the obligations of a contractor with respect to labor standards differ in the case of a covered and nonexempt contract, depending on whether the contract is or is not in excess of $2,500. Rules for resolving questions that may arise as to whether a contract is or is not in excess of this figure are set forth in the following sections.

§ 4.141 General criteria for measuring amount.

(a) In general, the contract amount is measured by the consideration agreed to be paid, whether in money or other valuable consideration, in return for the obligations assumed under the contract. Thus, even though a contractor, such as a wrecker entering into a contract with the Government to raze a building on a site which will remain vacant, may not be entitled to receive any money from the Government for such work under his contract or may even agree to pay the Government in return for the right to dispose of the salvaged materials, the contract will be deemed one in excess of $2,500 if the value of the property obtained by the contractor, less anything he might pay the Government, is in excess of such amount. In addition, concession contracts are considered to be contracts in excess of $2,500 if the contractor's gross receipts under the contract may exceed $2,500.

(b) All bids from the same person on the same invitation for bids will constitute a single offer, and the total award to such person will determine the amount involved for purposes of the Act. Where the procurement is made without formal advertising, in arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising. Therefore, if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the Act is not measured by the amount of an individual purchase order. In such cases, if the continuing services were procured through formal advertising, the contract term would typically be for one year, and the monthly purchase orders must be grouped together to determine whether the yearly amount may exceed $2,500. However, a purchase order for services which are not continuing but are performed on a one-time or sporadic basis and which are not performed under a requirements contract, need not be equated to a yearly amount. (See § 4.142(b)). In addition, where an invitation is for services in an amount in excess of $2,500 and bidders are permitted to bid on a portion of the services not amounting to more than $2,500, the amounts of the contracts awarded separately to individual and unrelated bidders will be measured by the portions of the services covered by their respective contracts.

(c) Where a contract is issued in an amount in excess of $2,500 this amount will govern for purposes of application of the Act even though penalty deductions, deductions for prompt payment, and similar deductions may reduce the amount actually expended by the Government to $2,500 or less.

§ 4.142 Contracts in an indefinite amount.

(a) Every contract subject to this Act, (and any bid specification therefor) which is indefinite in amount is required to contain the clauses prescribed in § 4.6 for contracts in excess of $2,500, unless the contracting officer has definite knowledge in advance that the contract will not exceed $2,500 in any event.

(b) Where contracts or agreements between a Government agency and prospective purveyors of services are negotiated which provide terms and conditions under which services will be furnished through the use of service employees in response to individual purchase orders or calls, if any, which may be issued by the agency during the life of the agreement, these agreements would ordinarily constitute contracts within the intendment of the Act under principles judicially established in United Biscuit Co. v. Wirtz, 17 WH Cases 146 (C.A.D.C.), a case arising under the Walsh-Healey Public Contracts Act. Such a contract, which may be in the nature of a bilateral option contract and not obligate the Government to order any services or the contractor to furnish any, nevertheless governs any procurement of services that may be made through purchase orders or calls issued under its terms. Since the amount of the contract is indefinite, it is subject to the rule stated in paragraph (a) of this section. The amount of the contract is not determined by the amount of any individual call or purchase order.

Changes in Contract Coverage

§ 4.143 Effects of changes or extensions of contracts, generally.

(a) Sometimes an existing service contract is modified, amended, or extended in such a manner that the changed contract is considered to be a new contract for purposes of the application of the Act's provisions. The general rule with respect to such contracts is that, whenever changes affecting the labor requirements are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed

contract in the same manner and to the same extent as they would to a wholly new contract. However, contract modifications or amendments (other than contract extensions) that are unrelated to the labor requirements of a contract will not be deemed to create a new contract for purposes of the Act. In addition, only significant changes related to labor requirements will be considered as creating new contracts. This limitation on the application of the Act has been found to be in accordance with the provisions of section 4(b) of the Act.

(b) Also, whenever the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment, the contract extension is considered to be a new contract for purposes of the application of the Act's provisions. All such "new" contracts as discussed above require the insertion of a new or revised wage determination in the contract as provided in § 4.5.

§ 4.144 Contract modifications affecting amount.

Where a contract which was originally issued in an amount not in excess of $2,500 is later modified so that its amount may exceed that figure, all the provisions of section 2(a) of the Act, and the regulations thereunder are applicable from the date of modification to the date of contract completion. In the event of such modification, the contracting officer will immediately request a wage determination from the Department of Labor and insert the required contract clauses and any wage determination issued into the contract. In the event that a contract for services subject to the Act in excess of $2,500 is modified so that it cannot exceed $2,500, compliance with the provisions of section 2(a) of the Act and the contract clauses required thereunder ceases to be an obligation of the contractor when such modification becomes effective.

§ 4.145 Extended term contracts.

(a) Sometimes service contracts are entered into for a term of years; however, their continuation in effect is subject to the appropriation by Congress of funds for each new fiscal year. In such event, for purposes of this Act, a contract shall be deemed entered into at the beginning of each new fiscal year during which the terms of the original contract are made effective by an appropriation for the purpose. In other cases a service contract, entered into for a specified term by a Government agency, may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the same length or other stipulated period. Since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the contractor is obligated to furnish services or for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is a wholly new contract with respect to application of the Act's provisions and the regulations thereunder.

(b) With respect to multi-year service contracts which are not subject to annual appropriations (for example, concession contracts which are funded through the concessionaire's sales, certain research and development contracts which are funded with so-called "no year money" or contracts awarded by instrumentalities of the United States, such as the Federal Reserve Banks, which do not receive appropriated funds), section 4(d) of the Act allows such contracts to be awarded for a period of up to five years on the condition that the multi-year contracts will be amended no less often than once every two years to incorporate any new Service Contract Act wage determination which may be applicable. Accordingly, unless the contracting agency is notified to the contrary (see § 4.4(d)), at the end of the second year and again at the end of the fourth year, etc. such contracts are treated as wholly new contracts for purposes of the application of the Act's provisions and regulations thereunder. The two-year period is considered to begin on the date that the contractor commences performance on the contract (i.e., anniversary date) rather than on the date of contract award.

Period of Coverage

§ 4.146 Contract obligations after award, generally.

A contractor's obligation to observe the provisions of the Act arises on the date the contractor is informed that award of the contract has been made, and not necessarily on the date of formal execution. However, the contractor is required to comply with the provisions of the Act and regulations thereunder only while the employees are performing on the contract, provided the contractor's records make clear the period of such performance. (See also § 4.179.) If employees of the contractor are required by the contract to complete certain preliminary training or testing prior to the commencement of the contract services, or if there is a phase-in period which allows the new contractor's employees to familiarize themselves with the contract work so as to provide a smooth transition between contractors, the time spent by employees undertaking such training or phase-in work is considered to be hours worked on the contract and must be compensated for even though the principal contract services may not commence until a later date.

§§ 4.147-4.149 [Reserved]

Employees Covered by the Act

§ 4.150 Employee coverage generally.

The Act, in section 2(b), makes it clear that its provisions apply generally to all employees engaged in performing work on a covered contract entered into by the contractor with the Federal Government, regardless of whether they are the contractor's employees or those of any subcontractor under such contract. All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see §§ 4.115 et seq.) is applicable. All such employees must be paid wages at a rate not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)), as amended. Payment of a higher minimum monetary wage and the furnishing of fringe benefits may be required under the contract, pursuant to the provisions of sections 2 (a)(1), (2), and 4(c) of the Act.

§ 4.151 Employees covered by provision of section 2(a).

The provisions of sections 2(a) and 4(c) of the Act prescribe labor standards requirements applicable, except as otherwise specifically provided, to every contract in excess of $2,500 which is entered into by the United States or the District of Columbia for the principal purpose of furnishing services in the United States through the use of service employees. These provisions apply to all service employees engaged in the performance of such a contract or any subcontract thereunder. The Act, in section 8(b) defines the term "service employee". The general scope of the definition is considered in § 4.113(b) of this subpart.

§ 4.152 Employees subject to prevailing compensation provisions of sections 2(a) (1) and (2) and 4(c).

(a) Under section 2(a) (1) and (2) of the Act, minimum monetary wages and fringe benefits to be paid or furnished the various classes of service employees performing such contract work are determined by the Secretary of Labor or his authorized representative in accordance with prevailing rates and fringe benefits for such employees in the locality or in accordance with the rates contained in a predecessor contractor's collective bargaining agreement, as appropriate, and are required to be specified in such contracts and subcontracts thereunder. All service employees of the classes who actually perform the specific services called for by the contract (e.g., janitors performing on a contract for office cleaning; stenographers performing on a contract for stenographic reporting) are covered by the provisions specifying such minimum monetary wages and fringe benefits for such classes of service employees and must be paid not less than the applicable rate established for the classification(s) of work performed.

(b) The duties which an employee actually performs govern the classification and the rate of pay to which the employee is entitled under the applicable wage determination. Some job classifications listed in an applicable wage determination are descriptive by title and have commonly understood meanings, (e.g., janitors, security guards, pilots, etc.). In such situations, detailed position descriptions may not be included in the wage determination. However, in cases where additional descriptive information is needed to inform users of the scope of duties included in the classification, the wage determination will generally contain detailed position descriptions based on the data source relied upon for the issuance of the wage determination.

(c) Some wage determinations will list a series of classes within a job classification family, e.g., Computer Operators, Class A, B, and C, or Electronic Technicians, Class A, B, and C, or Clerk Typist, Class A and B. Generally, the lowest level listed for a job classification family is considered to be the entry level and establishment of a lower level through conformance (§ 4.6(b)(2)) is not permissible. Likewise, so-called trainee classifications are not permissible and cannot be conformed under § 4.6(b)(2). Helpers in skilled maintenance trades (e.g., electricians, machinists, automobile mechanics, etc.) whose duties constitute, in fact, separate and distinct jobs, may be conformed. However, conformance may not be used to artificially split or subdivide classifications listed in the wage determination. In other words, conforming procedures may not be used if the work which an employee performs under the contract is within the scope of any classification listed on the wage determination, regardless of job title. Subminimum rates for apprentices, student learners, and handicapped workers are permissible under the conditions discussed in § 4.6(o).

§ 4.153 Inapplicability of prevailing compensation provisions to some employees.

There may be employees used by a contractor or subcontractor in performing a service contract in excess of $2,500 which is subject to the Act, whose services, although necessary to the performance of the contract, are not subject to minimum monetary wage or fringe benefit provisions contained in the contract pursuant to section 2(a) because such employees are not directly engaged in performing the specified contract services. An example might be a laundry contractor's billing clerk performing billing work with respect to the items laundered. In all such situations, the employees who are necessary to the performance of the contract but not directly engaged in the performance of the specified contract services, are nevertheless subject to the minimum wage provision of section 2(b) (see § 4.150) requiring payment of not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act to all employees working on a covered contract, unless specifically exempt. However, in situations where minimum monetary wages and fringe benefits for a particular class or classes of service employees actually performing the services called for by the contract have not been specified in the contract because the wage and fringe benefit determination applicable to the contract has been made only for other classes of service employees who will perform the contract work, the employer will be required to pay the monetary wages and fringe benefits which may be specified for such classes of employees pursuant to the conformance procedures provided in § 4.6(b).

§ 4.154 Employees covered by sections 2(a) (3) and (4).

The safety and health standards of section 2(a)(3) and the notice requirements of section 2(a)(4) of the Act (see § 4.183) are applicable, in the absence of a specific exemption, to every service employee engaged by a contractor or subcontractor to furnish services under a contract subject to section 2(a) of the Act.

§ 4.155 Employee coverage does not depend on form of employment contract.

The Act, in section 8(b), makes it plain that the coverage of service employees depends on whether their work for the contractor or subcontractor on a covered contract is that of a service employee as defined in section 8(b) and not on any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. In other words, any person, except those discussed in § 4.156 below, who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee. Thus, for example, a person's alleged status as an "owner-operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.

§ 4.156 Employees in bona fide executive, administrative, or professional capacity.

The term "service employee" as defined in Section 8(b) of the Act does not include persons employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR Part 541. Employees within the definition of service employee who are employed in an executive, administrative, or professional capacity are not excluded from coverage, however, even though they are highly paid, if they fail to meet the tests set forth in 29 CFR Part 541. Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations in Part 541 of this title, are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

Subpart D—Compensation Standards

§ 4.159 General minimum wage.

The Act, in section 2(b)(1), provides generally that no contractor or subcontractor under any Federal contract subject to the Act shall pay any employee engaged in performing work on such a contract less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act. Section 2(a)(1) provides that the minimum monetary wage specified in any such contract exceeding $2,500 shall in no case be lower than this Fair Labor

Standards Act minimum wage. Section 2(b)(1) is a statutory provision which applies to the contractor or subcontractor without regard to whether it is incorporated in the contract; however, §§ 4.6–4.7 provide for inclusion of its requirements in covered contracts and subcontracts. Because this statutory requirement specifies no fixed monetary wage rate and refers only to the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, and because its application does not depend on provisions of the contract, any increase in such Fair Labor Standards Act minimum wage during the life of the contract is, on its effective date, also effective to increase the minimum wage payable under section 2(b)(1) to employees engaged in performing work on the contract. The minimum wage rate under section 6(a)(1) of the Fair Labor Standards Act is $3.10 per hour beginning January 1, 1980, and $3.35 per hour after December 31, 1980.

§ 4.160 Effect of section 6(e) of the Fair Labor Standards Act.

Contractors and subcontractors performing work on contracts subject to the Service Contract Act are required to pay all employees, including those employees who are not performing work on or in connection with such contracts, not less than the general minimum wage standard provided in section 6(a)(1) of the Fair Labor Standards Act, as amended (Pub. L. 95–151).

§ 4.161 Minimum monetary wages under contracts exceeding $2,500.

The standards established pursuant to the Act for minimum monetary wages to be paid by contractors and subcontractors under service contracts in excess of $2,500 to service employees engaged in performance of the contract or subcontract are required to be specified in the contract and in all subcontracts (see § 4.6). Pursuant to the statutory scheme provided by sections 2(a)(1) and 4(c) of the Act, every covered contract (and any bid specification therefor) which is in excess of $2,500 shall contain a provision specifying the minimum monetary wages to be paid the various classes of service employees engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative in accordance with prevailing rates for such employees in the locality, or, where a collective bargaining agreement applied to the employees of a predecessor contractor, in accordance with the rates for such employees provided for in such agreement; including prospective wage increases as provided in such agreement as a result of arm's-length negotiations. In no case may such wages be lower than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. (For a detailed discussion of the application of section 4(c) of the Act, see § 4.163.) If some or all of the determined wages in a contract fall below the level of the Fair Labor Standards Act minimum by reason of a change in that rate by amendment of the law, these rates become obsolete and the employer is obligated under section 2(b)(1) of the Service Contract Act, to pay the minimum wage rate established by the amendment as of the date it becomes effective. A change in the Fair Labor Standards Act minimum by operation of law would also have the same effect on advertised specifications or negotiations for covered service contracts, i.e., it would make ineffective and would supplant any lower rate or rates included in such specifications or negotiations whether or not determined. However, unless affected by such a change in the Fair Labor Standards Act minimum wage, by contract changes necessitating the insertion of new wage provisions (see §§ 4.143–4.145 or by the requirements of section 4(c) of the Act (see § 4.163), the minimum monetary wage rate specified in the contract for each of the classes of service employees for which wage determinations have been made under section 2(a)(1) will continue to apply throughout the period of contract performance. No change in the obligation of the contractor or subcontractor with respect to minimum monetary wages will result from the mere fact that higher or lower wage rates may be determined to be prevailing for such employees in the locality after the award and before completion of the contract. Such wage determinations are effective for contracts not yet awarded, as provided in § 4.5(a).

§ 4.162 Fringe benefits under contracts exceeding $2,500.

(a) Pursuant to the statutory scheme provided by sections 2(a)(2) and 4(c) of the Act, every covered contract in excess of $2,500 shall contain a provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality or, where a collective bargaining agreement applied to the employees of a predecessor contractor, the various classes of service employees engaged in the performance of the contract or any subcontract must be provided the fringe benefits, including prospective or accrued fringe benefit increases, provided for in such agreement as a result of arm's-length negotiations. (For a detailed discussion of section 4(c) of the Act, see § 4.163.) As provided by section 2(a)(2) of the Act, fringe benefits include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.

(b) Under this provision, the fringe benefits, if any, which the contractor or subcontractor is required to furnish the service employees engaged in the performance of the contract are specified in the contract documents (see § 4.6). How the contractor may satisfy this obligation is dealt with in §§ 4.170–4.177 of this part. A change in the fringe benefits required by the contract provision will not result from the mere fact that other or additional fringe benefits are determined to be prevailing for such employees in the locality at a time subsequent to the award but before completion of the contract. Such fringe benefit determinations are effective for contracts not yet awarded (see § 4.5(a)), or in the event that changes in an existing contract requiring their insertion for prospective application have occurred (see §§ 4.143–4.145). However, none of the provisions of this subsection may be construed as altering a successor contractor's obligations under section 4(c) of the Act. (See § 4.163.)

§ 4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no "contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the

foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor). The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

(b) Section 4(c) is self-executing. Under section 4(c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid pursuant to a collective bargaining agreement. This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement. Pursuant to section 4(b) of the Act, a variation has been granted which limits the self-executing application of section 4(c) in the circumstances and under the conditions described in § 4.1b(b) of this part. It must be emphasized, however, that the variation in § 4.1b(b) is applicable only if the contracting officer has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative notification at least 30 days in advance of any estimated procurement date.

(c) *Variance hearings.* The regulations and procedures for hearings pursuant to section 4(c) of the Act are contained in § 4.10 of Subpart A and Part 6 of this title. If, as the result of such hearing, some or all of the wage rate and/or fringe benefit provisions of a predecessor contractor's collective bargaining agreement are found to be substantially at variance with the wage rates and/or fringe benefits prevailing in the locality, the Administrator will cause a new wage determination to be issued in accordance with the decision of the Administrative Law Judge or the Secretary. Since "it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved" (53 Comp. Gen. 401, 402, 1973), the solicitation, or the contract if already awarded, must be amended to incorporate the newly issued wage determination. Such new wage determination shall be made applicable to the contract as of the date of the Administrative Law Judge's decision or as of the date of the decision of the Secretary. The legislative history of the 1972 Amendments makes clear that the collectively bargained "wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after a hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services" (S. Rept. 92–1131, 92nd Cong., 2d Sess. 5). Thus, variance decisions do not have application retroactive to the commencement of the contract.

(d) *Sections 2(a) and 4(c) must be read in conjunction.* The Senate report accompanying the bill which amended the Act in 1972 states that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme." (S. Rept. 92–1131, 92nd Cong., 2nd Sess. 4.) Therefore, since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract. 48 Comp. Gen. 22, 23–24 (1968). In addition, because section 2(a) only applies to covered contracts in excess of $2,500, the requirements of section 4(c) likewise apply only to successor contracts which may be in excess of $2,500. However, if the successor contract is in excess of $2,500, section 4(c) applies regardless of the amount of the predecessor contract. (See §§ 4.141–4.142 for determining contract amount.)

(e) *The operative words of section 4(c) refer to "contract" not "contractor".* Section 4(c) begins with the language, "[n]o contractor or subcontractor under a *contract, which succeeds a contract* subject to this Act" (emphasis supplied). Thus, the statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§ 4.143–4.145). Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, it is clear that the provisions of section 4(c) apply whenever the Act or the regulations require that a new wage determination be incorporated into the contract (53 Comp. Gen. 401, 404–6 (1973)).

(f) *Collective bargaining agreement must be applicable to work performed on the predecessor contract.* Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract. Likewise, the requirements of section 4(c) would not apply if the predecessor contractor's collective bargaining agreement applied only to other employees of the firm and not to the employees working on the contract.

(g) *Contract reconfigurations.* As a result of changing priorities, mission requirements, or other considerations, contracting agencies may decide to restructure their support contracts. Thus, specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated contract. However, the protections afforded service employees under section 4(c) are not lost or negated because of such contract reconfigurations, and the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts.

(h) *Interruption of contract services.* Other than the requirement that substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c). Thus, the application of section 4(c) is not negated because the contracting authority may

change and the successor contract is awarded by a different contracting agency. Also, there is no requirement that the successor contract commence immediately after the completion or termination of the predecessor contract, and an interruption of contract services does not negate the application of section 4(c). Contract services may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees. In all such cases, the requirements of section 4(c) would apply to any successor contract which may be awarded after the temporary interruption or hiatus. The basic principle in all of the preceding examples is that successorship provisions of section 4(c) apply to the full term successor contract. Therefore, temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of section 4(c) to a full term successor contract.

(i) *Place of performance.* The successorship requirements of section 4(c) apply to all contracts for substantially the same services as were furnished under the predecessor contract. The Act does not distinguish between successor contracts performed at the same Government installation and successor contracts performed at the location of a successful bidder, and the requirements of section 4(c) apply equally to both types of contracts.

(j) *Interpretation of wage and fringe benefit provisions of wage determinations issued pursuant to sections 2(a) and 4(c).* Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement. However, failure to include in the wage determination any job classification, wage rate, or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply at a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned. Since the successor's obligations are governed by the terms of the collective bargaining agreement, any interpretation of the wage and fringe benefit provisions of the wage determination must be based on the intent of the parties to the collective bargaining agreement to the extent that such interpretation is not violative of law. Therefore, some of the principles discussed in §§ 4.170–4.177 regarding specific interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). As provided in section 2(a)(2), a contractor may satisfy its fringe benefit obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this Subpart.

(k) No provision of this section shall be construed as permitting a successor contractor to pay its employees less than the wages and fringe benefits to which such employees would have been entitled under the predecessor contractor's collective bargaining agreement. Thus, some of the principles discussed in § 4.167 may not be applicable in section 4(c) successorship situations. For example, if the predecessor contractor's collective bargaining agreement did not provide for the deduction from employees' wages of the reasonable cost or fair value for providing board, lodging, or other facilities, then the successor also may not include such costs as part of the applicable minimum wage specified in the wage determination. Likewise, unless the predecessor contractor's agreement allowed a tip credit (§ 4.6(q)), the successor contractor may not take a tip credit toward satisfying the minimum wage requirements under sections 2(a)(1) and 4(c).

Compliance with Compensation Standards

§ 4.164 [Reserved]

§ 4.165 Wage payments and fringe benefits—in general.

(a)(1) Monetary wages specified under the Act shall be paid to the employees to whom they are due promptly and in no event later than one pay period following the end of the pay period in which they are earned. No deduction, rebate, or refund is permitted, except as hereinafter stated. The same rules apply to cash payments authorized to be paid with the statutory monetary wages as equivalents of determined fringe benefits (see § 4.177).

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions. (See § 4.176 regarding fringe benefit payments to temporary and part-time employees.)

(b) The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A bi-weekly or semimonthly, pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semi-monthly is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

(c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality. Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

§ 4.166 Wage payments—unit of payment.

The standard by which monetary wage payments are measured under the Act is the wage rate per hour. An hourly wage rate is not, however, the only unit for payment of wages that may be used for employees subject to the Act. Employees may be paid on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance

with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum.

§ 4.167 Wage payments—Medium of payment.

The wage payment requirements under the Act for monetary wages specified under its provisions will be satisfied by the timely payment of such wages to the employee either in cash or negotiable instrument payable at par. Such payment must be made finally and unconditionally and "free and clear." Scrip, tokens, credit cards, "dope checks", coupons, salvage material, and similar devices which permit the employer to retain and prevent the employee from acquiring control of money due for the work until some time after the pay day for the period in which it was earned, are not proper mediums of payment under the Act. If, as is permissible, they are used as a convenient device for measuring earnings or allowable deductions during a single pay period, the employee cannot be charged with the loss or destruction of any of them and the employer may not, because the employee has not actually redeemed them, credit itself with any which remain outstanding on the pay day in determining whether it has met the requirements of the Act. The employer may not include the cost of fringe benefits or equivalents furnished as required under section 2(a)(2) of the Act, as a credit toward the monetary wages it is required to pay under section 2(a)(1) or 2(b) of the Act (see § 4.170). However, the employer may generally include, as a part of the applicable minimum wage which it is required to pay under the Act, the reasonable cost or fair value, as determined by the Administrator, of furnishing an employee with "board, lodging, or other facilities," as defined in Part 531 of this title, in situations where such facilities are customarily furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced. The determination of reasonable cost or fair value will be in accordance with the Administrator's regulations under the Fair Labor Standards Act, contained in such Part 531 of this title. While employment on contracts subject to the Act would not ordinarily involve situations in which service employees would receive tips from third persons, the treatment of tips for wage purposes in the situations where this may occur should be understood. For purposes of this Act, tips may generally be included in wages in accordance with the regulations under the Fair Labor Standards Act, contained in Part 531 (See also § 4.6(q).) The general rule under that Act is that the amount paid a tipped employee by his employer is deemed to be increased on account of tips by an amount determined by the employer, not in excess of 40 percent of the minimum wage applicable under section 6 of that Act, effective January 1, 1980. Thus, the tip credit taken by an employer subject to the Service Contract Act may not exceed $1.34 per hour after December 31, 1980. (See § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited be in excess of the value of tips actually received by the employee.

§ 4.168 Wage payments—deductions from wages paid.

(a) The wage requirements of the Act will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under the provisions of the Act and the regulations thereunder, or where the employee fails to receive such amounts free and clear because he "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to him. Authorized deductions are limited to those required by law, such as taxes payable by employees required to be withheld by the employer and amounts due employees which the employer is required by court order to pay to another; deductions allowable for the reasonable cost or fair value of board, lodging, and facilities furnished as set forth in § 4.167; and deductions of amounts which are authorized to be paid to third persons for the employee's account and benefit pursuant to his voluntary assignment or order or a collective bargaining agreement with bona fide representatives of employees which is applicable to the employer. Deductions for amounts paid to third persons on the employee's account which are not so authorized or are contrary to law or from which the contractor, subcontractor or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they cut into the wage required to be paid under the Act. The principles applied in determining the permissibility of deductions for payments made to third persons are explained in more detail in §§ 531.38 - 531.40 of this title.

(b) *Cost of maintaining and furnishing uniforms.* If the employees are required to wear uniforms either by the employer, the nature of the job, or the Government contract, then the cost of furnishing and maintaining the uniforms is deemed to be a business expense of the employer and such cost may not be borne by the employees to the extent that to do so would reduce the employee's compensation below that required by the Act. Since it may be administratively difficult and burdensome for employers to determine the actual cost incurred by all employees for maintaining their own uniforms, payment in accordance with the following standards is considered sufficient for the contractor to satisfy its wage obligations under the Act:

(1) The contractor furnishes all employees with an adequate number of uniforms without cost to the employees or reimburses employees for the actual cost of the uniforms. (2) Where uniform cleaning and maintenance is made the responsibility of the employee, the contractor reimburses all employees for such cleaning and maintenance at the rate of $3.10 a week (or 62 cents a day) as of January 1, 1980 and of $3.35 a week (or 67 cents a day) as of January 1, 1981. Since employees are generally required to wear a clean uniform each day regardless of the number of hours the employee may work that day, the preceding weekly amounts generally may be reduced to the stated daily equivalent but not to an hourly equivalent. A contractor may reimburse employees at a different rate if the contractor furnishes affirmative proof as to the actual cost to the employees of maintaining their uniforms or if a different rate is provided for in a bona fide collective bargaining agreement covering the employees working on the contract.

(c) Stipends, allowances or other payments made directly to an employee by a party other than the employer (such as a stipend for training paid by the Veterans Administration) are not part of "wages" and the employer may not claim credit for such payments toward its monetary obligations under the Act.

§ 4.169 Wage payments—work subject to different rates.

If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he or she performs, the employee must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer's records or other affirmative proof which of such hours were included in the periods spent in each class of work. The rule is the same where such an employee is

employed for a portion of the workweek in work not subject to the Act, for which compensation at a lower rate would be proper if the employer by his records or other affirmative proof, segregated the worktime thus spent.

§ 4.170 Furnishing fringe benefits or equivalents.

(a) *General.* Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages, by the contractor or subcontractor to the employees engaged in performance of the contract, as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents. Section 2(a)(2) of the Act provides that the obligation to furnish the specified benefits "may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." The governing rules and regulations for furnishing such equivalents are set forth in § 4.177 of this Subpart. An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.

(b) *Meeting the requirement, in general.* The various fringe benefits listed in the Act and in § 4.162(a) are illustrative of those which may be found to be prevailing for service employees in a particular locality. The benefits which an employer will be required to furnish employees performing on a particular contract will be specified in the contract documents. A contractor may dispose of certain of the fringe benefit obligations which may be required by an applicable fringe benefit determination, such as pension, retirement, or health insurance, by irrevocably paying the specified contributions for fringe benefits to an independent trustee or other third person pursuant to an existing "bona fide" fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions. Where such a plan or fund does not exist, a contractor must discharge his obligation relating to fringe benefits by furnishing either an equivalent combination of "bona fide" fringe benefits or by making equivalent payments in cash to the employee, in accordance with the regulations in § 4.177.

§ 4.171 "Bona fide" fringe benefits.

(a) To be considered a "bona fide" fringe benefit for purposes of the Act, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria:

(1) The provisions of a plan, fund, or program adopted by the contractor, or by contract as a result of collective bargaining, must be specified in writing, and must be communicated in writing to the affected employees. Contributions must be made pursuant to the terms of such plan, fund, or program. The plan may be either contractor-financed or a joint contractor-employee contributory plan. However, any contributions made by employees must be voluntary, and if such contributions are made through payroll deductions, such deductions must be made in accordance with § 4.166. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies deducted from the employee's wages may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like.

(3) The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan or the benefits provided under the plan must be specified or definitely determinable on an actuarial basis.

(4) Except as provided in paragraph (b), the contractor's contributions must be paid irrevocably to a trustee or other third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the contractor be able to recapture any of the contributions paid in nor in any way divert the funds to its own use or benefit.

(5) Benefit plans or trusts of the types listed in 26 U.S.C. 401(a) must be approved by the Internal Revenue Service as satisfying the requirements of section 401(a) of the Internal Revenue Code and meet the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. and regulations thereunder.

(6) It should also be noted that such plans must meet certain other criteria as set forth in § 778.215 of 29 CFR 778 in order for any contributions to be excluded from computation of the regular rate of pay for overtime purposes under the Fair Labor Standards Act (§§ 4.180–4.182).

(b)(1) Unfunded self-insured fringe benefit plans (other than fringe benefits such as vacations and holidays which by their nature are normally unfunded) under which contractors allegedly make "out of pocket" payments to provide benefits as expenses may arise, rather than making irrevocable contributions to a trust or other funded arrangement as required under § 4.171(a)(4), are not considered "bona fide" plans or equivalent benefits for purposes of the Act.

(2) A contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under the plan to meet the fringe benefit requirements of the Act. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing. The Administrator in his/her discretion may direct that assets be set aside and preserved in an escrow account or that other protections be afforded to meet the plan's future obligation.

(c) No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a "bona fide" fringe benefit for purposes of the Act.

(d) The furnishing to an employee of board, lodging, or other facilities under the circumstances described in § 4.167, the cost or value of which is creditable toward the monetary wages specified under the Act, may not be used to offset any fringe benefit obligations, as such items and facilities are not fringe benefits or equivalent benefits for purposes of the Act.

(e) The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a "bona fide" fringe benefit or equivalent benefit or the payment of wages. This would be true of such items,

for example, as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, and recruitment bonuses, as well as tools and other materials and services incidental to the employer's performance of the contract and the carrying on of his business, and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, by the contractor's Government contract, by law, or by the nature of the work to wear such items. See also § 4.168.

(f) Contributions by contractors for such items as social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional association or club dues, may not be used to offset any wages or fringe benefits specified in the contract, as such items are not "bona fide" wages or fringe benefits or equivalent benefits for purposes of the Act.

§ 4.172 Meeting requirements for particular fringe benefits—in general.

Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual minimum cash amount that must be provided by the employer for the employee. No deduction from the specified amount may be made to cover any administrative costs which may be incurred by the contractor in providing the benefits, as such costs are properly a business expense of the employer. If prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides. Unless otherwise specified in the particular wage determination, such as one reflecting collectively bargained fringe benefit requirements, issued pursuant to Section 4(c) of the Act, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract up to a maximum of 40 hours per week and 2,080 (i.e., 52 weeks of 40 hours each) per year, as these are the typical number of nonovertime hours of work in a week, and in a year, respectively. Since the Act's fringe benefit requirements are applicable on a contract-by-contract basis, employees performing on more than one contract subject to the Act must be furnished the full amount of fringe benefits to which they are entitled under each contract and applicable wage determination. Where a fringe benefit determination has been made requiring employer contributions for a specified fringe benefit in a stated amount per hour, a contractor employing employees part of the time on contract work and part of the time on other work, may only credit against the hourly amount required for the hours spent on the contract work, the corresponding proportionate part of a weekly, monthly, or other amount contributed by him for such fringe benefits or equivalent benefits for such employees. If , for example, the determination requires health and welfare benefits in the amount of 30 cents an hour and the employer provides hospitalization insurance for such employees at a cost of $10.00 a week, the employer may credit 25 cents an hour ($10.00 ÷ 40) toward his fringe benefit obligation for such employees. If an employee works 25 hours on the contract work and 15 hours on other work, the employer cannot allocate the entire $10.00 to the 25 hours spent on contract work and take credit for 30 cents per hour in that manner, but must spread the cost over the full forty hours.

§ 4.173 Meeting requirements for vacation fringe benefits.

(a) *Determining length of service for vacation eligibility.* It has been found that for many types of service contracts performed at Federal facilities a successor contractor will utilize the employees of the previous contractor in the performance of the contract. The employees typically work at the same location providing the same services to the same clientele over a period of years, with periodic, often annual, changes of employer. The incumbent contractor, when bidding on a contract, must consider his liability for vacation benefits for those workers in his employ. If prospective contractors who plan to employ the same personnel were not required to furnish these employees with the same prevailing vacation benefits, it would place the incumbent contractor at a distinct competitive disadvantage as well as denying such employees entitlement to prevailing vacation benefits.

(1) Accordingly, most vacation fringe benefit determinations issued under the Act require an employer to furnish to employees working on the contract a specified amount of paid vacation upon completion of a specified length of service with a contractor or successor. This requirement may be stated in the determination, for example, as "one week paid vacation after one year of service with a contractor or successor" or by a determination which calls for "one week's paid vacation after one year of service". Unless specified otherwise in an applicable fringe benefit determination, an employer must take the following two factors into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

(i) The total length of time spent by an employee in any capacity in the continuous service of the present (successor) contractor, including both the time spent in performing on regular commercial work and the time spent in performing on the Government contract itself, and

(ii) Where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same Federal facility.

(2) The application of these principles may be illustrated by the example given above of a fringe benefit determination calling for "one week paid vacation after one year of service with a contractor or successor". In that example, if a contractor has an employee who has worked for him for 18 months on regular commercial work and only for 6 months on a Government service contract, that employee would be eligible for the one week vacation since his total service with the employer adds up to more than 1 year. Similarly, if a contractor has an employee who worked for 16 months under a janitorial service contract at a particular Federal base for two different predecessor contractors, and only 8 months with the present employer, that employee would also be considered as meeting the "after one year of service" test and would thus be eligible for the specified vacation.

(3) The "contractor or successor" requirement set forth in paragraph (a)(1) of this section is not affected by the fact that a different contracting agency may have contracted for the services previously or by the agency's dividing and/or combining the contract services. However, prior service as a Federal employee is not counted toward an employee's eligibility for vacation benefits under fringe benefit determinations issued pursuant to the Act.

(4) Some fringe benefit determinations may require an employer to furnish a specified amount of paid vacation upon completion of a specified length of service *with the employer*, for example, "one week paid vacation after one year

of service with an employer". Under such determinations, only the time spent in performing on commercial work and on Government contract work in the employment of the present contractor need be considered in computing the length of service for purposes of determining vacation eligibility.

(5) Whether or not the predecessor contract(s) was covered by a fringe benefit determination is immaterial in determining whether the one year of service test has been met. This qualification refers to work performed before, as well as after, an applicable fringe benefit determination is incorporated into a contract. Also, the fact that the labor standards in predecessor service contract(s) were only those required under the Fair Labor Standards Act has no effect on the applicable fringe benefit determination contained in a current contract.

(b) Eligibility requirement—*continuous service.* Under the principles set forth above, if an employee's total length of service adds up to at least one year, the employee is eligible vacation with pay. However, such service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term "continuous service" does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service. Rather, as illustrated below, the reason(s) for an employee's absence from work is the primary factor in determining whether a break in service occurred.

(1) In cases where employees have been granted leave with or without pay by their employer, or are otherwise absent with permission for such reasons as sickness or injury, or otherwise perform no work on the contract because of reasons beyond their control, there would not be a break in service. Likewise, the absence from work for a few days, with or without notice, does not constitute a break in service, without a formal termination of employment. The following specific examples are illustrative situations where it has been determined that a break in service did not occur:

(i) An employee absent for five months due to illness but employed continuously for three years.

(ii) A strike after which employees returned to work.

(iii) An interim period of three months between contracts caused by delays in the procurement process during which time personnel hired directly by the Government performed the necessary services. However, the successor contractor in this case was not held liable for vacation benefits for those employees who had anniversary dates of employment during the interim period because no employment relationship existed during such period.

(iv) A mess hall closed three months for renovation. Contractor employees were considered to be on temporary layoff during the renovation period and did not have a break in service.

(2) Where an employee quits, is fired for cause, or is otherwise terminated (except for temporary layoffs), there would be a break in service even if the employee were rehired at a later date. However, an employee may not be discharged and rehired as a subterfuge to evade the vacation requirement.

(c) *Vesting and payment of vacation benefits.*

(1) In the example given in paragraph (a)(1) of this section of a fringe benefit determination calling for "one week paid vacation after 1 year of service with a contractor or successor", an employee who renders the "one year of service" continuously becomes eligible for the "one week paid vacation" (i.e., 40 hours of paid vacation, unless otherwise specified in an applicable wage determination) upon his anniversary date of employment and upon each succeeding anniversary date thereafter. However, there is no accrual or vesting of vacation eligibility before the employee's anniversary date of employment, and no segment of time smaller than one year need be considered in computing the employer's vacation liability, unless specifically provided for in a particular fringe benefit determination. For example, an employee who has worked 13 months for an employer subject to such stipulations and is separated without receiving any vacation benefit is entitled only to one full week's (40 hours) paid vacation. He would not be entitled to the additional fraction of one-twelfth of one week's paid vacation for the month he worked in the second year unless otherwise stated in the applicable wage determination. An employee who has not met the "one year of service" requirement would not be entitled to any portion of the "one week paid vacation".

(2) Eligibility for vacation benefits specified in a particular wage determination is based on completion of the stated period of past service. The individual employee's anniversary date (and each annual anniversary date of employment thereafter) is the reference point for vesting of vacation eligibility, but does not necessarily mean that the employee must be given the vacation or paid for it on the date on which it is vested. The vacation may be scheduled according to a reasonable plan mutually agreed to and communicated to the employees. A "reasonable" plan may be interpreted to be a plan which allows the employer to maintain uninterrupted contract services but allows the employee some choice, by seniority or similar factor, in the scheduling of vacations. However, the required vacation must be given or payment made in lieu thereof before the next anniversary date, before completion of the current contract, or before the employee terminates employment, whichever occurs first.

(d) *Contractor liability for vacation benefits.*

(1) The liability for an employee's vacation is not prorated among contractors unless specifically provided for under a particular fringe benefit determination. The contractor by whom a person is employed at the time the vacation right vests, i.e., on the employee's anniversary date of employment, must provide the full benefit required by the determination which is applicable on that date. For example, an employee, who had not previously performed similar contract work at the same facility, was first hired by a predecessor contractor on July 1, 1978. July 1 is the employee's anniversary date. The predecessor's contract ended June 30, 1979, but the employee continued working on the contract for the successor. Since the employee did not have an anniversary date of employment during the predecessor's contract, the predecessor would not have any vacation liability with respect to this employee. However, on July 1, 1979 the employee's entitlement to the full vacation benefit vested and the successor contractor would be liable for the full amount of the employee's vacation benefit.

(2) The requirements for furnishing data relative to employee hiring dates in situations where such employees worked for "predecessor" contractors are set forth in § 4.6. However, a contractor is not relieved from any obligation to provide vacation benefits because of any difficulty in obtaining such data.

(e) *Rate applicable to computation of vacation benefits.*

(1) If an applicable wage determination requires that the hourly wage rate be increased during the period of the contract, the rate

applicable to the computation of any required vacation benefits is the hourly rate in effect in the workweek in which the actual paid vacation is provided or the equivalent is paid, as the case may be, and would not be the average of the two hourly rates. This rule would not apply to situations where a wage determination specified the method of computation and the rate to be used.

(2) As set forth in § 4.172, unless specified otherwise in an applicable fringe benefit determination, service employees must be furnished the required amount of fringe benefits for all hours paid for up to a maximum of 40 hours per week and 2,080 hours per year. Thus, an employee on paid vacation leave would accrue and must be compensated for any other applicable fringe benefits specified in the fringe benefit determination, and if any of the other benefits are furnished in the form of cash equivalents, such equivalents must be included with the applicable hourly wage rate in computing vacation benefits or a cash equivalent therefor. The rules and regulations for computing cash equivalents are set forth in § 4.177.

§ 4.174 Meeting requirements for holiday fringe benefits.

(a) *Determining eligibility for holiday benefits—in general.*

(1) Most fringe benefit determinations list a specific number of named holidays for which payment is required. Unless specified otherwise in an applicable determination, an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefit, regardless of whether the named holiday falls on a Sunday, another day during the workweek on which the employee is not normally scheduled to work, or on the employee's day off. In addition, holiday benefits cannot be denied because the employee has not been employed by the contractor for a designated period prior to the named holiday or because the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination.

(2) An employee who performs no work during the workweek in which a named holiday occurs is generally not entitled to the holiday benefit. However, an employee who performs no work during the workweek because he is on paid vacation or sick leave in accordance with the terms of the applicable fringe benefit determination is entitled to holiday pay or another day off with pay to substitute for the named holiday. In addition, an employee who performs no work during the workweek because of a layoff does not forfeit his entitlement to holiday benefits if the layoff is merely a subterfuge by the contractor to avoid the payment of such benefits.

(3) The obligation to furnish holiday pay for the named holiday may be discharged if the contractor furnishes another day off with pay in accordance with a plan communicated to the employees involved. However, in such instances the holidays named in the fringe benefit determination are the reference points for determining whether an employee is eligible to receive holiday benefits. In other words, if an employee worked in a workweek in which a listed holiday occurred, the employee is entitled to pay for that holiday. Some determinations may provide for a specific number of holidays without naming them. In such instances the contractor is free to select the holidays to be taken in accordance with a plan communicated to the employees involved, and the agreed-upon holidays are the reference points for determining whether an employee is eligible to receive holiday benefits.

(b) *Determining eligibility for holiday benefits—newly hired employees.* The contractor generally is not required to compensate a newly hired employee for the holiday occurring prior to the hiring of the employee. However, in the one situation where a named holiday falls in the first week of a contract, all employees who work during the first week would be entitled to holiday pay for that day. For example, if a contract to provide services for the period January 1 through December 31 contained a fringe benefit determination listing New Year's Day as a named holiday, and if New Year's Day were officially celebrated on January 2 in the year in question because January 1 fell on a Sunday, employees hired to begin work on January 3 would be entitled to holiday pay for New Year's Day.

(c) *Payment of holiday benefits.*

(1) A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the fringe benefit determination, such as one reflecting collectively bargained holiday benefit requirements issued pursuant to Section 4(c) of the Act or a different historic practice in an industry or locality. Thus, for example, a contractor must furnish 7 hours of holiday pay to a full-time employee whose scheduled workday consists of 7 hours. An employee whose scheduled workday is 10 hours would be entitled to a holiday payment of 8 hours unless a different standard is used in the determination. As discussed in § 4.172, such holiday pay must include the full amount of other fringe benefits to which the employee is entitled.

(2) Unless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours or be furnished another day off with pay.

(3) If the fringe benefit determination lists the employee's birthday as a paid holiday and that day coincides with another listed holiday, the contractor may discharge his obligation to furnish payment for the second holiday by either substituting another day off with pay with the consent of the employee, furnishing holiday benefits of an extra day's pay, or if the employee works on the holiday in question, furnish holiday benefits of two extra days' pay.

(4) As stated in paragraph (a)(1) of this section, an employee's entitlement to holiday pay fully vests by working in the workweek in which the named holiday occurs. Accordingly, any employee who is terminated before receiving the full amount of holiday benefits due him must be paid the holiday benefits as a final cash payment.

(5) The rules and regulations for furnishing holiday pay to temporary and part-time employees are discussed in § 4.176.

(6) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of holiday pay are discussed in § 4.177.

§ 4.175 Meeting requirements for health, welfare, and/or pension benefits.

(a) *Determining the required amount of benefits.*

(1) Most fringe benefit determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. These payments are usually also stated as weekly or monthly amounts. As set forth in § 4.172, unless specified otherwise in the applicable determination such payments are due for all hours paid for, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2,080 hours per year on each contract. The application of this rule can be illustrated by the following examples:

(i) An employee who works 4 days a week, 10 hours a day is entitled to 40 hours of health and welfare and/or pension fringe benefits. If an employee works 3 days a week, 12 hours a day, then such employee is entitled to 36 hours of these benefits.

(ii) An employee who works 32 hours in a workweek and also receives 8 hours of holiday pay is entitled to the maximum of 40 hours of health and welfare and/or pension payments in that workweek. If the employee works more than 32 hours and also received 8 hours of holiday pay, the employee is still only entitled to the maximum of 40 hours of health and welfare and/or pension payments.

(iii) If an employee is off work for two weeks on vacation and received 80 hours of vacation pay, the employee must also receive payment for the 80 hours of health and welfare and/or pension benefits which accrue during the vacation period.

(iv) An employee entitled to two weeks paid vacation who instead works the full 52 weeks in the year, receiving the full 2,080 hours worth of health and welfare and/or pension benefits, would be due an extra 80 hours of vacation pay in lieu of actually taking the vacation; however, such an employee would not be entitled to have an additional 80 hours of health and welfare and/or pension benefits included in his vacation pay.

(2) A fringe benefit determination calling for a specified benefit such as health insurance contemplates a fixed and definite contribution to a "bona fide" plan (as that term is defined in § 4.171) by an employer on behalf of each employee, based on the monetary cost to the employer rather than on the level of benefits provided. Therefore, in determining compliance with an applicable fringe benefit determination, the amount of the employer's contribution on behalf of each individual employee governs. Thus, as set forth in § 4.172, if a determination should require a contribution to a plan providing a specified fringe benefit and that benefit can be obtained for less than the required contribution, it would be necessary for the employer to make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. The following illustrates the application of this principle: A fringe benefit determination requires a rate of $36.40 per month employee for a health insurance plan. The employer obtains the health insurance coverage specified at a rate of $20.45 per month for a single employee, $30.60 for an employee with spouse, and $40.90 for an employee with a family. The employer is required to make up the difference in cash or equivalent benefits to the first two classes of employees in order to satisfy the determination, notwithstanding that coverage for an employee would be automatically changed by the employer if the employee's status should change (e.g., single to married) and notwithstanding that the employer's average contribution per employee may be equal to or in excess of $36.40 per month.

(3) In determining eligibility for benefits under certain wage determinations containing hours or length of service requirements (such as having to work 40 hours in the preceding month), the contractor must take into account time spent by employees on commercial work as well as time spent on the Government contract.

(b) Some fringe benefit determinations specifically provide for health and welfare and/or pension benefits in terms of average cost. Under this concept, a contractor's contributions per employee to a "bona fide" fringe benefit plan are permitted to vary depending upon the individual employee's marital or employment status. However, the firm's total contributions for all service employees enrolled in the plan must average at least the fringe benefit determination requirement per hour per service employee. If the contractor's contributions average less than the amount required by the determination, then the firm must make up the deficiency by making cash equivalent payments or equivalent fringe benefit payments to all service employees in the plan who worked on the contract during the payment period. Where such deficiencies are made up by means of cash equivalent payments, the payments must be made promptly on the following payday. The following illustrates the application of this principle: The determination requires an average contribution of $0.84 an hour. The contractor makes payments to bona fide fringe benefit plans on a monthly basis. During a month the firm contributes $15,000 for the service employees employed on the contract who are enrolled in the plan, and a total of 20,000 man-hours had been worked by all service employees during the month. Accordingly, the firm's average cost would have been $15,000 ÷ 20,000 hours or $0.75 per hour, resulting in a deficiency of $0.09 per hour. Therefore, the contractor owes the service employees in the plan who worked on the contract during the month an additional $0.09 an hour for each hour worked on the contract, payable on the next regular payday for wages. Unless otherwise provided in the applicable wage determination, contributions made by the employer for non-service employees may not be credited toward meeting Service Contract Act fringe benefit obligations.

(c) *Employees not enrolled in or excluded from participating in fringe benefit plans.*

(1) Some health and welfare and pension plans contain eligibility exclusions for certain employees. For example, temporary and part-time employees may be excluded from participating in such plans. Also, employees receiving benefits through participation in plans of an employer other than the Government contractor or by a spouse's employer may be prevented from receiving benefits from the contractor's plan because of prohibitions against "double coverage". While such exclusions do not invalidate an otherwise bona fide insurance plan, employer contributions to such a plan cannot be considered to be made on behalf of the excluded employees. Accordingly, under fringe benefit determination requirements as described in the preceding subparagraph (a)(2), the employees excluded from participation in the health insurance plan must be furnished equivalent bona fide fringe benefits or be paid a cash equivalent payment during the period that they are not eligible to participate in the plan.

(2) It is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from that plan at all times. For example, under some plans, newly hired employees who are eligible to participate in an insurance plan from their first day of employment may be prohibited from receiving benefits from the plan during a specified "waiting period". Contributions made on behalf of such employees would serve to discharge the contractor's obligation to furnish the fringe benefit. However, if no contributions are made for such employees, no credit may be taken toward the contractor's fringe benefit obligations.

(d) *Payment of health and welfare and pension benefits.*

(1) Health and welfare and/or pension payments to a "bona fide" insurance plan or trust program may be made on a periodic payment basis which is not less often than quarterly. However, where fringe benefit determinations contemplate a fixed contribution on behalf of each employee, and a contractor exercises his option to make hourly cash equivalent or differential payments, such payments must be made promptly on the regular payday for wages. (See § 4.165.)

(2) The rules and regulations for furnishing health and welfare and pension benefits to temporary and part-time employees are discussed in § 4.176.

(3) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of health and welfare and pension benefits are discussed in § 4.177.

§ 4.176 Payment of fringe benefits to temporary and part-time employees.

(a) As set forth in § 4.165(a)(2), the Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. Accordingly, in the absence of express limitations, the provisions of an applicable fringe benefit determination apply to all temporary and part-time service employees engaged in covered work. However, in general, such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work. The application of these principles may be illustrated by the following examples:

(1) Assuming the paid vacation for full-time employees is one week of 40 hours, a part-time employee working a regularly scheduled workweek of 16 hours is entitled to 16 hours of paid vacation time or its equivalent each year, if all other qualifications are met.

(2) In the case of holidays, a part-time employee working a regularly scheduled workweek of 16 hours would be entitled to two-fifths of the holiday pay due full-time employees. It is immaterial whether or not the holiday falls on a normal workday of the part-time employee. A temporary or casual employee hired during a holiday week, but after the holiday, would be due no holiday benefits for that week.

(3) Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees based on the number of hours each such employee worked in the workweek prior to the workweek in which the holiday occurs or, with respect to vacations, the number of hours which the employee worked in the year preceding the employee's anniversary date of employment. For example:

(i) An employee works 10 hours during the week preceding July 4, a designated holiday. The employee is entitled to 10/40 of the holiday pay to which a full-time employee is entitled (i.e., 10/40 times 8=2 hours holiday pay).

(ii) A part-time employee works 520 hours during the 12 months preceding the employee's anniversary date. Since the typical number of nonovertime hours in a year of work is 2,080, if a full-time employee would be entitled to one week (40 hours) paid vacation under the applicable fringe benefit determination, then the part-time employee would be entitled to 520/2,080 times 40=10 hours paid vacation.

(4) A part-time employee working a regularly scheduled workweek of 20 hours would be entitled to one-half of the health and welfare and/or pension benefits specified in the applicable fringe benefit determination. Thus, if the determination requires $36.40 per month for health insurance, the contractor could discharge his obligation towards the employee in question by providing a health insurance policy costing $18.20 per month.

(b) A contractor's obligation to furnish the specified fringe benefits to temporary and part-time employees may be discharged by furnishing equivalent benefits, cash equivalents, or a combination thereof in accordance with the rules and regulations set forth in § 4.177.

§ 4.177 Discharging fringe benefit obligations by equivalent means.

(a) *In general.*

(1) Section 2(a)(2) of the Act, which provides for fringe benefits that are separate from and in addition to the monetary compensation required under section 2(a)(1), permits an employer to discharge his obligation to furnish the fringe benefits specified in an applicable fringe benefit determination by furnishing any equivalent combinations of "bona fide" fringe benefits or by making equivalent or differential payments in cash. However, credit for such payments is limited to the employer's fringe benefit obligations under section 2(a)(2), since the Act does not authorize any part of the monetary wage required by section 2(a)(1) and specified in the wage determination and the contract, to be offset by the fringe benefit payments or equivalents which are furnished or paid pursuant to section 2(a)(2).

(2) When a contractor substitutes fringe benefits not specified in the fringe benefit determination contained in the contract for fringe benefits which are so specified, the substituted fringe benefits, like those for which the contract provisions are prescribed, must be "bona fide" fringe benefits, as that term is defined in § 4.171.

(3) When a contractor discharges his fringe benefit obligation by furnishing, in lieu of those benefits specified in the applicable fringe benefit determination, other "bona fide" fringe benefits, cash payments, or a combination thereof, the substituted fringe benefits and/or cash payments must be "equivalent" to the benefits specified in the determination. As used in this subpart, the terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor. Thus, as set forth in § 4.172, if an applicable fringe benefit determination calls for a particular fringe benefit in a stated amount and the contractor furnished this benefit through contributions in a lesser amount, the contractor must furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefit which the contractor provides. This principle may be illustrated by the example given in § 4.175(a)(2).

(b) *Furnishing equivalent fringe benefits.*

(1) A contractor's obligation to furnish fringe benefits which are stated in a specified cash amount may be discharged by furnishing any combination of "bona fide" fringe benefits costing an equal amount. Thus, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if, instead, hospitalization benefits costing not less than 20 cents per hour are provided. The same obligation will be met if hospitalization benefits costing 10 cents an hour and life insurance benefits costing 10 cents an hour are provided. As set forth in § 4.171(c), no benefit required to be furnished the employee by any other law, such as workers' compensation, may be credited toward satisfying the fringe benefit requirements of the Act.

(2) A contractor who wishes to furnish equivalent fringe benefits in lieu of those benefits which are not stated in a specified cash amount, such as "one week paid vacation", must first determine the equivalent cash value of such benefits in accordance with the rules set forth in paragraph (c) of this section.

(c) *Furnishing cash equivalents.*

(1) Fringe benefit obligations may be discharged by paying to the employee on his regular payday, in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required. If, for example, an employee's monetary rate under an applicable determination is $4.50 an hour, and the fringe benefits to be furnished are hospitalization benefits costing 20 cents an hour and retirement benefits costing 20 cents an hour, the fringe benefit obligation is discharged if instead of furnishing the required fringe

benefits, the employer pays the employee, in cash, 40 cents per hour as the cash equivalent of the fringe benefits in addition to the $4.50 per hour wage rate required under the applicable wage determination.

(2) The hourly cash equivalent of those fringe benefits which are not stated in the applicable determination in terms of hourly cash amounts may be obtained by mathematical computation through the use of pertinent factors such as the monetary wages paid the employee and the hours of work attributable to the period, if any, by which fringe benefits are measured in the determination. If the employee's regular rate of pay is greater than the minimum monetary wage specified in the wage determination and the contract, the former must be used for this computation, and if the fringe benefit determination does not specify any daily or weekly hours of work by which benefits are to be measured, a standard 8-hour day and 40-hour week will be considered applicable. The application of these rules in typical situations is illustrated in paragraphs (c)(3) through (7) of this section.

(3) Where fringe benefits are stated as a percentage of the monetary rate, the hourly cash equivalent is determined by multiplying the stated percentage by the employees' regular or basic (i.e., wage determination) rate of pay, whichever is greater. For example, if the determination calls for a 5 percent pension fund payment and the employee is paid a monetary rate of $4.50 an hour, or if the employee earns $4.50 an hour on a piece-work basis in a particular workweek, the cash equivalent of that payment would be 22½ cents an hour.

(4) If the determination lists a particular fringe benefit in such terms as $8 a week, the hourly cash equivalent is determined by dividing the amount stated in the determination by the number of working hours to which the amount is attributable. For example, if a determination lists a fringe benefit as "pension—$8 a week", and does not specify weekly hours, the hourly cash equivalent is 20 cents per hour, i.e., $8 divided by 40, the standard number of non-overtime working hours in a week.

(5) In determining the hourly cash equivalent of those fringe benefits which are not stated in the determination in terms of a cash amount, but are stated, for example, as "nine paid holidays per year" or "1 week paid vacation after one year of service", the employee's hourly monetary rate of pay is multiplied by the number of hours making up the paid holidays or vacation. Unless the hours contemplated in the fringe benefit are specified in the determination, a standard 8-hour day and 40-hour week is considered applicable. The total annual cost so determined is divided by 2,080, the standard number of non-overtime hours in a year of work, to arrive at the hourly cash equivalent. This principle may be illustrated by the following examples:

(i) If a particular determination lists as a fringe benefit "nine holidays per year" and the employee's hourly rate of pay is $4.50, the $4.50 is multiplied by 72 (9 days of 8 hours each) and the result, $324, is then divided by 2,080 to arrive at the hourly cash equivalent, $0.1557 an hour. See § 4.174(c)(4).

(ii) If the determination requires "one week paid vacation after one year of service", and the employee's hourly rate of pay is $4.50, the $4.50 is multiplied by 40 and the result, $180.00, is then divided by 2,080 to arrive at the hourly cash equivalent, $0.0865 an hour.

(6) Where an employer elects to pay an hourly cash equivalent in lieu of a paid vacation, which is computed in accordance with paragraph (c)(5) of this section, such payments need commence only after the employee has satisfied the "after one year of service" requirement. However, should the employee terminate employment for any reason before receiving the full amount of vested vacation benefits due, the employee must be paid the full amount of any difference remaining as the final cash payment. For example, an employee becomes eligible for a week's vacation pay on March 1. The employer elects to pay this employee an hourly cash equivalent beginning that date; the employee terminates employment on March 31. Accordingly, as this employee has received only 1/12 of the vacation pay to which he/she is entitled, the employee is due the remaining 11/12 upon termination. As set forth in § 4.173(e), the rate applicable to the computation of cash equivalents for vacation benefits is the hourly wage rate in effect at the time such equivalent payments are actually made.

(d) *Furnishing a combination of equivalent fringe benefits and cash payments.* Fringe benefit obligations may be discharged by furnishing any combination of cash or fringe benefits as illustrated in the preceding paragraphs of this section, in monetary amounts the total of which is equivalent, under the rules therein stated, to the determined fringe benefits specified in the contract. For example, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if instead, hospitalization benefits costing 15 cents an hour and a cash equivalent payment of 5 cents an hour are provided.

(e) *Effect of equivalents in computing overtime pay.* Section 6 of the Act excludes from the regular or basic hourly rate of an employee, for purposes of determining the overtime pay to which the employee is entitled under any other Federal law, those fringe benefit payments computed under the Act which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e) (formerly designated as section 7(d)) of that Act (29 U.S.C. 207(e)). Fringe benefit payments which qualify for such exclusion are described in Subpart C of Regulations, 29 CFR Part 778. When such fringe benefits are required to be furnished to service employees engaged in contract performance, the right to compute overtime pay in accordance with the above rule is not lost to a contractor or subcontractor because it discharges its obligation under this Act to furnish such fringe benefits through alternative equivalents as provided in this section. If it furnishes equivalent benefits or makes cash payments, or both, to such an employee as authorized herein, the amounts thereof, which discharge the employer's obligation to furnish such specified fringe benefits, may be excluded pursuant to this Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under any other Federal law. No such exclusion can operate, however, to reduce an employee's regular or basic rate of pay below the monetary wage rate specified as the applicable minimum wage rates under sections 2(a)(1), 2(b), or 4(c) of this Act or under other law or an employment contract.

§ 4.178 Computation of hours worked.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in Part 785 of this title which is incorporated herein by reference. In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the

compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act. However, unless such hours are adequately segregated, as indicated in § 4.179, compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative proof to the contrary that such work did not continue throughout the workweek.

§ 4.179 Identification of contract work.

Contractors and subcontractors under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor during any workweek is not exclusively engaged in performing such contracts, or if while so engaged it has employees who spend a portion but not all of their worktime in the workweek in performing work on such contracts, it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such employee performed work on such contracts. In cases where contractors are not exclusively engaged in Government contract work, and there are adequate records segregating the periods in which work was performed on contracts subject to the Act from periods in which other work was performed, the compensation specified under the Act need not be paid for hours spent on non-contract work. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the contract, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Even where a contractor can segregate Government from non-Government work, it is necessary that the contractor comply with the requirements of section 6(e) of the FLSA discussed in § 4.160.

Overtime Pay of Covered Employees

§ 4.180 Overtime pay—in general.

The Act does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 recognizes however, that other Federal laws may require such compensation to be paid to employees working on or in connection with contracts subject to the Act (see § 4.181) and prescribes, for purposes of such laws, the manner in which fringe benefits furnished pursuant to the Act shall be treated in computing such overtime compensation as follows: "In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) [now section 7(e)] thereof." Fringe benefit payments which qualify for such exclusion are described in Part 778, Subpart C of this title. The interpretations there set forth will be applied in determining the overtime pay to which covered service employees are entitled under other Federal statutes. The effect of section 6 of the Act in situations where equivalent fringe benefits or cash payments are provided in lieu of the specified fringe benefits is stated in § 4.177(e) of this part, and illustrated in § 4.182.

§ 4.181 Overtime pay provisions of other Acts.

(a) *Fair Labor Standards Act.* Although provision has not been made for insertion in Government contracts of stipulations requiring compliance with the overtime provisions of the Fair Labor Standards Act, contractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act. This is true with respect to employees engaged in interstate or foreign commerce or in the production of goods for such commerce (including occupations and processes closely related and directly essential to such production) and employees employed in enterprises which are so engaged, subject to the definitions and exceptions provided in such Act. Such employees, except as otherwise specifically provided in such Act, must receive overtime compensation at a rate of not less than 1½ times their regular rate of pay for all hours worked in excess of the applicable standard in a workweek. See Part 778 of this title. However, the Fair Labor Standards Act provides no overtime pay requirements for employees, not within such interstate commerce coverage of the Act, who are subject to its minimum wage provisions only by virtue of the provisions of section 6(e), as explained in § 4.180.

(b) *Contract Work Hours and Safety Standards Act.* (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327–332) applies generally to Government contracts, including service contracts in excess of $2,500, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer or mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employee's basic rate of pay for all hours worked in any workweek in excess of 40 or in excess of eight on any calendar days therein, whichever is the greater number of overtime hours. Exemptions are provided for certain transportation and communications contracts, contracts for the purchase of supplies ordinarily available in the open market, and work required to be done in accordance with the provisions of the Walsh-Healey Act.

(2) Regulations concerning this Act are contained in Subparts A and C of 29 CFR Part 5 which permit overtime pay to be computed in the same manner as under the Fair Labor Standards Act, subject of course to the differences in computations required by reason of the daily overtime provision of the Contract Work Hours and Safety Standards Act, which has no counterpart in the Fair Labor Standards Act.

(3) Although the application of the Contract Work Hours and Safety Standards Act does not depend on inclusion of its requirements in provisions physically made part of the contract, the Act and the regulations of the Secretary require such provisions to be set forth in contract clauses. (See § 5.5(c) of this subtitle.)

(c) *Walsh-Healey Public Contracts Act.* As pointed out in § 4.117, while some Government contracts may be subject both to the McNamara-O'Hara Service Contract Act and to the Walsh-Healey Public Contracts Act, the employees performing work on the contract which is subject to the latter

Act are, when so engaged, exempt from the provisions of the former. They are, however, subject to the overtime provisions of the Walsh-Healey Act if, in any workweek, any of the work performed for the employer is subject to such Act and if, in such workweek, the total hours worked by the employee for the employer (whether wholly or only partly on such work) exceed 40 hours in the workweek or 8 hours in any day therein. In any such workweek the Walsh-Healey Act requires payment of overtime compensation at a rate not less than 1½ times the employee's basic rate for such weekly or daily overtime hours, whichever are greater in number. The overtime pay provisions of the Walsh-Healey Act are discussed in greater detail in 41 CFR Part 50–201.

§ 4.182 Overtime pay of service employees entitled to fringe benefits.

Reference is made in § 4.180 to the rules prescribed by section 6 of the Act which permit exclusion of certain fringe benefits and equivalents provided pursuant to section 2(a)(2) of the Act from the regular or basic rate of pay when computing overtime compensation of a service employee under the provisions of any other Federal law. As provided in § 4.177, not only those fringe benefits excludable under section 6 as benefits determined and specified under section 2(a)(2), but also equivalent fringe benefits and cash payments furnished in lieu of the specified benefits may be excluded from the regular or basic rate of such an employee. The application of this rule may be illustrated by the following examples:

(a) The A company pays a service employee $4.50 an hour in cash under a wage determination which requires a monetary rate of not less than $4 and a fringe benefit contribution of 50 cents which would qualify for exclusion from the regular rate under section 7(e) of the Fair Labor Standards Act. The contractor pays the 50 cents in cash because he made no contributions for fringe benefits specified in the determination and the contract. Overtime compensation in this case would be computed on a regular or basic rate of $4 an hour.

(b) The B company has for some time been paying $4.25 an hour to a service employee as his basic cash wage plus 25 cents an hour as a contribution to a welfare and pension plan, which contribution qualifies for exclusion from the regular rate under the Fair Labor Standards Act. For performance of work under a contract subject to the Act a monetary rate of $4 and a fringe benefit contribution of 50 cents (also qualifying for such exclusion) are specified because they are found to be prevailing for such employees in the locality. The contractor may credit the 25 cent welfare and pension contribution toward the discharge of his fringe benefit obligation under the contract but must also make an additional contribution of 25 cents for the specified or equivalent fringe benefits or pay the employee an additional 25 cents in cash. These contributions or equivalent payments may be excluded from the employee's regular rate which remains $4.25, the rate agreed upon as the basic cash wage.

(c) The C company has been paying $4 an hour as its basic cash wage on which the firm has been computing overtime compensation. For performance of work on a contract subject to the Act the same rate of monetary wages and a fringe benefit contribution of 50 cents an hour (qualifying for exclusion from the regular rate under the Fair Labor Standards Act) are specified in accordance with a determination that these are the monetary wages and fringe benefits prevailing for such employees in the locality. The contractor is required to continue to pay at least $4 an hour in monetary wages and at least this amount must be included in the employee's regular or basic rate for overtime purposes under applicable Federal law. The fringe benefit obligation under the contract would be discharged if 50 cents of the contributions for fringe benefits were for the fringe benefits specified in the contract or equivalent benefits as defined in § 4.177. The company may exclude such fringe benefit contributions from the regular or basic rate of pay of the service employee in computing overtime pay due.

Notice to Employees

§ 4.183 Employees must be notified of compensation required.

The Act, in section 2(a)(4), and the regulations thereunder in § 4.6(e), require all contracts subject to the Act which are in excess of $2,500 to contain a clause requiring the contractor or subcontractor to notify each employee commencing work on a contract to which the Act applies of the compensation required to be paid such employee under section 2(a)(1) and the fringe benefits required to be furnished under section 2(a)(2). A notice form (WH Publication 1313 and any applicable wage determination) provided by the Wage and Hour Division is to be used for this purpose. It may be delivered to the employee or posted as stated in § 4.184.

§ 4.184 Posting of notice.

Posting of the notice provided by the Wage and Hour Division shall be in a prominent and accessible place at the worksite, as required by § 4.6(e). The display of the notice in a place where it may be seen by employees performing on the contract will satisfy the requirement that it be in a "prominent and accessible place". Should display be necessary at more than one site, in order to assure that it is seen by such employees, additional copies of the poster may be obtained without cost from the Division. The contractor or subcontractor is required to notify each employee of the compensation due or attach to the poster any applicable wage determination specified in the contract listing all minimum monetary wages and fringe benefits to be paid or furnished to the classes of service employees performing on the contract.

Records

§ 4.185 Recordkeeping requirements.

The records which a contractor or subcontractor is required to keep concerning employment of employees subject to the Act are specified in § 4.6(g) of Subpart A of this part. They are required to be maintained for 3 years from the completion of the work, and must be made available for inspection and transcription by authorized representatives of the Administrator. Such records must be kept for each service employee performing work under the contract, for each workweek during the performance of the contract. If the required records are not separately kept for the service employees performing on the contract, it will be presumed, in the absence of affirmative proof to the contrary, that all service employees in the department or establishment where the contract was performed were engaged in covered work during the period of performance. (See § 4.179.)

§ 4.186 [Reserved]

Subpart E—Enforcement

§ 4.187 Recovery of underpayments.

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract

Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary or his or her authorized representatives, or an Administrative Law Judge, and are not paid directly to such employees by the contracting agency without the express prior consent of the Administrator. (See Decision of the Comptroller General, B–170784, February 12, 1971.) It is mandatory for a contracting officer to adhere to a request from the Department of Labor to withhold funds where such funds are available. (See Decision of the Comptroller General, B–109257, October 14, 1952, arising under the Walsh-Healey Act.) Contract funds which are or may become due a contractor under any contract with the United States may be withheld prior to the institution of administrative proceedings by the Secretary. (*McCasland* v. *U.S. Postal Service*, 82 CCH Labor Cases ¶ 33,607 (N.D. N.Y. 1977.))

(b) *Priority to withheld funds.*

The Comptroller General has afforded employee wage claims priority over an Internal Revenue Service levy for unpaid taxes. (See Decisions of the Comptroller General, B–170784, February 17, 1971; B–189137, August 1, 1977; 546 Comp. Gen. 499 (1977); 55 Comp. Gen. 744 (1976), arising under the Davis-Bacon Act; B–178198, August 30, 1973; B–161460, May 25, 1967.)

(1) As the Comptroller General has stated, "[t]he legislative histories of these labor statutes [Service Contract Act and Contract Work Hours and Safety Standards Act, 41 U.S.C. 327, *et seq.*] disclose a progressive tendency to extend a more liberal interpretation and construction in successive enactments with regard to worker's benefits, recovery and repayment of wage underpayments. Further, as remedial legislation, it is axiomatic that they are to be liberally construed". (Decision of the Comptroller General, B–170784, February 17, 1971.)

(2) Since section 3(a) of the Act provides that accrued contract funds withheld to pay employees wages must be held in a deposit fund, it is the position of the Department of Labor that monies so held may not be used or set aside for agency reprocurement costs. To hold otherwise would be inequitable and contrary to public policy, since the employees have performed work from which the Government has received the benefit (see *National Surety Corporation* v. *U.S.*, 132 Ct. Cl. 724, 728, 135 F. Supp 381 (1955), cert. denied, 350 U.S. 902), and to give contracting agency reprocurement claims priority would be to require employees to pay for the breach of contract between the employer and the agency. The Comptroller General has sanctioned priority being afforded wage underpayments over the reprocurement costs of the contracting agency following a contractor's default or termination for cause. Decision of the Comptroller General, B–167000, June 26, 1969; B–178198, August 30, 1973; and B–189137, August 1, 1977.

(3) Wage claims have priority over reprocurement costs and tax liens without regard to when the competing claims were raised. See Decisions of the Comptroller General, B–161460, May 25, 1967; B–189137, August 1, 1977.

(4) Wages due underpaid on the contract workers have priority over any assignee of the contractor, including assignments made under the Assignment of Claims Act, 311 U.S.C. 203, 41 U.S.C. 115, to funds withheld, since an assignee can acquire no greater rights to withheld funds than the assignor has in the absence of an assignment. See *Modern Industrial Bank* v. *U.S.*, 101 Ct. Cl. 808 (1944); *Royal Indemnity Co.* v. *United States*, 178 Ct. Cl. 46, 371 F. 2d 462 (1967), cert. denied, 389 U.S. 833; *Newark Insurance Co.* v. *U.S.* 149 Ct. Cl. 170, 181 F. Supp. 246 (1960); *Henningsen* v. *United States Fidelity and Guaranty Company*, 208 U.S. 404 (1908). Where employees have been underpaid, the assignor has no right to assign funds since the assignor has no property rights to amounts withheld from the contract to cover underpayments of workers which constitute a violation of the law and the terms, conditions, and obligations under the contract. (Decision of the Comptroller General, B–164881, August 14, 1968; B–178198, August 30, 1973; 56 Comp. Gen. 499 (1977); 55 Comp Gen. 744 (1976); *The National City Bank of Evansville* v. *United States*, 143 Ct. Cl. 154, 163 F. Supp. 846 (1958); *National Surety Corporation* v. *United States*, 132 Ct. Cl. 724, 135 F. Supp. 381 (1955), cert. denied, 350 U.S. 902.)

(5) The Comptroller General, recognizing that unpaid laborers have an equitable right to be paid from contract retainages, has also held that wage underpayments under the Act have priority over any claim by the trustee in bankruptcy. 56 Comp. Gen. 499 (1977), citing *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962); *Hadden* v. *United States*, 132 Ct. Cl. 529 (1955), in which the courts gave priority to sureties who had paid unpaid laborers over the trustee in bankruptcy.

(c) Section 5(b) of the Act provides that if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to the Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. The Service Contract Act is not subject to the statute of limitations in the Portal to Portal Act, 29 U.S.C. 255, and contains no prescribed period within which such an action must be instituted; it has therefore been held that the general period of six years prescribed by 28 U.S.C. 2415 applies to such actions, *United States of America* v. *Deluxe Cleaners and Laundry, Inc.*, 511 F. 2d 929 (C.A. 4, 1975). Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

(d) Releases or waivers executed by employees for unpaid wages and fringe benefits due them are without legal effect. As stated by the Supreme Court in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, (1945), arising under the Fair Labor Standards Act:

"Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

See also *Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946); *United States* v. *Morley Construction Company*, 98 F. 2d. 781 (C.A. 2, 1938), cert. denied, 305 U.S. 651.

Further, as noted above, monies not paid to employees to whom they are due because of violation are covered into the

U.S. Treasury as provided by section 5(b) of the Act.

(e)(1) The term "party responsible" for violations in section 3(a) of the Act is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the same principles are applied under both Acts. An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company (*S & G Coal Sales, Inc.*, Decision of the Hearing Examiner, PC–946, January 21, 1965, affirmed by the Administrator June 8, 1965; *Tennessee Processing Co., Inc.*, Decision of the Hearing Examiner, PC–790, September 28, 1965).

(2) The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty. *United States* v. *Sancolmar Industries, Inc.*, 347 F. Supp 404, 408 (E.D. N.Y. 1972). Accordingly, it has been held by administrative decisions and by the courts that the term "party responsible", as used in section 3(a) of the Act, imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts. See, for example, *Waite, Inc.*, Decision of the ALJ, SCA 530–566, October 19, 1976, *Spruce-Up Corp.*, Decision of the Administrator SCA 368–370, August, 19, 1976, *Ventilation and Cleaning Engineers, Inc.*, Decision of the ALJ, SCA 176, August 23, 1973, Assistant Secretary, May 17, 1974, Secretary, September 27, 1974; *Fred Van Elk*, Decision of the ALJ, SCA 254–58, May 28, 1974, Administrator, November 25, 1974; *Murcole, Inc.*, Decision of the ALJ, SCA 195–198, April 11, 1974; *Emile J. Bouchet*, Decision of the ALJ, SCA 38, February 24, 1970; *Darwyn L. Grover*, Decision of the ALJ, SCA 485, August 15, 1976; *United States* v. *Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *United States* v. *Sancolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972).

(3) In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

(4) It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in § 4.6, but includes all persons, irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached. *U.S.* v. *Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *U.S.* v. *Sancolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972); *Oscar Hestrom Corp.*, Decision of the Administrator, PC–257, May 7, 1946, affirmed, *U.S.* v. *Hedstrom*, 8 Wage Hour Cases 302 (N.D. Ill. 1948); *Craddock-Terry Shoe Corp.*, Decision of the Administrator, PC–330, October 3, 1947; *Reynolds Research Corp.*, Decision of the Administrator, PC–381, October 24, 1951; *Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC–632, August 9, 1957, Decision of the Administrator, April 29, 1958; *Cardinal Fuel and Supply Co.*, Decision of the Hearing Examiner, PC–890, June 17, 1963.

(5) Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. *Standard Fabrication Ltd.*, Decision of the Secretary, PC–297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC–1177, June 15, 1973; *James D. West*, Decision of the ALJ, SCA 397–398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78–25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76–6, June 14, 1977.

(f) The appellate rights of a contractor or subcontractor regarding violations of the Act, including back wage liability or the disposition of funds withheld by the agency for such liability are contained in Part 6 of this Title. Appeals in such matters have not been delegated to the contracting agencies and such matters cannot be appealed under the disputes clause in the contractor's contract.

(g) While the Act provides that action may be brought against a surety to recover underpayments of compensation, there is no statutory provision requiring that contractors furnish either payment or performance bonds before an award can be made. The courts have held, however, that when such a bond has been given, including one denominated as a performance rather than payment bond, and such a bond guarantees that the principal shall fulfill "all the undertakings, convenants, terms, conditions, and agreements" of the contract, or similar words to the same effect, the surety-guarantor is jointly liable for underpayments by the contractor of the wages and fringe benefits required by the Act up to the amount of the bond. *U.S.* v. *Powers Building Maintenance Co.*, 366 F. Supp. 819 (W.D. Okla. 1972); *U.S.* v. *Gillespie*, 72 CCH Labor Cases ¶ 33,986 (C.D. Cal. 1973) *U.S.* v. *Glens Falls Insurance Co.*, 279 F. Supp. 236 (E.D. Tenn. 1967); *United States* v. *Hudgins-Dize Co.*, 83 F. Supp. 593 (E.D. Va. 1949); *U.S.* v. *Continental Casualty Company*, 85 F. Supp. 573 (E.D. Pa. 1949), affirmed per curiam, 182 F.2d 941 (3rd Cir. 1950).

§ 4.188 Ineligibility for further contracts when violations occur.

(a) Section 5 of the Act directs the Comptroller General to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary has found violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States or the District of Columbia (whether or not subject to the Act) shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the names of such persons or firms. This prohibition against the award of a contract to an ineligible contractor applies to the contractor in its capacity as either a prime contractor or a subcontractor. Because the Act contains no provision authorizing removal from the list of the names of such persons or firms prior to the expiration of the three-year statutory period, the Secretary is without authority to accomplish such removal (other than in situations involving mistake or legal error). On the other hand, there may be situations in which persons or firms already on the list are

found in a subsequent administrative proceeding to have again violated the Act and their debarment ordered. In such circumstances, a new, three-year debarment term will commence with the republication of such names on the list.

(b)(1) The term "unusual circumstances" is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present. It is clear, however, that the effect of the 1972 Amendments is to limit the Secretary's discretion to relieve violators from the debarred list (H. Rept. 92–1251, 92d Cong., 2d Sess. 5; S. Rept. 92–1131, 92d Cong., 2d Sess. 3–4) and that the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction. *Ventilation and Cleaning Engineers, Inc.*, SCA–176, Administrative Law Judge, August 23, 1973, Assistant Secretary, May 22, 1974, Secretary, October 2, 1974. It is also clear that unusual circumstances do not include any circumstances which would have been insufficient to relieve a contractor from the ineligible list prior to the 1972 amendments, or those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract, failure to keep necessary records and the like. *Emerald Maintenance Inc.*, Supplemental Decision of the ALJ, SCA–153, April 5, 1973.

(2) The Subcommittee report following the oversight hearings conducted just prior to the 1972 amendments makes it plain that the limitation of the Secretary's discretion through the unusual circumstances language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future. See, House Committee on Education and Labor, Special Subcommittee on Labor, The Plight of Service Workers under Government Contracts 12–13 (Comm. Print 1971). As Congressman O'Hara stated: "Restoration * * * [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts * * *. The authority [to relieve from blacklisting] was intended to be used in situations where the violation was a minor one, or an inadvertent one, or one in which disbarment * * * would have been wholly disproportionate to the offense." House Committee on Education and Labor, Special Subcommittee on Labor, Hearings on H.R. 6244 and H.R. 6245, 92d Cong., 1st Sess. 3 (1971).

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. See, e.g., *Washington Moving & Storage Co.*, Decision of the Assistant Secretary, SCA 68, August 16, 1973, Secretary, March 12, 1974; *Quality Maintenance Co.*, Decision of the Assistant Secretary, SCA 119, January 11, 1974. Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor. *Murcole, Inc.*, Decision of the ALJ, SCA 195–198, April 10, 1974; *McLaughlin Storage, Inc.*, Decision of the ALJ, SCA 362–365, November 5, 1975, Administrator, March 25, 1976; *Able Building & Maintenance & Service Co.*, Decision of the ALJ, SCA 389–390, May 29, 1975, Assistant Secretary, January 13, 1976; *Aarid Van Lines, Inc.*, Decision of the Administrator, SCA 423–425, May 13, 1977.

(5) Furthermore, a contractor cannot be relieved from debarment by attempting to shift his/her responsibility to subordinate employees. *Security Systems, Inc.*, Decision of the ALJ, SCA 774–775, April 10, 1978; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974; *Ernest Roman*, Decision of the Secretary, SCA 275, May 6, 1977. As the Comptroller General has stated in considering debarment under the Davis-Bacon Act, "[n]egligence of the employer to instruct his employees as to the proper method of performing his work or to see that the employee obeys his instructions renders the employer liable for injuries to third parties resulting therefrom. * * * The employer will be liable for acts of his employee within the scope of the employment regardless of whether the acts were expressly or impliedly authorized. * * * Willful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer." (Decision of the Comptroller General, B–145608, August 1, 1961.)

(6) Negligence per se does not constitute unusual circumstances. Relief on no basis other than negligence would render the effect of section 5(a) a nullity, since it was intended that only responsible bidders be awarded Government contracts. *Greenwood's Transfer & Storage, Inc.*, Decision of the Secretary, SCA 321–326, June 1, 1976; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974.

(c) Similarly, the term "substantial interest" is not defined in the Act. Accordingly, this determination, too, must be made on a case-by-case basis in light of the particular facts, and cognizant of the legislative intent "to provide to service employees safeguards similar to those given to employees covered by the Walsh-Healey Public Contracts Act". *Federal Food Services, Inc.*, Decision of the ALJ, SCA 585–592, November 22, 1977. Thus, guidance can be obtained from cases arising under the

Walsh-Healey Act, which uses the concept "controlling interest". See *Regal Mfg. Co.*, Decision of the Administrator, PC–245, March 1, 1946; *Acme Sportswear Co.*, Decision of the Hearing Examiner, PC–275, May 8, 1946; *Gearcraft, Inc.*, Decision of the ALJ, PCX–1, May 3, 1972. In a supplemental decision of February 23, 1979, in *Federal Food Services, Inc.* the Judge ruled as a matter of law that the term "does not preclude every employment or financial relationship between a party under sanction and another * * * [and that] it is necessary to look behind titles, payments, and arrangements and examine the existing circumstances before reaching a conclusion in this matter."

(1) Where a person or firm has a direct or beneficial ownership or control of more than 5 percent of any firm, corporation, partnership, or association, a "substantial interest" will be deemed to exist. Similarly, where a person is an officer or director in a firm or the debarred firm shares common management with another firm, a "substantial interest" will be deemed to exist. Furthermore, wherever a firm is an affiliate as defined in § 4.1a(g) of Subpart A, a "substantial interest" will be deemed to exist, or where a debarred person forms or participates in another firm in which he/she has comparable authority, he/she will be deemed to have a "substantial interest" in the new firm and such new firm would also be debarred (*Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC–632, August 9, 1957).

(2) Nor is interest determined by ownership alone. A debarred person will also be deemed to have a "substantial interest" in a firm if such person has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance and/or the labor policies of a firm. A "substantial interest" may also be deemed to exist, in other circumstances, after consideration of the facts of the individual case. Factors to be examined include, among others, sharing of common premises or facilities, occupying any position such as manager, supervisor, or consultant to, any such entity, whether compensated on a salary, bonus, fee, dividend, profit-sharing, or other basis of remuneration, including indirect compensation by virtue of family relationships or otherwise. A firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred person.

(3) Firms with such identity of interest with a debarred person or firm will be placed on the debarred bidders list after the determination is made pursuant to procedures in Part 6, Subpart A, or § 4.12 and Part 6, Subpart D. Where a determination of such "substantial interest" is made after the initiation of the debarment period, contracting agencies are to terminate any contract with such firm entered into after the initiation of the original debarment period since all persons or firms in which the debarred person or firm has a substantial interest are also ineligible to receive Government contracts.

§ 4.189 Administrative proceedings relating to enforcement of labor standards.

The Secretary is authorized pursuant to the provisions of section 4(a) of the Act to hold hearings and make decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of the Act. Pursuant to section 4(a) of the Act, the Secretary's findings of fact after notice and hearing are conclusive upon all agencies of the United States and, if supported by the preponderance of the evidence, conclusive in any court of the United States, without a trial de novo. *United States* v. *Powers Building Maintenance Co.*, 336 F. Supp. 819 (W.D. Okla. 1972). Rules of practice for administrative proceedings are set forth in Part 6 of this Title.

§ 4.190 Contract cancellation.

(a) As provided in section 3 of the Act, where a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency, whereupon the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(b) Every contractor shall certify pursuant to § 4.6(n) of Subpart A that it is not disqualified for the award of a contract by virtue of its name appearing on the debarred bidders list or because any such currently listed person or firm has a substantial interest in said contractor, as described in § 4.188. Upon discovery of such false certification or determination of substantial interest in a firm performing on a Government contract, as the case may be, the contract is similarly subject upon written notice to immediate cancellation by the contracting agency and any additional cost for the completion of the contract charged to the original contractor as specified in paragraph (a), *supra*. Such contract is without warrant of law and has no force and effect and is void ab initio, 33 Comp Gen. 63; Decision of the Comptroller General, B–115051, August 6, 1953. Furthermore, any profit derived from said illegal contract is forfeited (*Paisner* v. *U.S.*, 138 Ct. Cl. 420, 150 F. Supp. 835 (1957), cert. denied, 355 U.S. 941.)

§ 4.191 Complaints and compliance assistance.

(a) Any employer, employee, labor or trade organization contracting agency, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent violation, of the Act, or of any of the rules or regulations prescribed thereunder. Such offices are also available to assist or provide information to contractors or subcontractors desiring to insure that their practices are in compliance with the Act. Information furnished is treated confidentially. It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a confidential written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b) A report of breach or violation relating solely to safety and health requirements may be in writing and addressed to the Regional Administrator of an Occupational Safety and Health Administration Regional Office, U.S. Department of Labor, or to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(c) Any other report of breach or violation may be in writing and addressed to the Assistant Regional Administrator of a Wage and Hour Division's regional office, U.S. Department of Labor, or to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

(d) In the event that an Assistant Regional Administrator for the Wage and Hour Division, Employment Standards Administration, is notified of

a breach or violation which also involves safety and health standards, the Regional Administrator of the Employment Standards Administration shall notify the appropriate Regional Administrator of the Occupational Safety and Health Administration who shall with respect to the safety and health violation take action commensurate with his responsibilities pertaining to safety and health standards.

(e) Any report should contain the following:

(1) The full name and address of the person or organization reporting the breach or violations.

(2) The full name and address of the person against whom the report is made.

(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the McNamara-O'Hara Service Contract Act, or of any of the rules or regulations prescribed thereunder.

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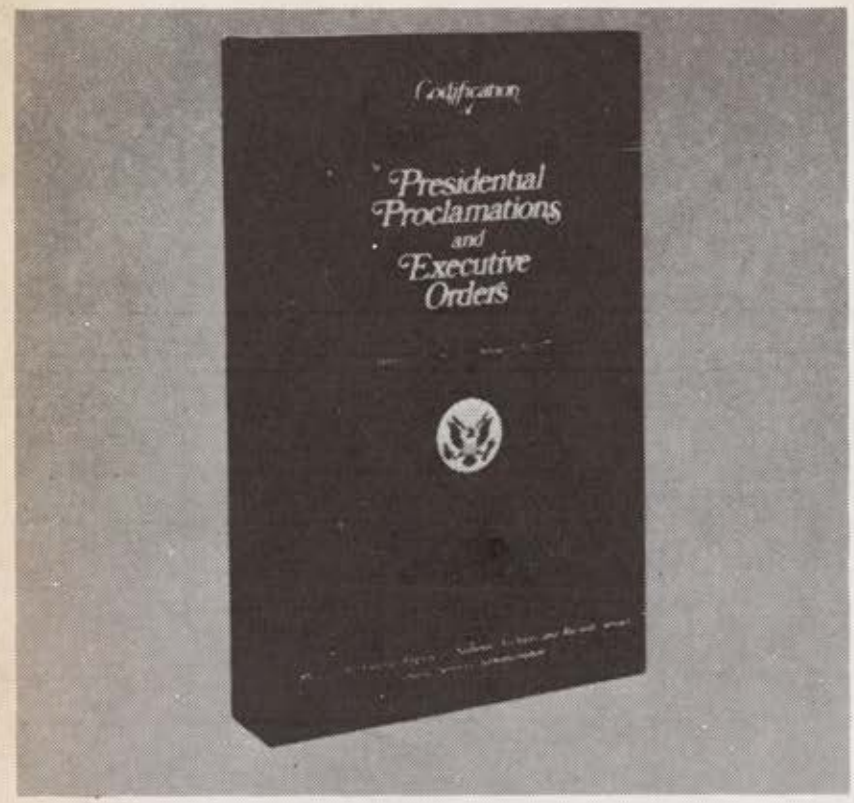

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4380 Part IX—Labor/ESA/W&H:
Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

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4568 Part XVI—Labor/ETA:
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4584 Part XVII—HHS/SSA:
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4614 Part XIX—EPA:
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4622 Part XX—USDA/FNS and Labor/Office of the Secretary:
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4634 Part XXI—HHS/FDA:
Licensed Biological Products

4660 Part XXII—USDA/FNS:
Food Stamp Program

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

29 CFR Part 5

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final Regulations, 29 CFR Part 5, Subpart A, pertaining to labor standards applicable to contracts for Federally financed and assisted construction and to contracts subject to the Contract Work Hours and Safety Standards Act. Changes have been made in the contract labor standard clauses which are required to be included in such construction contracts, and provision has been made for withholding of funds due a contractor on other Federal and Federally assisted contracts in situations where laborers or mechanics have not been paid in compliance with the law and insufficient monies remain under the contract on which such violations occurred. Apprenticeship requirements have also been revised. Other changes have been made in debarment and enforcement procedures, and in the procedure for adding wage rates for classifications of workers which have been omitted from the prevailing wage determination applicable to the contract. Changes have also been made to preclude a debarred contractor from becoming either a contractor or a subcontractor on other Federal or Federally assisted projects, and to reduce the number of reports that contracting agencies must submit to the Department of Labor.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Dorothy P. Come, Assistant Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, D.C. 20210, telephone: (202) 523-8333.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the **Federal Register** (44 FR 77080) to make certain revisions to Subpart A of Regulations, 29 CFR Part 5. Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act). The purpose of these changes was to revise, update, and clarify this subpart.

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the notice in the **Federal Register**. Subsequently, on February 15 and April 1, 1980, notice was given in the **Federal Register** extending the dates for submission of comments to March 27 and May 27, 1980, respectively. The first extension was granted at the request of various interested parties who needed additional time to prepare their comments. The second extension was granted in order to allow the comment period to run concurrently with that for the related procedural rules in revised Part 6 of this Title, published in proposed form on April 22, 1980.

Comments were received from approximately 246 interested parties, which included contracting agencies, contractor associations, contractors, labor unions and organizations, State and local governmental bodies, business organizations, law firms and individuals. In addition, the General Accounting Office submitted comments on the proposed regulations. Among those Federal agencies submitting comments were the Department of Defense, the Federal Highway Administration, the General Services Administration, the Department of Energy, the National Aeronautics and Space Administration, the Logistics Service and the Office of Airport Planning and Programming of the Federal Aviation Administration, and the Department of Housing and Urban Development. Contractor associations and business organizations submitting comments included the Associated General Contractors of America, the Associated Builders and Contractors, Inc., the National Association of Home Builders, the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Business Roundtable. Labor unions and organizations commenting on the proposal included the Building and Construction Trades Department of the American Federation of Labor—Congress of Industrial Organizations (whose comments were endorsed by the Center to Protect Worker's Rights) and the International Brotherhood of Electrical Workers.

While some requests for public hearings were made, it was decided, after careful consideration that, in view of the broad range of the responses and issues addressed, such hearings would be redundant.

It has been determined that the amendments to these Regulations do not meet the criteria of Executive Order 12044 and the Department of Labor Guidelines (44 FR 5570) for a regulatory analysis. These regulations will not, in our opinion, cause major cost/price increases.

The following is an analysis of all the principal comments received and the concomitant changes made to the proposed rule. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major comments and recommendations, the Department's findings as to whether or not suggested changes to the proposed rule would be in accordance with the statutory language and intent of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Act, as appropriate, and the substantive changes herein adopted.

Discussion of Major Comments

Definitions (§ 5.2(a)–(r))

Comments were received concerning the definitions of the terms "contract"; "construction", "prosecution", "completion", or "repair"; "site of work"; "laborer" or "mechanic"; "apprentice" and "trainee"; "employed"; "wage determination"; and "any affiliated person".

A number of comments received from State and local Governments reflected a misunderstanding of the intent of our revisions to the definition of "contract". The revision does not extend coverage to State and local Government employees. There are, however, certain statutes which require the payment of Davis-Bacon prevailing wage rates to the recipient State and local Government's employees who are performing the construction work. For example, the U.S. Housing Act of 1937 requires the payment of the Davis-Bacon prevailing wage rates to all laborers or mechanics employed in the development of the project, including employees of the recipient local Government. Accordingly, we have amended the proposed regulations to clarify this term with respect to the application of prevailing wage standards to State and local Governmental employees.

Questions were raised as to whether the definition of the terms "construction", "prosecution",

"completion", or "repair" included the on-site installation of items fabricated off-site. Therefore, this subsection has been amended to include language to make it clear that on-site installation involving construction is within the meaning of these terms. In addition, as requested by the Federal Highway Administration, the citation for the Federal-Aid Highway Act of 1956 was changed.

Several comments were received objecting to the inclusion within the definition of "site of work" of such facilities as fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., which are dedicated exclusively, or nearly so, to a particular contract and are located in close proximity to the actual location of construction. Contrary to the understanding of many of the commenters, we are not extending the scope of this definition. Rather, we are including in the regulations the Department's long-standing position with respect to the definition of this term which has been upheld by the Department's Wage Appeals Board. In this regard, it should be noted that the General Accounting Office has indicated that, despite its prior rulings on this issue, it does not object to the proposed definition of this term.

Numerous commenters objected to including working foremen in the definition of the term "laborer" or "mechanic" on the basis that "supervisors" and "foremen" should be excluded as part of management. Normally, anyone who performs duties which are manual or physical on a covered project is a "laborer" or "mechanic" during the time so spent. However, recognizing the realities of the construction industry and the fact that some employees are assigned managerial duties, it was decided to adopt a reasonable tolerance by applying a percentage limitation test on the amount of time which could be spent performing such non-managerial duties, after which working foremen would be considered "laborers or mechanics" for purposes of the Davis-Bacon Act. The language on working foremen and the 20 percent limitation on such work simply codify a long-standing policy of the Department which was adopted to accommodate the needs of the industry without ignoring the remedial purposes of the statute to protect the wages of the workers.

There were several comments concerning the definitions of the terms "apprentice" and "trainee". First, there were comments disapproving of the requirement that apprenticeship and training programs be registered with the Bureau of Apprenticeship and Training or with a State apprenticeship agency recognized by BAT. Numerous commenters shared the opinion that the policy of permitting only employment of apprentices and trainees under BAT approved programs was denying job opportunities to youths, minorities, and women. In addition, several parties recommended that changes be made in this subsection to reflect the provisions of 23 U.S.C. 113(c) which exempt apprentices and trainees certified by the Secretary of Transportation, rather than the Secretary of Labor, on Federal-Aid Highway projects, from the required payment of prevailing wage rates.

The Davis-Bacon Act requires that all laborers and mechanics be paid the applicable prevailing wage rate for the classification of work performed. However, in an effort to encourage meaningful training of workers in the construction industry, which will provide a ready and stable reservoir of skilled workers, the Department of Labor permits the use of apprentices and trainees at less than the required applicable predetermined rate for the work performed, where the apprentices and trainees are enrolled in training programs approved in accordance with the requirements of the Bureau of Apprenticeship and Training, or, with respect to apprentices, a similar State agency approved by BAT. We do this because we are assured that the training is real and is not a subterfuge to freeze young, minority, and female workers into low paying unskilled jobs. It should be stressed that the provisions allowing for the payment of less than the prevailing wage rates to apprentices and trainees is an exception to the requirements of the Davis-Bacon Act (see *Gevyn Construction Corporation* v. *United States*, No. 515–78 (Ct. Cl., September 12, 1980)) and that strict conditions must be maintained in order to prevent the circumvention of the Act's requirements, especially in the case of the young, minority, and female worker against whom job and wage discrimination might otherwise be widespread.

Contrary to some of the opinions expressed that the registration requirements deny employment opportunities to youths, minorities, and women, participation in apprenticeship and training programs is available to all of these groups.

The suggestions with respect to 23 U.S.C. section 113(c) have been implemented.

A number of commenters opposed including the phrase "regardless of any contractual relationship alleged to exist between the contractors or such person" in the definition of the term "employed". They argue that such language would encompass bona fide subcontractors and it was their belief that such language was only meant to apply to alleged subcontractors who are in fact employees. The phrase in question is required by the statute itself. Furthermore, the argument of these commenters was considered and rejected by the Attorney General (41 Op. Atty. Gen. 488 (1960)), who concluded that Congress intended to preserve the benefits of the Act for all engaged in laborer's or mechanic's work, whether they are independent contractors of employees.

There were objections to the deletion of the language "issued prior to the award of the contract" which had been contained in the previous definition of the term "wage determination" because it was felt that this change would give the Department "carte blanche" authority to change the wage determination in the contract after award. These comments are discussed together with the rules regarding application of wage determinations in Part 1 of this title.

Concern was expressed that the term "any affiliated person" would extend debarment to members of a contractor's immediate family who were not responsible for the violations which led to the debarment. This term was included in the text of the proposed subsection because of the Department's original intention to incorporate the existing Part 3 of this Title (concerning allowable deductions under the Copeland Act), where the term "affiliated person" is defined, as Subpart D of this Part. However, since the publication of Subpart D will be delayed, we are deleting this subsection and any concern of parties who have an interest in this issue should be dispelled.

Contract Provisions and Related Matters (Section 5.5)

Objections were raised to the deletion of former language allowing contracting agencies to insert modifications to the Davis-Bacon labor standards contract clauses to meet the particular needs of the agency, if first approved by the Department of Labor. Upon reconsideration, we have decided that the objections are valid and we are adding language to allow for the above.

Several parties took exception to the addition of the language "without regard to skill" in § 5.5(a)(1)(i), which deals with the issue of wage payments for laborers and mechanics. In addition, a suggestion was made to add language to make it clear that laborers and

mechanics performing work in more than one classification should receive the applicable rate for the time spent performing work in each classification. The addition of the phrase "without regard to skill" makes clear to the public the Department's long-standing policy on the minimum payment due to laborers or mechanics working in a given classification. There is no prohibition under the Davis-Bacon Act against payment of a higher rate than that found to be prevailing if the contractor wishes to recognize a worker's special skill. This policy has been upheld in administrative hearings and by the Wage Appeals Board. As suggested, we have added language to this subsection to reflect that laborers and mechanics must be paid the applicable prevailing wage rate for the classification of work performed.

A substantial number of comments were received concerning the provisions of § 5.5(a)(1)(ii), which deals with the issue of adding necessary classifications and rates omitted from the wage determination which has been made applicable to the project in question. Concern was expressed that the procedures in this subsection would impose collective bargaining, cause delays, create the potential for disruption and disagreement, and slow the construction process.

These changes proposed and finalized in this subsection will not impose collective bargaining. The Department of Labor will continue its long-standing policy of prohibiting the artificial splitting of classifications traditionally recognized in the construction industry and traditionally contained in Department of Labor wage determinations. The inclusion of employees, or their representatives, as interested parties in the process of adding classifications and rates which have been omitted from wage determinations recognizes the facts of economic reality, that workers bring a useful intelligence of the relationship of the work they are performing to that of other classes which helps set proper rate relationships. To deprive them of a right to have input in this process, as was the case in the past, would be to continue an unjustifiable inequity. This was recognized when the policy dealing with the same issue in cases arising under the Service Contract Act was adopted in 1966.

While we have included time limits on responding to agency conformance requests in (B) of this subsection to eliminate any unnecessary delays in processing requests for additional classifications, we agree with the commenters that the same limits should be followed under (C) of this subsection, concerning resolution of disputes, and the language has been changed accordingly.

Numerous comments were received opposing the addition of provisions in §§ 5.5(a)(2) and 5.5(b)(3) to allow agencies to withhold monies to satisfy DBRA/CWHSSA underpayments on contracts other than those in which the alleged violations occurred (hereafter referred to as "cross-withholding"). Some commenters argued that the statute did not authorize cross-withholding and that the decision in *Whitney Bros. Plumbing and Heating* v. *United States* (224 F. Supp. 860 (D. Alaska 1963)] specifically prohibited this. Several agencies state that these provisions would in effect remove authority from the contracting agency to withhold funds and redelegate it to the Department of Labor. Other commenters objected that the provisions would be unworkable when more than one agency was involved.

The language of both the DBA and the CWHSSA provide that stipulations (clauses) be included in each contract subject to the Acts to permit the contracting agency to withhold funds from the contract to satisfy unpaid wages due to laborers and mechanics employed on the contract. The clear Congressional intent of such language is to protect the wages of laborers and mechanics who perform work on the contract. In the past, due to the lack of the cross-withholding provisions, many contractors and subcontractors have escaped payment of back wages because violations were not discovered until after final payment on the contract had been made. To allow such practices to continue is contrary to the clear intent of the Acts. The decision in *Whitney Bros. Plumbing and Heating* v. *United States*, while precluding the withholding from another contract under the regulations as they existed at that time, did not indicate the cross-withholding would be prohibited if the Department adopted regulations to accomplish cross-withholding.

Provisions for cross-withholding have been contained in the Service Contract Act and the Walsh-Healey Public Contracts Act since their inception, and the Department's experience with this authority and its enforcement of such provisions under these Acts has not caused any of the disruptions and administrative delays anticipated by many of the commenters. It should be noted that the General Accounting Office commented in favor of cross-withholding. GAO concluded its comments on this matter by stating: "We believe that a cross-withholding procedure provided by regulations and contractual provision is not contrary to the DBA and CWHSSA, and indeed is consistent with the remedial purpose of those Acts."

While the Department recognizes that the contracting officer takes the action necessary to accomplish actual withholding of payment of contract funds, it is clear that to require such action be taken on a request by authorized representatives of the Department of Labor is not a usurpation of the contracting agency's authority but rather the exercise of an authority given to the Department by Reorganization Plan No. 14 of 1950 in order to accomplish the enforcement coordination and oversight responsibilities conferred upon it under that Plan, and to permit it to carry out its investigatory responsibilities.

With respect to the contract labor standards provision pertaining to the submission of weekly payrolls set forth in § 5.5(a)(3)(ii), commenters suggested that contractors be required to report the employee's address only in the first week of employment and thereafter only when there was a change in the address. A Federal agency questioned why the social security number was not required since such information would further aid in identifying employees, many of whom may have similar names. Another Federal agency commented that an agency should have the right to delegate its recordkeeping responsibilities to local Government agencies, which are the recipient of Federal funds, with monitoring authority only being retained by the agency. In response to the comments on employee addresses, the instructions for completing the Form WH–347 require only that the address of the employee be reported on the first payroll an employee works on the contract unless the address changes. Many firms do not use this optional form but submit the required information in a manner preferable to them, and therefore are not aware of these instructions. Accordingly, we have added language to this subsection to reflect the Department's policy. The inclusion of employees' social security numbers would assist the Federal agencies, the Department of Labor, and the General Accounting Office in making positive identification of employees and in making tax deductions on back wage payments, and we have added the social security number to the information which is to be reported on the payrolls.

Based on our experience there has been little or no review of certified payroll records by parties other than the Federal agencies, and consequently, we have not adopted the suggestion of delegating this responsibility since we want to insure that these documents so necessary to on-going compliance are fully used for the essential purpose for which they are intended.

Several contractors' associations and construction companies expressed dissatisfaction with the requirement in § 5.5(a)(4) to pay the full amount of the fringe benefits stipulated on the applicable wage decision for journeymen to apprentices and trainees when the apprenticeship or training program is silent regarding the payment of such benefits. There were also objections to the proposed requirement to observe the ratios and wage rates for apprentices and trainees in localities where construction is performed, rather than those ratios applicable in the locality in which the program is registered or approved. A Federal agency recommended that a minor language change be made to make it clear that it is the contractor's or subcontractor's obligation to furnish written evidence of the registration of the apprenticeship program or the certification of the training program without being specifically requested by the contracting officer to do so. Another Federal agency suggested that language similar to that in § 5.5(a)(4)(ii) regarding the withdrawal of approval of training programs by BAT be added to § 5.5(a)(4)(i) referencing apprentices.

It has been the Department's position that if the apprentice or trainee plan is silent on fringe benefits, the apprentices or trainees must receive the full amounts of the fringe benefits stipulated in the applicable wage decision for the classification of work performed. In situations where fringe benefits are listed on the wage determination for a particular craft, apprentices or trainees in that craft normally receive such benefits. In cases where the prevailing apprentice practice indicates they do not receive the full fringe benefits, or no benefits at all, we have made provisions in the regulations to allow for less than the payment of full fringe benefits. To allow a contractor to make its own decisions on the amount of fringe benefits to pay his apprentices and trainees when its approved plan is silent on the issue would give it a distinctly unfair competitive advantage with the cost to be borne by the apprentices and trainees employed by such a contractor. This is clearly against the intent of the law. We have, however, clarified the language in this subsection for easier comprehension.

We have also made revisions in this subsection to allow contractors to follow the ratios and wage rates stipulated in their approved programs at the "home" locality instead of requiring contractors to observe the ratios and wage rates for apprentices and trainees in the locality where the construction is performed, if it happens to be different from those required by their programs. Upon reconsideration, we decided that to impose different plans on contractors, many of which work in several locations where there could be differing apprenticeship standards, would be adding needless burdens to their business activities.

In addition, we adopted the Federal agencies' suggestions to change the language in § 5.5(a)(4) to make it clear it was the contractor's or subcontractor's obligation to submit written evidence of the program and to add the language in § 5.5(a)(4)(ii) concerning the withdrawal of registration of the program to § 5.5(a)(4)(i).

Several contractor associations objected to the new language of § 5.5(a)(7) which prohibits debarred persons or firms from performing not only as prime contractors but also as subcontractors on projects subject to any of the statutes listed in § 5.1. The change in this subsection is in accordance with the intent of the Acts that debarred contractors not perform any work on Government contracts. This has been a policy followed under the Service Contract Act from its inception. See § 4.188 of 29 CFR Part 4. In addition, this provision is consonant with the Federal Procurement Regulations, the Defense Acquisition Regulations, and other individual agency procurement regulations. Moreover, in its comments on the proposed regulations, the General Accounting Office stated that it had no objection to debarred contractors being ineligible to receive subcontracts from contractors having contracts with the Government.

A number of respondents objected to the portion of § 5.5(a)(9) which states that disputes arising out of the labor standards provisions of the contract are not subject to the general disputes clause of the contract, but to the provisions of Parts 5, 6, and 7 of this Title. Federal agencies commented that the provision conflicts with the authority of the contracting officer as set forth in the Contracts Dispute Act of 1978 (Pub. L. 95-563, 41 U.S.C. Sec. 601 et seq.). Reorganization Plan No. 14 of 1950, as explained in the President's message accompanying the Plan, invests in the Secretary of Labor the responsibility "to coordinate the administration of laws relating to wages and hours on Federally-financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies * * *". With respect to the Contract Disputes Act of 1978, section 14 of that statute sets forth the specific amendments to existing statutes. Significantly, no change, repeal, amendment, or other reference was made to the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act, the Copeland Act, or Reorganization Plan No. 14 of 1950. Therefore, in our view, the Department's authority to resolve disputes under these statutes and Reorganization Plan No. 14 is not impinged by section 14 of the Contract Disputes Act. Also, section 6(a) of the Contract Disputes Act states, in part, that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine".

Furthermore, logic would dictate that the authority to resolve labor disputes should reside in the agency which has the primary responsibility for protecting worker labor standards and the prerequisite expertise in administering the law and the regulations necessary to insure the effective and consistent enforcement of such labor standards provisions. Agencies should note that the General Accounting Office stated that it had no objection to the adoption of this provision.

Concern was expressed, particularly by contractor associations, about the possible interpretation of the term "interest" found in § 5.5(a)(10)(i) dealing with the debarment of contractors. The phrase "any person or firm who has an interest in the contractor's firm", is derived from the statutory language of the Davis-Bacon Act. The Department looks to each situation on a case by case basis and we will consider all the circumstances, including such factors as the question of a person's involvement with the firm's daily operations and policy decisions and the person's ownership interest in the firm.

As suggested by a Federal agency, we have amended § 5.5(c), which deals with the labor standards clauses which are to be inserted in contracts subject to the CWHSSA, to set forth in full the recordkeeping requirements.

Enforcement (Section 5.6)

Several Federal agencies commented that some of the enforcement

responsibilities set forth in § 5.6, such as the preservation of payrolls and the filing of certifications of compliance, should be delegated to grantees. Other contracting agencies recommended that the Department furnish agencies a copy of the entire investigation file, including the interview statements to enable the agencies to make a more intelligent decision on the assessment of liquidated damages. Concern was expressed about the requirement that no payments be made to the contractor until the agency insures that the contract contains the applicable labor standards clauses and wage determination since disputes occasionally arise and the Department would be given unwarranted control over the disbursement of agency funds.

It is clear from the definition of "Federal agency" in § 5.2(c) that this term does not include local Government grantees or recipients of Federal assistance. The Davis-Bacon enforcement responsibility lies solely with the Federal agencies and the Department of Labor and cannot be abdicated to local Governments who are the recipients of the Federal funds. We believe that this policy is mandated by the terms of Reorganization Plan No. 14 of 1950, and is necessary in order to maintain effective and efficient control over Federal construction monies and construction standards and the Davis-Bacon enforcement program. In reporting the results of its investigations to contracting agencies, the Department routinely furnishes all of the information which is necessary for an agency to complete its actions. Experience has shown that copies of employee interview statements, which are obtained under a pledge of confidentiality, have sometimes been provided to the contractors who have instituted reprisals against the affected employees. Nevertheless, if a contracting agency feels it is necessary in a particular case, we do, and will continue to, provide summaries of the information contained in the statements. Contrary to the understanding of some commenters, on § 5.6(a)(1), the Federal agency may approve the payment of funds when there is a dispute provided that there is a certification on file that there is a substantial dispute with respect to the required provisions. Of course, withholding must be effectuated before final payment is made.

Suspension of Funds (Section 5.9)

Several contracting agencies questioned the Department's authority to request the contracting agencies to withhold funds as provided in § 5.9. The authority delegated to the Secretary of Labor under Reorganization Plan No. 14 of 1950, contemplates that the Department of Labor, which is responsible for a coordinated Government-wide enforcement program, should have the concomitant authority to request the withholding of funds with the full expectation of having such requests honored by the agency. Without this authority to protect funds from which workers will be paid wages owed them, the Department's authority under the Plan to conduct investigations would be meaningless.

Department of Labor Hearings (Section 5.11)

In its comments on Part 6, containing enforcement procedures, the ABC, commented on the "loophole" it perceived in proposed section 5.11 pursuant to which the granting of evidentiary hearings on enforcement matters other than debarment was subject to the Administrator's discretion when the dispute involved significant sums of money, large groups of employees, or novel or unusual situations. ABC argued that this "loophole" constituted a denial of due process to contractors. Although hearings have commonly been afforded under the existing regulation, this regulation has been revised to provide hearings on disputes whenever there is a relevant issue of fact. However, in many instances a hearing is not necessary because there is no relevant issue of fact. Accordingly, in such a case the regulation provides that a ruling will be issued by the Administrator, and the contractor afforded an opportunity to seek review by the Wage Appeals Board.

As suggested by one of the respondents, we have increased the time in which a contractor may request a hearing from twenty days to thirty days from the date of the Administrator's letter.

Debarment Proceedings (Section 5.12)

There were several comments questioning why there are different periods of debarment under the Davis-Bacon Act and the Davis-Bacon and Related Acts, and different provisions for removal from the ineligible list under the Davis-Bacon and the Related Acts. It was also suggested that the Department provide for varied periods of debarment under the Davis-Bacon and the Related Acts.

Section 3(a) of the Davis-Bacon Act mandates a three-year period of debarment and there is no provision in the statute for removal from the ineligible bidders list prior to the expiration of the three years. Debarment under the Davis-Bacon and Related Acts is not mandated by these various statutes, but is provided for by regulations. In consonance with the ruling by the U.S. Court of Appeals for the District of Columbia in *Copper Plumbing and Heating Co.* v. *Campbell* (290 F 2d 368 (C.A.D.C. 1961)] we have provided by regulation for removal from the ineligible list of the contractors debarred under the Related Acts who can demonstrate a current responsibility to comply with labor standards requirements. Since these regulations provide procedures for removal from the ineligible list after six months, we are, in effect, allowing varying periods of debarment as suggested by some of the commenters.

There was also a suggestion to provide for an interim debarment mechanism during the pendency of administrative proceedings similar to the mechanisms currently utilized by other agencies. While no changes are being made in the regulations at this time, we are considering the development of interim debarment procedures.

As in § 5.11, we are changing the 20 day time limit in which to respond to the letter notifying the party of potential debarment to 30 days.

A new subsection (d) has been added to provide a procedure for determination of a debarred contractor's interest in another firm. This subsection provides for administrative law judge hearings where there is a relevant question of fact, or appeal to the Wage Appeals Board where relevant facts are not in dispute. This provision dovetails with the hearing procedure in 29 CFR Part 6, Subpart D, and corresponds with proposed 29 CFR 4.12. This change is procedural in nature and was omitted as an oversight.

In addition to the above, there were other comments recommending minor editorial and language changes which we deemed valid, and we have amended the affected sections.

This rule was drafted under the supervision and direction of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210 (202–523–6191).

Accordingly, 29 CFR Part 5 is revised as set forth below.

Signed at Washington, D.C., this 12th day of January, 1981.

Donald Elisburg,

Assistant Secretary of Labor, Employment Standards Administration.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

Sec.

5.1 Purpose and scope.
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5.18 Appeal from Bureau of Apprenticeship and Training's decision.

* * * * *

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 and the Copeland Act in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and of such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon the Secretary of Labor under Reorganization Plan No. 14 of 1950:

1. The Davis-Bacon Act (sec. 1–7, 46 Stat. 1949, as amended; Pub. L. 74–403, 40 U.S.C 276a–276a–7).

2. Copeland Act (40 U.S.C. 276c).

3. The Contract Work Hours and Safety Standards Act (40 U.S.C. 327–332).

4. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

5. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

6. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86–372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

7. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

8. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

9. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 128; 20 U.S.C. 684(b)(5)).

10. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

11. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91–230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92–318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

12. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113, as amended), see particularly the amendments in the Federal-Aid Highway Act of 1968 (Pub. L. 90–495, 82 Stat. 815).

13. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

14. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

15. Rehabilitation Act of 1973 (sec. 306(b)(5) 87 Stat. 384, 29 U.S.C. 776(b)(5)).

16. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1645; 29 U.S.C. 966; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

17. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

18. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

19. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

20. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).

21. National Visitors Center Facilities Act of 1966 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).

22. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).

23. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).

24. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

25. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a[g](1)(C); also sec. 308a, 90 Stat. 2258, 42 U.S.C. 293a(c)(7)).

26. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 384; 42 U.S.C. 296a(b)(5)).

27. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).

28. Safe Drinking Water Act (sec. 2(a) see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j–9(e)).

29. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o–3(b)(1)(H)).

30. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 867; 42 U.S.C. 1437j).

31. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

32. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

33. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

34. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c–3).

35. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

36. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j[a)(5)).

37. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

38. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

39. Housing and Urban Development Act of 1965 (sec 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

40. Older Americans Act of 1965 (sec. 502, Pub. L. 89–73, as amended by sec. 501, Pub. L. 93–29; 87 Stat. 50; 42 U.S.C. 3041a[a)(4)].

41. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).

42. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

43. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).

44. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

45. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

46. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

47. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

48. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).

49. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

50. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).
51. Solid Waste Disposal Act (sec. 2, 90 Stat. 2823; 42 U.S.C. 6979).
52. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).
53. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).
54. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).
55. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).
56. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281(i).
57. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4). Note.—Repealed December 9, 1969, and labor standards incorporated in sec. 1–1431 of the District of Columbia Code).
58. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89–694, but not in the United States Code).
59. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87–328) (considered a statute for purposes of the plan but not in the United States Code).
60. Energy Security Act (sec. 175(c), Pub. L. 96–294, 94 Stat. 611; 42 U.S.C. 8701 note).

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its related statutes as listed in that part.

§ 5.2 Definitions.

(a) The term "Secretary" includes the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, and their authorized representatives.

(b) The term "Administrator" means the Administrator of the Wage and Hour Division or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division, is designated to act for the Administrator under this Part. Except as otherwise provided in this Part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator in the administration of the statutes listed in § 5.1.

(c) The term "Federal agency" means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in § 5.1.

(d) The term "Agency Head" means the principal official of the Federal agency and includes those persons duly authorized to act in the behalf of the Agency Head.

(e) The term "Contracting Officer" means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term "labor standards" as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in § 5.1, and the regulations in Parts 1 and 3 of this subtitle and this part.

(g) The term "United States or the District of Columbia" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities.

(h) The term "contract" means any contract in excess of $2,000 which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 and any subcontract of any tier thereunder, let under the prime contract, which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution, except where a different meaning is expressly indicated. A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under certain enabling statutes, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms "construction", "prosecution", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on-site of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project), by persons employed by the contractor or subcontractor. However, the term "initial construction" in section 113 of Title 23, U.S.C., which pertains to Federal-aid highway work, does not include repair or maintenance work.

(k) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(l) The term "site of the work" is defined as follows:

(1) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been

completed and to other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of its proximity.

(2) Fabrication Plants, "mobile factories," batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract and are so located in proximity to the actual construction location that it would be reasonable to include them.

(3) Not included in the "site of the work" are permanent home offices or branch plant establishments of a contractor or subcontractor, its fabrication plant and tool yard establishments, whose locations and continuance are governed by its general business operations.

(m) The term "laborer" or "mechanic" includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term "laborer" or "mechanic" includes apprentices and trainees, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice and trainee are defined as follows:

(1) "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

(3) These provisions do not apply to "apprentices" and "trainees" employed on projects subject to 23 U.S.C. 113 who ar enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is "employed" regardless of any contractual relationship alleged to exist between the contractor or such person.

(p) The term "wages" means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of § 1.6 of this title.

§§ 5.3–5.4 [Reserved]

§ 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract subject to the labor standards provisions of any of the acts listed in § 5.1, except those subject only to the Contract Work Hours and Safety Standards Act, the following clauses (or any modifications thereof to meet the particular needs of the agency: *Provided,* That such modifications are first approved by the Department of Labor):

(1) *Minimum wages.* (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to the skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided,* That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage

determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is generally recognized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, agree with the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized representative, will respond within 30 days of receipt thereof and will approve, reverse, or modify every additional classification action.

(C) In the event the contractor, or the laborers or mechanics to be employed in the classification or their representatives, do not agree with the contracting officer on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt unless notice is otherwise furnished to the contracting agency within the 30 day period.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (1)(B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided,* That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.* The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices and trainees, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice or trainee, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(ii) The contractor shall submit weekly a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be for transmission to the (write in name of agency). The payrolls shall set out accurately and completely the name and address (on the first payroll on which the employee's name appears and on subsequent payrolls if the employee's address changes) and social security number of each laborer or mechanic, his or her correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. This information may be submitted in any form desired. Optional Form WH–347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029–005–00014–1), U.S. Government Printing Office, Washington, D.C. 20402. Each payroll shall be accompanied by a "Statement of Compliance" as set forth on the reverse side of Optional Form WH–347 or on any form with identical wording, signed by the employer or his or her agent indicating that the payrolls are

correct and complete, that the wage rates and fringe benefits or cash equivalents shown therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work performed. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor or subcontractor will make the records required under the labor standards clauses of the contract available for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and will permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to make the required records available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the contracting agencies that they are registered in an approved program and shall identify the program.

(4) *Apprentices and trainees—(i) Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subdivision (ii) of this subparagraph or is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. The contractor or subcontractor shall furnish to the contracting officer written evidence of the registration of the program, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable program, prior to using any apprentices on the contract work. Every apprentice must be paid at not less that the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) *Trainees.* Except as provided in 29 CFR 5.16 trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. The contractor or subcontractor shall furnish the contracting officer written evidence of the certification of the program, the registration of the trainees, and the ratios and wage rates (expressed in percentages of the journeyman hourly rate) prescribed in that program prior to using any trainees on the contract work. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity.* The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(5) *Compliance with Copeland Act requirements.* The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(6) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate

instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment.* A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements.* All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of Eligibility.* (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) *Contract Work Hours and Safety Standards Act.* The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract subject to the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.6 of Part 4 of this title. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is greater.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in subparagraph (1) of this paragraph, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in subparagraph (1) of this paragraph, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2) of this paragraph.

(4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs (1) through (4) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in subparagraphs (1) through (4) of this paragraph.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

§ 5.6 Enforcement.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts subject to the labor standards provisions of the Acts contained in § 5.1. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses required by § 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the agency a certification by

the contractor that there is a substantial dispute with respect to the required provisions.

(2) The Federal agency shall make such examination of the submitted payrolls and statements of compliance as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. In connection with such examination particular attention should be given to the correctness of classifications and disproportionate employment of laborers, of helpers where they are listed on the wage determination, and of apprentices or trainees registered in approved programs. Such payrolls and statements shall be preserved by the agency for a period of 3 years from the date of completion of the contract and shall be produced at the request of the Department of Labor at any time during the 3-year period.

(3) In addition to the examination of payrolls and statements required by paragraph (a)(2) of this section, the Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans to determine the correctness of classifications and disproportionate employment of laborers, of helpers where they are listed on the wage determination, and of apprentices or trainees registered in approved programs. Such investigations shall also include evidence of fringe benefit plans and payments thereunder. Complaints of alleged violations shall be given priority.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages and liquidated damages and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contract, without requesting the permission and views of the Department of Labor.

(5) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b) The Administrator shall cause to be made such investigations as deemed necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes listed in § 5.1. Federal agencies, contractors, subcontractors, sponsors, applicants, or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations. The findings of such an investigation, including amounts found due, may not be altered or reduced without the approval of the Department of Labor. Where the underpayments disclosed by such an investigation total $1,000 or more, where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), or where liquidated damages may be assessed under the Contract Work Hours and Safety Standards Act, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation and any action taken by the contractor to correct the violative practices, including any payment of back wages. In other circumstances, the Federal agency will be furnished a letter of notification summarizing the findings of the investigation.

§ 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than $1,000, and where there is no reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation was made at the request of the Department of Labor. In the latter case, the Federal agency shall submit a factual summary report detailing any violations including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as "letters of notice"), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total $1,000 or more, or where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), the Federal agency shall furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

(b) *Semi-annual enforcement reports.* To assist the Secretary in fulfilling the responsibilities under Reorganization Plan No. 14 of 1950, Federal agencies shall furnish to the Administrator by April 30 and October 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of October 1 through March 31 and April 1 through September 30, respectively. Such reports shall be prepared in the manner prescribed in memoranda issued to Federal agencies by the Administrator.

(c) *Additional information.* Upon request, the Agency Head shall transmit to the Administrator such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Administrator may find necessary for the performance of his or her duties with respect to the labor standards provisions referred to in this part.

(d) *Contract termination.* Where a contract is terminated by reason of violations of the labor standards provisions of the statutes listed in § 5.1, a report shall be submitted promptly to the Administrator and to the Comptroller General (if the contract is subject to the Davis-Bacon Act) giving the name and address of the contractor

or subcontractor whose right to proceed has been terminated, and the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of the contract, and the description of the work to be performed.

§ 5.8 Liquidated damages under the Contract Work Hours and Safety Standards Act.

(a) The Contact Work Hours and Safety Standards Act requires that laborers or mechanics shall be paid wages at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or forty hours in any work week. In the event of violation of this provision, the contractor and any subcontractor shall be liable for the unpaid wages and in addition for liquidated damages, computed with respect to each laborer or mechanic employed in violation of the Act, of $10, for each calendar day or workweek in which such individual was required or permitted to work without payment of required overtime wages. Any contractor or subcontractor aggrieved by the withholding of liquidated damages shall have the right to appeal to the head of the agency of the United States (or the territory or District of Columbia, as appropriate) for which the contract work was performed or for which financial assistance was provided.

(b) *Findings and recommendations of the Agency Head.* The Agency Head has the authority to review the administrative determination of liquidated damages and to issue a final order affirming the determination. It is not necessary to seek the concurrence of the Administrator but the Administration shall be advised of the action taken. Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, and the amount of the liquidated damages computed for the contract is in excess of $500, the Agency Head may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages shall include findings with respect to any wage underpayments for which the liquidated damages are determined.

(c) The recommendations of the Agency Head for adjustment or relief from liquidated damages under paragraph (a) of this section shall be reviewed by the Administrator or an authorized representative who shall issue an order concurring in the recommendations, partially concurring in the recommendations, or rejecting the recommendations, and the reasons therefor. The order shall be the final decision of the Department of Labor, unless a petition for review is filed pursuant to Part 7 of this title, and the Wage Appeals Board in its discretion reviews such decision and order.

(d) Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act for a contract is $500 or less and the Agency Head finds that the sum of liquidated damages is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for such liquidated damages without submitting recommendations to this effect or a report to the Department of Labor. This delegation of authority is made under section 105 of the Contract Work Hours and Safety Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business.

§ 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1, the Federal agency, upon its own action or upon written request of an authorized representative of the Department of Labor, shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b). of this section, where violations of the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1 result in underpayment of wages to employees, the Federal agency or an authorized representative of the Department of Labor shall request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of section 1(b)(2) of the Davis-Bacon Act.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the payment of wage underpayments shall not be requested and the matter shall be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator shall be informed simultaneously of the action taken.

§ 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that the contractor and/or subcontractor(s) should also be subject to debarment under the Davis-Bacon Act or § 5.12(a)(1), the letter will so indicate.

(2) A contractor and/or subcontractor desiring a hearing concerning the Administrator's investigative findings shall request such a hearing by letter postmarked within 30 days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute and the reasons therefore, including any affirmative defenses, with respect to the violations and/or debarment, as appropriate.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and response thereto, for designation of

an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR Part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator shall notify the contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings, and shall issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor and/or subcontractor(s) disagree with the factual findings of the Administrator or believe that there are relevant facts in dispute, the contractor or subcontractor(s) shall so advise the Administrator by letter postmarked within 30 days of the date of the Administrator's letter. In the response, the contractor and/or subcontractor(s) shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(1)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor and subcontractor(s) (if any) accordingly.

(3) If the contractor and/or subcontractor(s) desire review of the ruling issued by the Administrator under paragraphs (c)(1) or (2) of this section, the contractor and/or subcontractor(s) shall file a petition for review thereof with the Wage Appeals Board within 30 days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with Part 7 of this title.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings and/or ruling shall be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator shall advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(1). If a timely response or petition for review is filed, the findings and/or ruling of the Administrator shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Wage Appeals Board.

§ 5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

(b)(1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in § 5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, the Administrator shall notify by registered or certified mail to the last known address, the contractor or subcontractor and its responsible officers, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding. The Adminstrator shall afford such contractor or subcontractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a)(1) of this section or section 3(a) of the Davis-Bacon Act. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or subcontractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter postmarked within 30 days of the date of the letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute. In considering debarment under any of the statutes listed in § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge shall issue an order concerning whether the contractor or subcontractor is to be debarred in accordance with paragraph (a)(1) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge shall issue a recommendation as to whether the contractor or subcontractor should be debarred under section 3(a) of the Act.

(2) Hearings under this section shall be conducted in accordance with 29 CFR Part 6. If no hearing is requested within 30 days of receipt of the letter from the Administrator, the Administrator's findings shall be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) Any person or firm debarred under § 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list. Such a request should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, and shall contain a full explanation of the reasons why such person or firm should be removed from the ineligible list. In

cases where the contractor or subcontractor failed to make full restitution to all underpaid employees, a request for removal will not be considered until such underpayments are made. In all other cases, the Administrator will examine the facts and circumstances surrounding the violative practices which caused the debarment, and issue a decision as to whether or not such person or firm has demonstrated a current responsibility to comply with the labor standards provisions of the statutes listed in § 5.1, and therefore should be removed from the ineligible list. Among the factors to be considered in reaching such a decision are the severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm. In no case will such removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions applicable to Federal contracts and Federally assisted construction work subject to any of the applicable statutes listed in § 5.1 and other labor statutes providing wage protection, such as the Service Contract Act, the Walsh-Healey Public Contracts Act, and the Fair Labor Standards Act. If the request for removal is denied, the person or firm may petition for review by the Wage Appeals Board pursuant to 29 CFR Part 7.

(d)(1) Section 3(a) of the Davis-Bacon Act provides that for a period of three years from date of publication on the ineligible list, no contract shall be awarded to any persons or firms placed on the list as a result of a finding by the Comptroller General that such persons or firms have disregarded obligations to employees and subcontractors, and further, that no contract shall be awarded to "any firm, corporation, partnership, or association in which such persons or firms have an interest." Paragraph (a)(1) of this section similarly provides that contracts subject to any of the statutes listed in § 5.1 (other than the Davis-Bacon Act) shall not be awarded to "any firm, corporation, partnership, or association" in which a contractor or subcontractor on the ineligible list pursuant to that paragraph has a "substantial interest." A finding as to whether persons or firms whose names appear on the ineligible list have an interest (or a substantial interest, as appropriate) in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on his/her own motion or after receipt of a request for a determination pursuant to paragraph (d)(3) of this section may make a finding on the issue of interest (or substantial interest, as appropriate).

(ii) If the Administrator determines that there may be an interest (or substantial interest, as appropriate), but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (d)(4) of this section.

(iii) If the Administrator finds that no interest (or substantial interest, as appropriate) exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified an no further action taken.

(iv)(A) If the Administrator finds that an interest (or substantial interest, as appropriate) exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address), which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue.

(B) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (d)(2)(iv)(B) of this section, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the ruling of the Administrator shall be inoperative unless and until the administrative law judge or the Wage Appeals Board issues an order that there is an interest (or substantial interest, as appropriate).

(3)(i) A request for a determination of interest (or substantial interest, as appropriate), may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Government agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards.

(ii) The request shall include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the debarred bidders list has an interest (or a substantial interest, as appropriate) in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia, or which is subject to any of the statutes listed in § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) *Referral to the Chief Administrator Law Judge.* The Administrator, on his/her own motion under paragraph (d)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceedings shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(5) *Referral to the Wage Appeals Board.* If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Wage Appeals Board to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 7.

§ 5.13 Rulings and interpretations.

All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to Part 1 of this subtitle, of the rules contained in this part and in Parts 1 and 3, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

§ 5.14 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.

The Secretary of Labor may make variations, tolerances, and exemptions from the regulatory requirements of this part and those of Parts 1 and 3 of this subtitle whenever the Secretary finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship. Variations, tolerances, and exemptions may not be made from the statutory requirements of any of the statutes listed in § 5.1 unless the statute specifically provides such authority.

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

(a) *General.* Upon his or her own initiative or upon the request of any Federal agency, the Secretary of Labor may provide under section 105 of the Contract Work Hours and Safety Standards Act reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of that Act whenever the Secretary finds such action to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of the conduct of Government business. Any request for such action by the Secretary shall be submitted in writing, and shall set forth the reasons for which the request is made.

(b) *Exemptions.* Pursuant to section 105 of the Contract Work Hours and Safety Standards Act, the following classes of contracts are found exempt from all provisions of that Act in order to prevent injustice, undue hardship, or serious impairment of Government business:

(1) Contracts of $2,000.00 or less.

(2) Purchases and contracts other than construction contracts in the aggregate amount of $2,500.00 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising.

(3) Contract work performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: A State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island;

(4) Agreements entered into by or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, oats, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds, cotton, and wool.

(5) Sales of surplus power by the Tennessee Valley Authority to States, counties, municipalities, cooperative organization of citizens or farmers, corporations and other individuals pursuant to section 10 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 8311).

(c) *Tolerances.* (1) The "basic rate of pay" under section 102 of the Contract Work Hours and Safety Standards Act may be computed as an hourly equivalent to the rate on which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), as interpreted in Part 778 of this title. This tolerance is found to be necessary and proper in the public interest in order to prevent undue hardship.

(2) Concerning the tolerance provided in paragraph (c)(1) of this section, the provisions of section 7(d)(2) of the Fair Labor Standards Act and § 778.7 of this title should be noted. Under these provisions, payments for occasional periods when no work is performed, due to vacations, and similar causes are excludable from the "regular rate" under the Fair Labor Standards Act. Such payments, therefore, are also excludable from the "basic rate" under the Contract Work Hours and Safety Standards Act.

(3) See § 5.8(c) providing a tolerance subdelegating authority to the heads of agencies to make appropriate adjustments in the assessment of liquidated damages totaling $500 or less under specified circumstances.

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship or training programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice or trainee comes within the definition contained in § 5.2(n).

(iii) The time in question does not involve productive work or performance of the apprentice's or trainee's regular duties.

(d) *Variations.* (1) In order to prevent undue hardship, a workday consisting of a fixed and recurring 24-hour period commencing at the same time on each calendar day may be used in lieu of the calendar day in applying the daily overtime provisions of the Act to the employment of firefighters or fireguards, under the following conditions: (i) Where such employment is under a platoon system requiring such employees to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status; and (ii) if the use of such alternate 24-hour day has been agreed upon between the employer and such employees or their authorized representatives before performance of the work; and (iii) provided that, in determining the daily and the weekly overtime requirements of the Act in any particular workweek of any such employee whose established workweek begins at an hour of the calendar day different from the hour when such agreed 24-hour day commences, the hours worked in excess of 8 hours in any such 24-hour day shall be counted in the established workweek (of 168 hours commencing at the same time each week) in which such hours are actually worked.

(2) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully both the unpaid wages due laborers and mechanics and the liquidated damages due the United States, the available funds shall be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, shall be used for the payment of liquidated damages.

(3) In the performance of any contract entered into pursuant to the provisions of 38 U.S.C. 620 to provide nursing home care of veterans, no contractor or subcontractor under such contract shall be deemed in violation of Section 102 of the Contract Work Hours and Safety Standards Act by virtue of failure to pay the overtime wages required by such section for work in excess of 8 hours in any calendar day or 40 hours in the workweek to any individual employed by an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive

days for the purpose of overtime compensation and if such individual receives compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1½ times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

§ 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.

(a) Notwithstanding the provisions of § 5.5(a)(4)(ii) relating to the utilization of trainees on Federal and federally assisted construction, no contractor shall be required to obtain approval of a training program which, prior to August 20, 1975, was approved by the Department of Labor for purposes of the Davis-Bacon and Related Acts, was established by agreement of organized labor and management and therefore recognized by the Department, and/or was recognized by the Department under Executive Order 11246, as amended. A copy of the program and evidence of its prior approval, if applicable shall be submitted to the Employment and Training Administration, Bureau of Apprenticeship and Training, which shall certify such prior approval or recognition of the program. In every other respect, the provisions of § 5.5(a)(4)(ii)—including those relating to registration of trainees, permissible ratios, and wage rates to be paid—shall apply to these programs.

(b) Every trainee employed on a contract executed on and after August 20, 1975, in one of the above training programs must be individually registered in the program in accordance with BAT procedures, and must be paid at the rate specified in the program for the level of progress. Any such employee listed on the payroll at a trainee rate who is not registered and participating in a program certified by BAT pursuant to this section, or approved and certified by BAT pursuant to § 5.5(a)(4)(ii), must be paid the wage rate determined by the Secretary of Labor for the classification of work actually performed. The ratio of trainees to journeymen shall not be greater than permitted by the terms of the program.

(c) In the event a program which was recognized or approved prior to August 20, 1975, is modified, revised, extended, or renewed, the changes in the program or its renewal must be approved by the Bureau of Apprenticeship and Training before they may be placed into effect.

§ 5.17 Withdrawal of approval of a training program.

If at any time the Employment and Training Administration, Bureau of Apprenticeship and Training determines, after opportunity for a hearing, that the standards of any program, whether it is one recognized or approved prior to August 20, 1975, or a program subsequently approved, have not been complied with, or that such a program falls to provide adequate training for participants, a contractor will no longer be permitted to utilize trainees at less than the predetermined rate for the classification of work actually performed until an acceptable program is approved. If the contractor files an appeal pursuant to § 5.18 within 30 days of receipt of a certified letter withdrawing the Bureau of Apprenticeship and Training's approval, the effect of the withdrawal of approval of the program will be delayed until a decision is rendered on the appeal.

§ 5.18 Appeal from Bureau of Apprenticeship and Training's decisions.

(a) Appeal from a withdrawal of approval of a training program by the Bureau of Apprenticeship and Training pursuant to § 5.17 may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210. Appeals brought more than 30 days after the contractor's receipt of notice of withdrawal of approval of a program will be processed, but the effects of withdrawal of approval of the program will not be delayed during consideration of such an appeal.

(b) Appeal from disapproval of new training programs whose approval is requested pursuant to these regulations may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210.

(c) The Assistant Secretary for Employment and Training (or designee) shall examine the complete record on the basis of which the denial was issued, including the application for the program, supporting data, Bureau of Apprenticeship and Training decision, and any written argument which the applicant may submit, and any reply thereto by the Bureau of Apprenticeship and Training. Copies of any such reply shall be served on the applicant. The Assistant Secretary, or designee, shall approve or disapprove the decision of the Bureau or shall advise what modifications are necessary for approval of the program. This decision by the Assistant Secretary or designee shall be final.

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January 16, 1981

Part X

Department of Labor

Office of the Secretary

Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts; Final Rule

Office of the Secretary

29 CFR Part 6

Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts

AGENCY: Department of Labor.

ACTION: Final rule.

SUMMARY: The revisions to this part are intended to provide administrative hearings in enforcement cases and substantial interest proceedings involving the Davis-Bacon and related acts, the Service Contract Act, and the Contract Work Hours and Safety Standards Act, and substantial variance and arm's length proceedings under Section 4(c) of the Service Contract Act. These revisions are designed to make such proceedings as uniform as possible. A procedure for appeal to the Secretary is provided instead of appeal to a Board, which had been proposed as a new Part 8 to 29 CFR.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Gail V. Coleman, Counsel for Contract Labor Standards, General Legal Services, Office of the Solicitor, U.S. Department of Labor, Room N2464, 200 Constitution Ave., NW., Washington, D.C. 20210. Phone 202-523-8268.

SUPPLEMENTARY INFORMATION: On April 22, 1980, a proposal was published in the Federal Register (45 FR 27400) to make revisions to 29 CFR Part 6, Rules of Practice for Administrative Proceedings Enforcing Labor Standards in Federal and Federally Assisted Construction Contracts and Federal Service Contracts. As stated in the proposal, its purpose was primarily to make more uniform the proceedings for enforcement under the various labor standards statutes and to provide more expedited hearings under Section 4(c) of the Service Contract Act.

Interested persons were afforded the opportunity to submit comments to the Office of the Solicitor by May 27, 1980. Comments were received from eight interested parties, including the Department of Defense, the National Aeronautics and Space Administration, the Philadelphia Area Office of the Department of Housing and Urban Development, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the International Brotherhood of Electrical Workers, the Building and Construction Trades Department, AFL-CIO, the Associated Builders and Contractors, Inc. (ABC), and the Council of Defense and Space Industry Associations (CODSIA).

The following is an analysis of all the principal comments received and the corresponding changes made to the proposed rule. Each submission has been thoroughly reviewed and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major comments and recommendations, the Department's findings as to whether or not suggested changes to the proposed rule are appropriate, and the substantive changes herein adopted.

The Building and Construction Trades Department, CODSIA, and the Philadelphia Area Office of the Department of Housing and Urban Development commented generally in favor of the proposed regulations, which are designed to ensure due process resolution of disputes.

The International Brotherhood of Electrical Workers and the Building and Construction Trades Department objected to the different standard for debarment of affiliated companies under the Davis-Bacon Act and the related acts, and suggested that the standard in § 6.2(d) and in Subparts C and D should be "interest" rather than "substantial interest." The regulations adopt the "interest" standard for debarment under the Davis-Bacon Act because it is the standard imposed by the statute. In determining both "interest" and "substantial interest" the Department looks to each situation on a case by case basis and considers all the circumstances, including such factors as the person's involvement with the firm's daily operations and policy decisions and the person's ownership interest in the firm. Although no change is made in the standard for debarment, the definition of "Respondent" is amended to include the Davis-Bacon statutory standard.

The Department of Defense suggested that service in Section 6.3 should be by certified mail. The Department of Labor in fact serves the complaint under the Service Contract Act and the notification letter under Davis-Bacon procedures (see 29 CFR 5.11 and 5.12) by certified or registered mail because of the legal ramifications of failure to respond to these documents. However, regular mail is the normal method of service of briefs, etc., and is more expeditious than certified mail. Therefore no change is adopted except to make it clear that filing is accomplished upon service.

The International Brotherhood of Electrical Workers suggested the addition of the Davis-Bacon Act to the subpoena provision in § 6.7. No change can be made in this provision since there is no statutory basis for administrative subpoenas under the Act. However, the concern is partially accommodated by § 6.8, concerning production of documents and witnesses.

The Department of Defense suggested that production of documents and witnesses should only be available against parties to the proceeding. However, this is already implicit in the regulation, which defines parties as the Department of Labor and the respondents. Section 6.8 has been amended to make it clear that confidential statements may not be disclosed prior to trial without the employee's consent.

The National Aeronautics and Space Administration expressed concern over the provision of proposed § 6.12(b) that permitted a party to appeal a decision although the party did not appear at the hearing. To address its concern, the regulation has been amended to limit appeal rights under these circumstances to non-evidentiary issues.

Because agency recommendations for waiver of liquidated damages under the Contract Work Hours and Safety Standards Act are not received until after violations are finally determined, § 6.26 has been amended to eliminate the possibility that the complaint might state that such a recommendation has been received. Appeals regarding the Department's actions in response to such agency recommendations will be heard by the Wage Appeals Board to provide uniform decisions, rather than two forums.

CODSIA suggested that § 6.26 should be amended to provide that the name of a contractor found to have violated the Service Contract Act would not be sent to the Comptroller General to be put on the ineligibility list until after federal court proceedings are completed. This suggestion is contrary to the mandate of Section 5(a) of the Service Contract Act, which requires that the violator's name be sent to the Comptroller General not later than 90 days after a finding of violation. However, § 6.24 and corresponding provisions have been amended to make it clear that the administrative law judge's decision is inoperative while it is being appealed.

The ABC suggested that Subpart C, concerning hearings under the Davis-Bacon and related acts, should contain a provision defining the burden of proof. Although the Department agrees in general that the initial burden is on it to establish the existence of violations, the

nature of the burden varies under the circumstances, particularly where the contractor has not kept required records. Furthermore, the burden of proof is a legal issue, rather than procedural. Therefore, this suggestion is not adopted.

The International Brotherhood of Electrical Workers suggested that employees should be parties to enforcement proceedings under Subpart C and suggested that § 6.30 be so amended. In the Department's view this change is not appropriate since the employees' interests are represented by the Department. However, employees are normally notified of such proceedings because their presence as witnesses may be necessary.

The Building and Construction Trades Department and the International Brotherhood of Electrical Workers commented on the delays that may be inherent in the debarment procedures in Subpart C. It is the Department of Labor's opinion that elimination of the appeal to the Administrator in the current procedure will result in a net decrease in the time to a final decision. However, the Department is looking into the possibility of an interim debarment mechanism similar to that of other agencies, as suggested by the Building Trades.

CODSIA opposed the provision in § 6.31 that the scope of the hearing can be expanded to include debarment. It suggested that the regulation should require that before such an amendment may be made additional substantial violations must be brought to light for the first time at the hearing. Protection against misuse of the provision is contained in the regulation since the approval of the administrative law judge is required, the amendment cannot prejudice the opposing party's presentation on the merits, and a continuance in the hearing may be granted if necessary to allow the party to address the charges. Evidence that violations previously uncovered are aggravated or willful may often be disclosed just prior to or at the hearing. Therefore the provision proposed is necessary to effectuate the Act and no change is recommended.

The ABC was pleased to see that Section 6.33(b) administrative law judge decisions are final if not appealed, rather than recommendations to the Wage and Hour Division. However, it suggested that § 6.33(b) specifically require issuance of findings of fact and conclusions of law. Although in the Department's view this requirement was implicit in the requirement for "a statement of findings and conclusions," it has been made explicit here and elsewhere in this part.

The ABC commented on the different time limits for filing by the parties of proposed findings and conclusions by the parties and petitions for review in Subparts C and D (§§ 6.33 and 6.34, 6.44 and 6.45) and suggested a uniform longer period of 60 days throughout. Relatively short time periods are provided in Subpart D because of the necessity of providing prompt notice to contracting agencies of firms found ineligible as a result of the existence of a substantial interest in the firm by a debarred contractor. The Department believes the time periods in Subparts C and D are generally sufficient, but notes that under Subpart C, additional time may be allowed. In the Department's view, 60 days as a general rule is unnecessary.

Because of the possibility of a good faith dispute regarding the violations, the Department of Defense opposed the provision in § 6.33(b)(2) that relief from debarment under the Davis–Bacon Act be conditioned upon payment of back wages. Since debarment is not effectuated until after the completion of administrative appeals on the issue of liability for back wages, this suggestion is not accepted.

In response to the comment of the Philadelphia Area Office of the Department of Housing and Urban Development, no specific time limit is put on the administrative law judge's decision under § 6.33 because there is no constraint imposed by procurement deadlines, and because of the complexity of some cases.

With regard to proceedings under Subpart E to determine a substantial variance pursuant to Section 4(c) of the Service Contract Act, the National Aeronautics and Space Administration commented generally that the procedures in Subpart E are potentially more formal and more time-consuming (if an appeal is taken to the Board of Service Contract Appeals) than in the current regulations. Contrary to NASA's view, it is the Department's opinion that hearings on the record are required by Section 4(c). Furthermore, because such proceedings often inherently involve substantive legal issues, an appellate forum appears to be necessary. To the extent possible the proposed and final regulations tighten the time frames and provide for more expeditious hearings. Time restrictions have not been placed on the Administrator's own decisions because further investigation is often required, although it is the Department's intent to act quickly with a view towards accommodating procurement deadlines. As discussed under new Subpart F below, it has been determined that appeals shall be to the Secretary rather than to a new board. In our view, this should result in more expeditious decisionmaking.

The AFL–CIO opposed what it perceived as two separate procedures for determining "substantial variance" and "arm's length" negotiations pursuant to Section 4(c) of the Act. To the contrary, § 4.11(d) of 29 CFR clearly states that where both questions are at issue, only one proceeding will be held.

The Department of Defense has suggested that contractors known to be desirous of bidding on a contract be eliminated from the list of parties notified in § 6.51(a). The Department of Labor agrees that as proposed the provision is overly broad, and therefore it has been amended to include only contractors known or believed to be interested in the issue, as well as other interested parties.

The AFL–CIO suggested the authorized representative of affected Federal employees should receive the Order of Reference pursuant to § 6.51(a). It is not anticipated that Federal employees would be affected by these proceedings since Section 4(c) of the Act concerns only contracts where there was a predecessor contract, not contract work previously performed by Federal employees. However, the section has been amended to include other affected parties known to be interested.

Section 6.54 has been amended to expressly preclude disclosure of source data collected by the Bureau of Labor Statistics as a result of comments concerning this issue on proposed 29 CFR Part 8 by several labor organizations.

Comments were received in support of and in opposition to the establishment of a Board of Service Contract Appeals, proposed as a new 29 CFR Part 8 (45 FR 27410, April 22, 1980). Those in favor were pleased to see an independent, appellate procedure. Those opposed were concerned that a hearing procedure for wage determinations would result in a court decision such as that in *Wirtz* v. *Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963) (arising under the Walsh-Healey Public Contracts Act), and the cessation of wage determinations under the Service Contract Act. Other concerns were the length of time and cumbersomeness of the process, and a view that another Government body was unnecessary. Although the Department disagrees strongly with the analyses of *Baldor*, which was based on a provision in the Walsh-Healey Act, not contained in SCA, which required hearings on the record, the Department shares the other concerns expressed. Accordingly, it has

been determined to substitute for the proposed Board a formal appeal procedure to the Secretary. This procedure, which has been incorporated in a new Subpart F, will provide due process review of issues such as wage determinations and coverage, which have not previously been subject to any appeal procedure. This change was adopted to expedite the review process, thereby reducing administrative delays in the procurement process, and to further the goal of controlling the proliferation of Governmental bodies.

Accordingly, Part 8 has been withdrawn and a new Subpart F is being issued in substitution, to provide for administrative appeals of Service Contract Act matters to the Secretary. Appeals are permitted from decisions of administrative law judges pursuant to Subparts B, D and E of this part, and from any final decisions of the Administrator of the Wage and Hour Division (including wage determinations, additional classification actions, coverage decisions, etc.).

Subpart F adopts the same general framework as the procedures proposed for the Board. The comments received on the corresponding sections of proposed Part 8 are discussed herein.

The Department of Defense, NASA, CODSIA and NCTSI questioned the scope of the appeals permitted (see proposed § 8.1). Appeals on all final decisions are permitted pursuant to § 6.62, including conformance actions and rulings on issues such as the application wage determinations and of the Act (e.g., coverage). In addition, the Wage-Hour Administrator or authorized representative is substituted for the Department of Labor in this section to make it clear that only official agency actions may be appealed. This is not intended, however, to preclude review of decisions of the Assistant Secretary for Employment Standards acting in the stead of the Administrator.

NASA suggested that review by the Board should not be discretionary. The procedures adopted for appeals to the Secretary provide a right of review.

NCTSI suggested that some factfinding should be provided (see proposed § 8.1(e)). It has been the Department's experience that factfinding is not appropriate before an appellate body, and further that it is necessary for the Wage and Hour Division to evaluate data before it is submitted on appeal since the data may affect its decision and obviate the necessity of appeal. Therefore no such change has been made to § 6.61(d).

The AFGE and the Research Department of the AFL–CIO suggested that Federal employees should be parties able to petition for review of wage determinations (see proposed § 8.2(5)). Since Federal employees frequently have no substantial interest in a wage determination, they have not been specifically added to § 6.61(a). However, a general provision concerning parties whom the Secretary finds to have a sufficient interest in the wage determination has been added, which would presumably include Federal employees in appropriate cases.

The Department of Defense suggested that 30 days rather than 15 days should be allowed to appeal a wage determination (see proposed § 8.3(a)). In the Department's view this suggestion does not permit the expedited decisionmaking required by the procurement process. However, § 6.61(c) does allow 20 days to appeal. It is believed that this time is sufficient to prepare a petition and also accommodate procurement deadlines.

NASA, on the other hand, commented on the delays inherent in the Board procedure. To make it clear that the Secretary will act with a view to applicable procurement deadlines, appropriate provisions have been added to §§ 6.65 and 6.66.

NCTSI and the Department of Defense suggested that wage determinations be reviewable after contract award and be applicable to the contract (see proposed § 8.6(b)). The regulations provide (§ 6.61(e)(2)) that the Secretary in his/her discretion may review a case involving significant issues of general applicability after award, for application to future procurements where a contracting agency has incorporated the wage determination required by 29 CFR 4.4 and 4.5 into the contract specifications, changing that wage determination would be contrary to basic principles of competitive bidding and contrary to a long line of Wage Appeals Board precedent. Therefore the suggestions have not been adopted.

NASA suggested that proposed § 8.6(c) should include situations where it has been found that no substantial variance exists. This provision, now contained in § 6.61(e), concerns review of prevailing wage determinations, not determinations regarding the existence of a substantial variance. Appeals may be filed of determinations that no substantial variance exists, even if made after award, provided the time limitations of 29 CFR 4.10 have been met. See § 6.57.

Because of the concerns expressed by the various labor organizations regarding the *Baldor* decision, a provision has been added to § 6.64 to prohibit the inclusion of BLS source data in the wage determination record submitted to the Secretary. NCTSI also expressed concern over protection of proprietary and commercial information. The Department is sympathetic to this concern but at this time cannot envision a method of protecting such information and ensuring the ability to challenge the basis of a wage determination, when the data has been collected by Wage and Hour. Presumably the Secretary, if appropriate, could protect certain proprietary data, subject to the constraints of the Freedom of Information Act and 29 CFR Part 70, but it does not appear to be appropriate to make further specific changes to the regulations at this time.

The Department of Defense suggested that regulations of the Department of Labor should be reviewable or at least subject to interpretation (see proposed § 8.1(b)). It is the Department of Labor's view that duly promulgated regulations must be observed in any administrative proceedings unless amended pursuant to rulemaking procedures. The Secretary of course has the authority to interpret the regulations, and § 6.66 contains no limitation on this authority.

As suggested by the Department of Defense, the standard of review of findings of fact (proposed § 8.9(b)) has been changed in § 6.66 from "clearly erroneous" to "not supported by substantial evidence."

In addition to the above, other minor editorial and language changes have been made in various sections.

Because Part 6 is procedural in character, it was determined that it is not a significant regulation within the meaning of Executive Order 12044 and the Department's guidelines. Accordingly, no regulatory analysis was prepared.

This rule was drafted under the supervision and direction of Carin Ann Clauss, Solicitor of Labor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

29 CFR Part 6 is revised as set forth below.

Signed at Washington, D.C. this 12th day of January 1981.

Ray Marshall,

Secretary of Labor.

PART 6—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS ENFORCING LABOR STANDARDS IN FEDERAL AND FEDERALLY ASSISTED CONSTRUCTION CONTRACTS AND FEDERAL SERVICE CONTRACTS

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6.66 Decision of the Secretary.

Authority: Secs. 4 and 5, 79 Stat. 1034, 1035 as amended by 86 Stat. 789, 790, 41 U.S.C. 353 and 354; 5 U.S.C. 301; Reorg. Plan No. 14 of 1950, 64 Stat. 1267, 5 U.S.C. Appendix; 46 Stat. 1494, as amended by 49 Stat. 1011, 78 Stat. 238, 40 U.S.C. 276a–276a–7; 76 Stat. 357–359, 40 U.S.C. 327–332; 48 Stat. 948, as amended by 63 Stat. 108, 72 Stat. 967, 40 U.S.C. 276c.

Subpart A—General

§ 6.1 Applicability of rules.

This part provides the rules of practice for administrative proceedings under the Service Contract Act, the Davis-Bacon Act and related statutes listed in § 5.1 of Part 5 of this title which require payment of wages determined in accordance with the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Act. See Parts 4 and 5 of this title.

§ 6.2 Definitions.

(a) "Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative.

(b) "Associate Solicitor" means the Associate Solicitor for General Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20210.

(c) "Chief Administrative Law Judge" means the Chief Administrative Law Judge, U.S. Department of Labor, 1111 20th Street, N.W., Suite 700, Washington, D.C. 20036.

(d) "Respondent" means the contractor, subcontractor, person alleged to be responsible under the contract or subcontract, and/or any firm, corporation, partnership, or association in which such person or firm is alleged to have a substantial interest (or interest if the proceeding is under the Davis-Bacon Act) against whom the proceedings are brought.

§ 6.3 Service; copies of documents and pleadings.

(a) *Manner of service.* Service upon any party shall be made by the party filing the pleading or document by delivering a copy or mailing a copy to the last known address. When a party is represented by an attorney, the service should be upon the attorney. For purposes of this part, filing is accomplished upon the day of service, by mail or otherwise.

(b) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of said service shall be proof of the service. Where service is made by mail, service shall be complete upon mailing.

(c) *Service upon Department, number of copies of pleading or other documents.* An original and three copies of all pleadings and other documents shall be filed with the Department of Labor: The original and one copy with the Administrative Law Judge before whom the case is pending, one copy with the attorney representing the Department during the hearing, and one copy with the Associate Solicitor.

§ 6.4 Computation of time.

Saturdays, Sundays, and holidays shall be included in computing the time allowed for filing any document or paper under this part, but when such time expires on such a day, such period shall be extended to include the next following day which is not a Saturday, Sunday or holiday.

§ 6.5 Motions and requests.

Motions or requests or any matter, including discovery, shall be filed with the Chief Administrative Law Judge, except that those made during the course of the hearing shall be filed with the Administrative Law Judge or shall be stated orally and made part of the transcript. Each motion or request shall state the particular order, ruling, or action desired, and the grounds therefor. The Administrative Law Judge is authorized to rule upon all motions or requests filed or made prior to the filing of the decision.

§ 6.6 Depositions.

(a) *When, how, and by whom taken.* For good cause shown, the testimony of any witness may be taken by deposition in any proceeding, after a complaint has been filed. Depositions may be taken upon written interrogatories or orally before any person having power to administer oaths.

(b) *Application.* Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge, setting forth the reasons why such deposition should be taken; the time when, the place where, and the name and address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each witness is expected to testify.

(c) *Notice.* Such notice as the Administrative Law Judge shall order shall be given for the taking of a

deposition, but this shall not be less than 5 days' written notice when the deposition is to be taken within the United States and not less than 20 days' written notice when the deposition is to be taken elsewhere.

(d) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and, with respect to oral depositions, the adverse party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to and subscribed by the witness, and certified by the officer authorized to administer oaths. Thereafter, the officer shall seal the deposition, with two copies thereof, in an envelope and mail the same by registered mail to the Administrative Law Judge. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof. No part of a deposition shall be admitted in evidence except for the limited purpose of impeachment, unless there is a showing that the witness is unavailable to testify (including a witness who cannot be subpoenaed or who is located outside of the State in which the hearing is held) or unless the parties stipulate regarding use of the deposition.

§ 6.7 Subpoenas.

All applications under the Service Contact Act for subpoenas ad testificandum and subpoenas duces tecum shall be made in writing to the Administrative Law Judge. Application for subpoenas duces tecum shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope.

§ 6.8 Production of documents and witnesses.

The parties, who shall be deemed to be the Department of Labor and the respondent(s), may serve on any other party a request to produce documents or witnesses in the control of the party served, setting forth with particularity the documents or witnesses requested. The party served shall have 15 days to respond or object thereto unless a shorter or longer time is ordered by the Administrative Law Judge. The parties shall produce documents and witnesses to which no privilege attaches which are in the control of the party, if so ordered by the Administrative Law Judge upon motion therefor by a party. If a privilege is claimed, it must be specifically claimed in writing prior to the hearing or orally at the hearing, including the reasons therefor. In no event shall a statement taken in confidence by the Department of Labor or other Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained.

§ 6.9 Witnesses and fees.

Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like services in the District Court of the United States. The witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

§ 6.10 Administrative Law Judge.

(a) *Who presides.* All hearings shall be presided over by an Administrative Law Judge appointed under section 11 of the Administrative Procedure Act.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge.

(c) *Powers.* Administrative Law Judges shall have all powers necessary to the conduct of fair and impartial hearings, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas in proceedings under the Service Contract Act upon proper applications as provided in § 6.7 of this title;

(3) To rule upon offers of proof and receive relevant evidence;

(4) To take or cause to be taken depositions and to determine their scope;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel therein;

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To consider and rule upon procedural requests;

(8) To make and file decisions in conformity with this part;

(9) To take any action authorized by the rules in this part or in conformance with the Administrative Procedure Act.

(d) *Consultation.* The Administrative Law Judge shall not consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate.

(e) *Disqualification of Administrative Law Judge.* (1) When an Administrative Law Judge deems himself/herself disqualified to preside in a particular proceeding, he/she shall withdraw therefrom by notice on the record directed to the Chief Administrative Law Judge.

(2) Whenever any party believes the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Chief Administrative Law Judge a motion to disqualify and remove such Administrative Law Judge, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. The Chief Administrative Law Judge shall rule upon the motion.

(f) *Contemptuous conduct: failure or refusal of a witness to appear or answer.* Contemptuous conduct at any hearing before an Administrative Law Judge shall be ground for exclusion from the hearing. The failure or refusal of a witness to appear at any hearing when so ordered by the Administrative Law Judge, or to answer any question which has been ruled to be proper, shall be ground for the action provided in section 5 of the Act of June 30, 1936 (41 U.S.C. 39) and, in the discretion of the Administrative Law Judge, for striking out all or part of the testimony which may have been given by such witness.

§ 6.11 Prehearing conferences.

(a) Upon his/her own motion or the motion of the parties, the Administrative Law Judge may direct the parties or their counsel to meet with the Administrative Law Judge for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulations, admissions of fact and contents and authenticity of documents;

(4) Limitation of the number of expert witnesses; and

(5) Such other matters as may tend to expedite the disposition of the proceeding.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceedings shall be controlled by such action.

§ 6.12 Appearances.

(a) *Representation.* The parties may appear in person, by counsel, or otherwise.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present evidence in whole or such portion thereof sufficient to make a prima facie case before the

Administrative Law Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Administrative Law Judge's decision and to file a petition for review thereof with the Secretary or the Wage Appeals Board, as appropriate. *Provided, however,* That no such petition for review may be filed concerning any findings of fact of the Administrative Law Judge or concerning the admissibility of evidence.

§ 6.13 Hearing.

(a) *Order of proceeding.* Except as may be determined otherwise by the Administrative Law Judge or where the only issue in the proceeding is the existence of unusual circumstances under section 5(a) of the Service Contract Act, counsel for the Department of Labor shall proceed first at the hearing.

(b) *Evidence*—(1) *In general.* The testimony of witnesses shall be upon oath or affirmation administered by the Administrative Law Judge and shall be subject to such cross-examination as may be required for a full and true disclosure of the facts. The Administrative Law Judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, the party shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the Administrative Law Judge may be relied upon subsequently in the proceeding. Formal exception to an adverse ruling is not required.

(c) *Official notice.* Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice and also concerning which the Department of Labor by reason of its functions is presumed to be expert: *Provided,* That the parties shall be given adequate notice at the hearing or by reference in the Administrative Law Judge's decision of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(d) *Transcript.* A transcript shall be made of the proceeding.

§ 6.14 Transmission of record.

If a petition for review of the Administrative Law Judge's decision is filed with the Secretary or the Wage Appeals Board, the Chief Administrative Law Judge shall promptly transmit the record of the proceeding. The record shall include: The pleadings, motions, and requests filed in written form, rulings thereon, the transcript of the testimony and proceeding taken at the hearing, together with the exhibits admitted in evidence, and documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions of law, orders, and supporting reasons, as may have been filed, the Administrative Law Judge's decision, and such other documents as may have been filed in the proceeding. If a petition for review is not filed within the time prescribed in this part, the Chief Administrative Law Judge shall so advise the Administrator.

Subpart B—Enforcement Proceedings Under the Service Contract Act (and Under the Contract Work Hours and Safety Standards Act for Contracts Subject to the Service Contract Act)

§ 6.20 Complaints.

(a) Enforcement proceedings under the Service Contract Act and under the Contract Work Hours and Safety Standards Act for contracts subject to the Service Contract Act, may be instituted by the Deputy Solicitor or a Regional Solicitor by issuing a complaint and causing the complaint to be served upon the respondent.

(b) The complaint shall contain a clear and concise factual statement of the grounds for relief and the relief requested.

(c) The Administrative Law Judge shall notify the parties of the time and place for a hearing.

§ 6.21 Answer.

(a) Within 20 days after the service of the complaint, the respondent shall file an answer with the Chief Administrative Law Judge. The answer shall be signed by the respondent or his/her attorney.

(b) The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny, each of the allegations of the complaint unless the respondent is without knowledge, in which case the answer shall so state; or (2) state that the respondent admits all of the allegations of the complaint. The answer may contain a waiver of hearing. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) Failure to file an answer shall constitute grounds for waiver of hearing and entry of a default judgment unless respondent shows good cause for such failure to file. In preparing the decision of default judgment the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint and shall order the appropriate relief and/or sanctions.

§ 6.22 Amendments to pleadings.

At any time prior to the close of the hearing record, the complaint or answer may be amended with the permission of the Administrative Law Judge and on such terms as he/she may approve. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 6.23 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the proceedings in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and Secretary regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.24 Decision of the Administrative Law Judge.

(a) *Proposed findings of fact, conclusions, and order.* Within 30 days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the

Administrative Law Judge proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the Administrative Law Judge.* (1) Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and order, or within 30 days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/her decision. If any aggrieved party desires review of the decision, a petition for review thereof shall be filed as provided in § 6.25 of this title, and such decision and order shall be inoperative unless and until the Secretary issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made under §§ 6.21, 6.22, and 6.23 of this title. It shall be supported by reliable, probative, and substantial evidence. Such decision shall be in accordance with the regulations and rulings continued in Parts 4 and 5 and other pertinent parts of this title.

(2) If the respondent is found to have violated the Service Contract Act, the Administrative Law Judge shall include in his/her decision an order as to whether the respondent is to be relieved from the ineligible list as provided in Section 5(a) of the Act, and, if relief is ordered, findings of the unusual circumstances, within the meaning of Section 5(a) of the Act, which are the basis therefor. If respondent is found to have violated the provisions of the Contract Work Hours and Safety Standards Act, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list as provided in § 5.12(a)(1) of Part 5 of this title, including findings regarding the existence of aggravated or willful violations. If wages and/or fringe benefits are found due under the Service Contract Act and/or the Contract Work Safety Standards Act and are unpaid, no relief from the ineligible list shall be ordered except on condition that such wages and/or fringe benefits are paid.

(3) The Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act.

§ 6.25 Petition for review.

Within 40 days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Secretary), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Secretary pursuant to Subpart E, with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

§ 6.26 Ineligible list.

(a) Upon the final decision of the Administrative Law Judge or Secretary, as appropriate, the Administrator shall promptly forward to the Comptroller General the name of any respondent found in violation of the Service Contract Act, including the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest, unless such decision orders relief from the ineligible list because of unusual circumstances.

(b) Upon the final decision of the Administrative Law Judge or the Secretary, as appropriate, the Administrator promptly shall forward to the Comptroller General the name of any respondent found to be in aggravated or willful violation of the Contract Work Hours and Safety Standards Act, and the name of any firm, corporation, partnership, or association in which the respondent has a substantial interest.

Subpart C—Enforcement Proceedings Under the Davis-Bacon Act and Related Prevailing Wage Statutes, the Copeland Act, and the Contract Work Hours and Safety Standards Act (Except Under Contracts Subject to the Service Contract Act)

§ 6.30 Referral to Chief Administrative Law Judge.

(a) Upon timely receipt of a request for a hearing under §§ 5.11 (where the Administrator has determined that relevant facts are in dispute) or 5.12 of Part 5 of this title, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the notification letter to the respondent from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent.

(b) The notification letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings. The notification letter and response shall be in accordance with the provisions of § 5.11 or § 5.12(b)(1) of Part 5 of this title, as appropriate.

§ 6.31 Amendments to pleadings.

At any time prior to the closing of the hearing record, the complaint (notification letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to § 5.11 of Part 5 of this title, such an amendment may include a statement that debarment action is warranted under § 5.12(a)(1) of Part 5 of this title or under Section 3(a) of the Davis-Bacon Act. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 6.32 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) That any order concerning debarment under the Davis-Bacon Act (but not under any of the other statutes listed in § 5.1 of Part 5 of this title) shall

constitute a recommendation to the Comptroller General;

(4) A waiver of any further procedural steps before the Administrative Law Judge and the Wage Appeals Board regarding those matters which are the subject of the agreement; and

(5) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.33 Decision of the Administrative Law Judge.

(a) *Proposed findings of fact, conclusions, and order.* Within 30 days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the Administrative Law Judge.* (1) Within a reasonable time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/her decision. If any aggrieved party desires review of the decision, a petition for review thereof shall be filed as provided in § 6.34 of this title, and such decision and order shall be inoperative unless and until the Wage Appeals Board either declines to review the decision or issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in Part 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondent's answer (response) and § 6.32 of this title. It shall be supported by reliable, probative, and substantial evidence.

(2) If the respondent is found to have violated the labor standards provisions of any of the statutes listed in § 5.1 of Part 5 of this title other than the Davis-Bacon Act, and if debarment action was requested pursuant to the complaint (notification letter) or any amendment thereto, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list as provided in § 5.12(a)(1) of this title, including any findings of aggravated or willful violations. If the respondent is found to have violated the Davis-Bacon Act, and if debarment action was requested, the Administrative Law Judge shall issue as a part of the order a recommendation as to whether respondent should be subject to the ineligible list pursuant to Section 3(a) of the Act, including any findings regarding respondent's disregard of obligations to employees and subcontractors. If wages are found due and are unpaid, no relief from the ineligible list shall be ordered or recommended except on condition that such wages are paid.

(3) The Administrative Law Judge shall make no findings regarding liquidated damages under the Contract Work Hours and Safety Standards Act.

§ 6.34 Petition for review.

Within 40 days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Wage Appeals Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Wage Appeals Board, pursuant to Part 7 of this title, with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the aggravated or willful violations and/or disregard of obligations to employees and subcontractors, or lack thereof, as appropriate.

§ 6.35 Ineligible list.

Upon the final decision of the Administrative Law Judge or Wage Appeals Board, as appropriate, regarding violations of any statute listed in § 5.1 of Part 5 of this title other than the Davis-Bacon Act, the Administrator promptly shall forward to the Comptroller General the name of any respondent found to have committed aggravated or willful violations of the labor standards provisions of such statute, and the name of any firm, corporation, partnership, or association in which such respondent has a substantial interest. Upon the final decision of the Administrative Law Judge or Wage Appeals Board, as appropriate, regarding violations of the Davis-Bacon Act, the Administrator promptly shall forward to the Comptroller General any recommendation regarding debarment action against a respondent, and the name of any firm, corporation, partnership, or association in which such respondent has an interest.

Subpart D—Substantial Interest Proceedings

§ 6.40 Scope.

This subpart supplements the procedures contained in § 4.12 of Part 4 and § 5.12(d) of Part 5 of this title, and states the rules of practice applicable to hearings to determine whether persons or firms whose names appear on the ineligible list pursuant to Section 5(a) of the Service Contract Act or § 5.12(a)(1) of Part 5 of this title have a substantial interest in any firm, corporation, partnership, or association other than those listed on the ineligible list; and/or to determine whether persons or firms whose names appear on the ineligible list pursuant to Section 3(a) of the Davis-Bacon Act have an interest in any firm, corporation, partnership, or association other than those listed on the ineligible list.

§ 6.41 Referral to Chief Administrative Law Judge.

(a) Upon timely receipt of a request for a hearing under § 4.12 of Part 4 or § 5.12 of Part 5 of this title, where the Administrator has determined that relevant facts are in dispute, or on his/her own motion, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of any findings of the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the person or firm requesting the hearing, if any, and upon the respondents.

(b) The findings of the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

§ 6.42 Amendments to pleadings.

At any time prior to the closing of the hearing record, the complaint (Administrator's findings) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 6.43 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the discretion of the Administrative Law Judge, prior to the issuance of the decision of the Administrative Law Judge, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Secretary or Wage Appeals Board, as appropriate, regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 6.44 Decision of the Administrative Law Judge.

(a) *Proposed findings of fact, conclusions, and order.* Within 30 days of filing of the transcript of the testimony, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the Administrative Law Judge.* Within 60 days after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall make his/her decision. If any aggrieved party desires review of the decision, a petition for review thereof shall be filed as provided in § 6.45 of this title, and such decision and order shall be inoperative unless and until the Secretary or the Wage Appeals Board, as appropriate, issues an order affirming the decision. The decision of the Administrative Law Judge shall include findings of fact and conclusions of law, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. Such decision shall be in accordance with the regulations and rulings contained in Parts 4 and 5 and other pertinent parts of this title. The decision of the Administrative Law Judge shall be based upon a consideration of the whole record, including any admissions made in the respondents' answer (response) and § 6.43 of this title.

§ 6.45 Petition for review.

Within 30 days after the date of the decision of the Administrative Law Judge, any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Secretary if the proceeding was under the Service Contract Act, or to the Wage Appeals Board if the proceeding was under § 5.12(a)(1) of Part 5 of this title or under Section 3(a) of the Davis-Bacon Act, with a copy thereof to the Chief Administrative Law Judge. The petition for review shall refer to the specific findings of fact, conclusions of law, or order at issue.

§ 6.46 Ineligible list.

Upon the final decision of the Administrative Law Judge, Secretary or Wage Appeals Board, as appropriate, the Administrator promptly shall forward to the Comptroller General the names of any firm, corporation, partnership, or association in which a person or firm debarred pursuant to Section 5(a) of the Service Contract Act or § 5.12(a) of Part 5 of this title has a substantial interest; and/or the name of any firm, corporation, partnership, or association in which a person or firm debarred pursuant to Section 3(a) of the Davis-Bacon Act has an interest.

Subpart E—Substantial Variance and Arm's-Length Proceedings

§ 6.50 Scope.

This subpart supplements the procedures contained in §§ 4.10 and 4.11 of Part 4 of this title and states the rules of practice applicable to hearings under Section 4(c) of the Act to determine whether the collectively bargained wages and/or fringe benefits otherwise required to be paid under that section and Sections 2(a) (1) and (2) of the Act are substantially at variance with those which prevail for services of a character similar in the locality, and/or to determine whether the wages and/or fringe benefits provided in the collective bargaining agreement were reached as a result of arm's-length negotiations.

§ 6.51 Referral to Chief Administrative Law Judge.

(a) Referral pursuant to § 4.10 or § 4.11 of Part 4 of this title will be by an Order of Reference from the Administrator to the Chief Administrative Law Judge, to which will be attached the material submitted by the applicant or any other material the Administrator considers relevant and, for proceedings pursuant to § 4.11 of this title, a copy of any findings of the Administrator. A copy of the Order of Reference and all attachments will be sent by mail to the following parties: the agency whose contract is involved, the parties to the collective bargaining agreement, any contractor or subcontractor performing on the contract, any contractor or subcontractor known to be desirous of bidding thereon or performing services thereunder who is known or believed to be interested in the determination of the issue, any unions or other authorized representatives of service employees employed or who may be expected to be employed by such contractor or subcontractor on the contract work, and any other affected parties known to be interested in the determination of the issue. The Order of Reference will have attached a certificate of service naming all interested parties who have been served.

(b) Accompanying the Order of Reference and attachments will be a notice advising that any interested party, including the applicant, who intends to participate in the proceeding shall submit a written response to the Chief Administrative Law Judge within 20 days of the date on which the certificate of service indicates the Order

of Reference was mailed. The notice will state that such a response shall include:

(1) A statement of the interested party's case;

(2) A list of witnesses the interested party will present, a summary of the testimony each is expected to give, and copies of all exhibits proposed to be proffered;

(3) A list of persons who have knowledge of the facts for whom the interested party requests that subpoenas be issued and a brief statement of the purpose of their testimony; and

(4) A certificate of service in accordance with § 6.3 of this title on all interested parties, including the Administrator.

§ 6.52 Appointment of Administrative Law Judge and notification of prehearing conference and hearing date.

Upon receipt from the Administrator of an Order of Reference, notice to the parties, attachments and certificate of service, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the time and place of a prehearing conference and of the hearing which shall be held immediately upon the completion of prehearing conference. The date of the prehearing conference and hearing shall be not less than 30 nor more than 40 days from the date on which the certificate of service indicates the Order of Reference was mailed.

§ 6.53 Prehearing Conference.

(a) At the prehearing conference the Administrative Law Judge shall attempt to determine the exact areas of agreement and disagreement raised by the Administrator's Order of Reference and replies thereto, so that the evidence and arguments presented at the hearing will be relevant, complete, and as brief and concise as possible.

(b) Any interested party desiring to file proposed findings of fact and conclusions of law shall submit them to the Administrative Law Judge at the prehearing conference.

(c) If the parties agree that no hearing is necessary to supplement the written evidence and the views and arguments that have been presented, the Administrative Law Judge shall forthwith render his/her final decision. The Administrative Law Judge with the agreement of the parties may permit submission of additional written evidence or argument, such as data accompanied by affidavits attesting to its validity or depositions, within ten days of commencement of the prehearing conference.

§ 6.54 Hearing.

(a) Except as provided in § 6.53(c) of this title, the hearing shall commence immediately upon the close of the prehearing conference. All matters remaining in controversy, including the presentation of additional evidence, shall be considered at the hearing. There shall be a minimum of formality in the proceeding consistent with orderly procedure.

(b) To expedite the proceeding the Administrative Law Judge shall, after consultation with the parties, set reasonable guidelines and limitations for the presentations to be made at the hearing. The Administrative Law Judge may limit cross-examination and may question witnesses.

(c) Under no circumstances shall source data obtained by the Bureau of Labor Statistics, U.S. Department of Labor, or the names of establishments contacted by the Bureau be submitted into evidence or otherwise disclosed. Where the Bureau has conducted a survey, the published summary of the data may be submitted into evidence.

(d) Affidavits or depositions may be admitted at the discretion of the Administrative Law Judge. The Administrative Law Judge may also require that unduly repetitious testimony be submitted as affidavits. Such affidavits shall be submitted within three days of the conclusions of the hearing.

(e) Counsel for the Administrator shall participate in the proceeding to the degree he/she deems appropriate.

(f) An expedited transcript shall be made of the hearing and of the prehearing conference.

§ 6.55 Closing of record.

The Administrative Law Judge shall close the record promptly and not later than 10 days after the date of commencement of the prehearing conference. Post-hearing briefs may be permitted, but the filing of briefs shall not delay issuance of the decision of the Administrative Law Judge pursuant to § 6.56 of this title.

§ 6.56 Decision of the Administrative Law Judge.

Within 15 days of receipt of the transcript, the Administrative Law Judge shall render his/her decision containing findings of fact and conclusions of law. The decision of the Administrative Law Judge shall be based upon consideration of the whole record, and shall be in accordance with the regulations and rulings contained in Part 4 and other pertinent parts of this title. If any party desires review of the decision, a petition for review thereof shall be filed as provided in § 6.57 of this title, and such decision and order shall be inoperative unless and until the Secretary issues an order affirming the decision. If a petition has not been filed within 10 days of issuance of the Administrative Law Judge's decision, the Administrator shall promptly issue any wage determination which may be required as a result of the decision.

§ 6.57 Petition for review.

Within 10 days after the date of the decision of the Administrative Law Judge, any interested party who participated in the proceedings before the Administrative Law Judge and desires review of the decision shall file a petition for review by the Secretary. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to and the specific pages of transcript relevant to the petition for review.

Subpart F—Appeals From Decisions Under the Service Contract Act (and Under the Contract Work Hours and Safety Standards Act for Contracts Subject to the Service Contract Act)

§ 6.60 Scope.

This subpart contains the rules regarding appeals to the Secretary from decisions of Administrative Law Judges under the Service Contract Act pursuant to Subparts B, D and E of this part, and from wage determinations and other final decisions of the Administrator or authorized representative under the Service Contract Act. These rules also apply to appeals to the Secretary from decisions under the Contract Work Hours and Safety Standard Act for contracts subject to the Service Contracts Act, issued by Administrative Law Judges pursuant to Subpart B of this part.

§ 6.61 Petitions for Review of Wage Determinations.

(a) Any interested party who is seeking a modification or other change in a wage determination under the Service Contract Act and who has requested the Administrator or authorized representative to make such modification or other change under § 4.55 of Part 4 of this title, and the request has been denied, shall have a right to petition for review of the action taken by that officer.

(b) For purposes of this subpart, the term "interested party" shall mean:

(1) Any employee or any labor orgainzation which represents an employee who is likely to be employed or to seek employment under a contract containing a particular wage

determination, or any contractor or association representing a contractor who is likely to seek a contract or to work under a contract containing a particular wage determination;

(2) The Federal agency(ies) which will administer a proposed contract containing a particular wage determination issued pursuant to the Service Contract Act; and

(3) Any other party whom the Secretary finds to have a sufficient interest in the wage determination.

(c) Requests for review of wage determinations must be filed within 20 days of issuance of the Administrator's decision denying a request to make a change in the wage determination. The Secretary shall under no circumstances request any administering agency to postpone any contract action because of the filing of a petition.

(d) A petition for review of a wage determination shall:

(1) Be in writing and signed by the petitioner or his/her counsel (or other authorized representative);

(2) Be addressed to the Secretary;

(3) Identify clearly the wage determination, location where the contract will be performed, if known, and the agency concerned;

(4) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request;

(5) Contain a short and plain statement of the grounds for review;

(6) Be accompained by supporting data, views, or arguments; and

(7) Contain a statement that all data or other evidence submitted have previously been submitted to the Administrator.

(e) Except as provided in paragraphs (d)(1) and (2) of this section, the Secretary will not review a wage determination after award, exercise of option, or extension of a contract, unless such procurement action was taken without the wage determination required pursuant to §§ 4.4 and 4.5 of Part 4 of this title.

(1) A wage determination may be reviewed after award, exercise of option, or extension of a contract if it is issued after a finding by an Administrative Law Judge that a substantial variance exists between collectively bargained wage rates and/or fringe benefits otherwise required to be paid pursuant to Section 4(c) of the Act and those prevailing for services of a character similar in the locality, or after a finding that such collective bargaining agreement was not reached as a result of arm's length negotiations.

(2) Where a petition for review of a wage determination is filed prior to award, exercise of option, or extension of a contract, the Secretary may review the wage determination after such award, exercise of option, or extension of a contract if the issue is a significant issue of general applicability. The Secretary's decision shall not affect the contract after such award, exercise of option or extension.

§ 6.62 Petitions for Review of Other Decisions.

(a) A petition for review of a decision of an Administrative Law Judge pursuant to Subparts B, D or E of this part shall be filed in accordance with the provisions therein.

(b) A petition for review of a final written decision (other than a wage determination) of the Administrator or authorized representative shall be filed within 60 days of the date of the decision of which review is sought. Where a case has been referred directly to the Secretary pursuant to § 4.11 or § 4.12 of this title, no petition for review shall be necessary; a brief in support of the aggrieved party's position shall be filed within 30 days of filing of the administrative record by the Administrator.

(c) The petition shall state concisely the points relied upon, and shall be accompanied by a statement setting forth supporting reasons.

§ 6.63 Filing and Service.

(a) *Filing.* An original and one copy of all papers submitted shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, D.C. 20210, Attention: Service Contract Act Appeals.

(b) *Manner of Service.* Service shall be personal or by mail. Service by mail is complete on mailing. For purposes of this subpart, filing is accomplished upon the day of service, by mail or otherwise.

(c) *Proof of Service.* Papers filed with the Secretary shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service.

(d) *Service upon the Department of Labor and other interested parties.* A copy of all documents filed shall be served upon the Associate Solicitor, Division of General Legal Services, U.S. Department of Labor, Washington, D.C. 20210; the Administrator; the Federal contracting agency involved; and all other interested parties.

§ 6.64 Filing of administrative record.

(a) If a petition for review has been filed concerning a decision pursuant to Subparts B, D or E of this part, the Chief Administrative Law Judge shall promptly forward the record of the proceeding before the Administrative Law Judge to the Secretary.

(b) If a petition for review has been filed concerning a wage determination or other final decision of the Administrator or authorized representative, the Associate Solicitor shall promptly file a record upon which the decision was based. The record of a wage determination shall under no circumstances include source data obtained by the Bureau of Labor Statistics, U.S. Department of Labor, or the names of establishments contacted by the Bureau. Where the Bureau has conducted a survey, the published summary of the data may be filed.

§ 6.65 Presentations of other interested parties.

(a) Where a petition has been filed for review of a wage determination or other final decision of the Administrator or authorized representative, the Wage and Hour Division shall notify the parties known or believed to be interested in the case. The Associate Solicitor and any other parties interested in presenting their views shall file a statement within 30 days of the filing of the petition (or such other time as is specified by the Secretary, with consideration of procurement deadlines, as appropriate).

(b) Where a petition has been filed for review of a decision issued pursuant to Subparts B, D or E of this part, any other parties to the proceeding interested in presenting their views shall file a statement within 30 days of the filing of the petition (or such other time as is specified by the Secretary, with consideration of procurement deadlines, as appropriate).

§ 6.66 Decision of the Secretary.

(a) The Secretary will issue his/her decision upon the basis of the entire record. The Secretary may affirm, modify or set aside, in whole or in part, the decision under review and will issue a decision including a statement of reasons or bases for the actions taken. The Secretary, in his/her decision, will observe the provisions of pertinent portions of the Code of Federal Regulations and, in reviewing decisions of Administrative Law Judges pursuant to Subparts B, D and E of this part, will modify or set aside findings of fact only when the Secretary has determined that those findings are not supported by substantial evidence. In any remand of a case, the Secretary will include any appropriate instructions.

(b) In issuing decisions, the Secretary will take into consideration procurement deadlines where appropriate.

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January 16, 1981

Part XI

Department of Labor

Occupational Safety and Health Administration

Hazards Indentification; Notice of Proposed Rulemaking and Public Hearings

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Hazards Identification; Notice of Public Rulemaking and Public Hearings

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Notice of proposed rulemaking; notice of public hearings.

SUMMARY: The proposed standard requires employers to identify the hazardous chemicals in their workplaces, and to inform their employees of the identity and nature of the employees' hazardous exposures. OSHA has determined that this standard is necessary because most employees are not aware of the presence of hazardous chemicals in their workplaces, or of the health effects exposure to these hazards may produce. Furthermore, many employers are also unaware of the complete chemical identities and hazards of the chemicals in their workplaces. The proposed standard would alleviate these problems through specific hazard identification and evaluation procedures, labeling requirements, and records preservation. Public hearings are being scheduled to permit interested parties the opportunity to orally present information and data related to the issues raised by this proposed rule.

DATES: Comments must be received on or before April 16, 1981.

Notices of intention to appear at the public hearings must be received on or before May 1, 1981.

The hearings are scheduled as follows:

Date Hearing Will Begin and City

1. May 26, 1981, Washington, D.C.
2. July 7, 1981, Houston, Texas
3. July 21, 1981, Chicago, Illinois
4. August 11, 1981, Philadelphia, Pennsylvania
5. September 1, 1981, San Francisco, California.

ADDRESS: Comments should be submitted, in quardruplicate, to the Docket Officer, Docket H–022, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Room S–6212, Washington, D.C. 20210; (202) 523–7894.

Notices of intention to appear should be submitted to Mr. Tom Hall, Division of Consumer Affairs, Room N3635, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523–8024.

Addresses for the hearing locations will be published in the **Federal Register** at a later date.

Written comments received and notices of intention to appear will be available for inspection and copying in the Docket Office, Room S6212 at the above address.

FOR FURTHER INFORMATION CONTACT:

Proposal

Mr. James Foster, Room N3641, Office of Public Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C., 20210; (202) 523–8151.

Hearings

Mr. Tom Hall, Division of Consumer Affairs, Room N–3635, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210. (202) 523–8024.

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I. Need for a Hazards Identification Standard

Approximately 25 million American workers are currently exposed on the job to chemical or physical hazards. As many as 40 to 50 million Americans (23 percent of the entire U.S. population) may have been exposed to one or more of the hazardous chemicals presently regulated by OSHA at some point during their lifetime (1).* Yet, as indicated in the NIOSH National Occupational Hazards Survey (NOHS) discussed below, workers are generally unaware of the presence of hazardous chemicals in the workplace and of the very real potential that exposure to such chemicals may injure their health. Furthermore, some workers complain that even where they receive information about hazardous chemicals, it is often inaccurate or incomplete.

Thus, workers and their representatives have consistently emphasized in previous OSHA rulemakings the need for OSHA to promulgate a standard for chemical substance identification. The following testimony presented during the OSHA rulemaking hearings on "Access to Employee Exposure and Medical Records," OSHA Docket H–112, is evidence of workers' concerns about a labeling regulation (28).

(A)pproximately 150 new chemicals come into that plant every day, many of them with just trade names, many with just a code number. As I have been investigating, every company uses a different code number * * *

Many times our people are exposed for a month, six weeks or two months before we find out (the chemical identity) * * * then, after we have it evaluated, (the company) will remove it; but the damage is already done.

(Mr. John Mroczkowski, United Steelworkers, Tr. 1189–1190, OSHA Docket H–112.)

* * * * *

(N)ow our employees are rather well-schooled craftsmen. They can recognize hazards if they know what the hazard is. Our basic problem is on a daily exposure we have to work with coolants, lubricants, and the vapors that result from the use therein * * *

The thing we are asking for is a labeling, a chemical labeling of what really is contained in that lubricant or that coolant. And I think we can take it from there. We are not asking for a hell of a lot. But if the men don't know what they are being exposed to on a daily basis, there is nothing they can do about it until years later. And then it is too darn late.

(Mr. Victor Horvath, International Ass'n of Machinists, Tr. 1378, OSHA Docket H–112)

* * * * *

(W)e must reiterate the importance of labeling data * * * without some kind of very efficient labeling data we are absolutely in the dark about many chemicals that are used in our shop.

(Mr. Michael Gaffney, United Autoworkers, Tr. 1325, OSHA Docket H–112)

Without adequate chemical substance identification, millions of workers with routine exposures to hazardous chemical substances are unaware of the hazards posed by these substances, and are thus incapable of protecting themselves or ensuring that their employers provide adequate protection. The need for self-protection is no trivial matter. Workers are exposed to hazardous chemicals both in the workplace and the general environment, making them the greatest involuntary consumers of hazardous chemicals in the nation. And in many cases, exposure in the workplace is far greater than what occurs in the general environment. Consequently, to leave workers ignorant of the hazards they face, without the ability to protect themselves, would be incompatible with OSHA's duty under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, to assure every working man and woman in the nation, so far as possible, safe and healthful working conditions.

This lack of an adequate system for the identification and labeling of hazardous substances in the workplace has been, and continues to be, a contributing factor in the occurrence of occupational disease. As the Committee on Government Operations, U.S. House of Representatives concluded in its report, *Chemical Dangers in the Workplace* (Thirty-forth Report, 1976) (28):

Identifying and controlling toxic substances in the workplace is becoming progressively more difficult as more chemicals, chemical processes, and chemical products are used in industry. Tens of thousands of trade-name products, whose chemical contents are not disclosed, are used daily. Lack of knowledge about exposure hampers the identification of occupationally caused diseases, illnesses, and deaths and is a major impediment to preventing them.

Dr. Thomas Mancuso, an occupational medicine practitioner for thirty years, addressed the problem of inadequate chemical substance identification at Congressional hearings held in 1976 on control of toxic substances in the workplace (25). Dr. Mancuso stated:

* * * the doctor in practice, if he is to make a medical diagnosis, needs information about the work environment and the specific work exposures, the specific chemicals to which his worker patient was exposed prior to the illness. Basically, this lack of information constitutes the fundamental obstacle to the recognition of causality of an occupational illness and appropriate steps and approaches must be evolved to overcome this fundamental problem.

Dr. Mancuso also indicated that there is a nation-wide lack of recognition of occupationally-related illness, disease, and death by the worker and his family, by the doctor, by the industry and by the government. He further stated:

This stems in general from the fact that for decades the workers, the doctors and society have been predominantly oriented and trained on the infectious causes of disease, due to bacteria and viruses, and there has been a corresponding lack of realization of the impact of the many thousands of chemicals—the microchemicals in the work environment—in the causation of illness, disability, and death.

Similarly, Dr. Daniel Teitelbaum, a practicing occupational toxicologist familiar with the problems of inadequate substance identification in occupational medicine, offered the following testimony at the OSHA hearings on access to records (28):

(W)hen such (chemical identification) information is not provided to a consultant, diagnostic difficulties often occur. Patients usually do not know what materials were used in the course of their employment. Even if they are familiar with the material, they do not know the health effects, the level of their exposure, or the chemistry of the material itself. They are usually unable to provide to me enough information for development of a definitive diagnostic and treatment program.

(Tr. 116, OSHA Docket H–112)

To end the disparity between what workers now know and what they should know about potential chemical hazards in the workplace, OSHA is today proposing a comprehensive hazard identification standard which will require employers to communicate two types of basic information to their employees. Under the standard, an employer must inform employees of the precise chemical identity of the hazardous chemicals with which they work. The employer must also warn employees of the particular hazards

*Numerical references are to the References listed in this preamble, *infra*.

posed by chemicals in the workplace, including any applicable precautions to be used when working with hazardous chemicals. This information would be conveyed to the workers by the use of container labels, placards, and material safety data sheets.

The benefit of informing workers of the particular hazards of a chemical is immediate and direct. The need for workers to know the precise chemical identities of the hazardous chemicals with which they work is less direct, but no less important.

Access to the precise chemical identity of hazardous chemicals will substantially improve the ability of workers to participate actively in the promotion of health and safety in the workplace, whether their efforts be individual or combined with the efforts of physicians, unions, or agencies of government concerned with worker health. For example, access to the precise chemical identities of hazardous chemicals will give workers the capability to:

—Provide physicians with exact descriptions of workplace exposures when workers suspect occupational causes of disease or material impairment of bodily functions;
—Complement incomplete information communicated to workers concerning the hazards of workplace chemicals;
—Participate with their employers on an intelligent basis in designing and implementing industrial hygiene precautions and procedures to promote workplace health and safety.

In addition, if a requirement for a substance-employee identification list is included in the finale rule, then workers will be able to:

—Obtain an accurate history of the hazardous chemicals to which a worker might have been exposed in the workplace as an aid in identifying the causes of chronic diseases and diseases with long latency periods;
—Determine, with scientific assistance, any additional adverse effects upon workers that are known to be caused by prolonged exposures to chemicals which have been classified as posing only a moderately acute hazard;
—Determine, with scientific assistance, whether worker exposure to various chemicals results in synergistic adverse effects not attributable to any one chemical.

Without access to precise chemical identity, workers must continue to rely principally upon their employers, and upon the limited resources of OSHA and NIOSH, for protection against injury and disease caused by hazardous chemicals. These resources are inadequate, and to fulfill its statutory mandate to strive for a safe and healthful workplace for every worker, OSHA must give workers the means to protect themselves.

OSHA realizes that some employers have already made efforts to institute substance identification and labeling practices in their establishments as part of their occupational safety and health programs. However, although they may conform to some industry consensus standard, such as that of ANSI, these programs are not uniformly designed or self-enforced. Also, the use of identification systems is not widespread in industry. Even when a system is in place, the system may be unique only to that establishment, and may not be as comprehensive as would be necessary to be truly effective. These inadequacies were clearly demonstrated by the results of the NIOSH occupational health survey, which is discussed below. As a result, the Committee on Government Operations concluded in its 1976 report that voluntary identification standards were not adequately protecting employees. The report stated (26):

> Attempts at self-regulation by the chemical industry have not generated adequate information for buyers and users about toxic chemicals in industrial products. Voluntary labeling guidelines developed by the chemical manufacturing industry are directed primarily to the avoidance of injury from single, accidental exposures and do not address the health hazards caused by chronic low-level exposure to toxic chemical substances.

As a result of their investigations in this regard, the Committee concluded:

> We believe that industry self-regulation is preferable to governmental intervention if it can produce the necessary level of safety. To this point, however, self-regulation, although laudable, has not been equal to the task.

Similarly, the provisions contained in the regulations of other Federal agencies and state governments, which are described below, are also not comprehensive in scope. None of the Federal statutes adequately addresses itself to the problems presented by hazardous materials in the workplace environment. While nine of the fifty states have regulations covering labeling in the workplace, these standards are not comprehensive or uniform, and this small number of state laws is not sufficient to adequately protect the vast majority of American workers. Nonetheless, the fact that the states are beginning to recognize the need for regulation of this type indicates the need for national, uniform standards to address a problem which, as Congress recognized in the OSH Act and in subsequent oversight hearings, is of nationwide scope. The proposed standard will help to avoid the potential for conflicting state-imposed burdens on interstate commerce.

The proposed hazards identification standard has been developed as the second major component of a total information system designed to convey to workers information essential to awareness of existing and potential job related health hazards. The first component of this system is OSHA's standard on Access to Employee Exposure and Medical Records, 29 CFR 1910.20 (45 Federal Register 35212 *et seq.*, May 23, 1980), which provides employees exposed to toxic substances and harmful physical agents with access to their employer maintained exposure and medical records.

The information provided by the existing access standard and the proposed hazard identification standard is complementary, and without the type of information provided by either standard, the ability of workers to understand and react to significant workplace hazards will be significantly diminished. The access standard generally assures employees access, upon request, to information concerning the identification of toxic substances and harmful physical agents to which they are exposed, as well as access to other exposure and health information, if such information has been recorded by the employer. Access by employees to such records thereby provides an early warning system of possible occupational health hazards and is crucial to the overall purposes of the Act. The access standard does not, however, require the creation of such records. The hazard identification standard, therefore, will significantly add to the informational rights provided to employees in the access standard by affirmatively assuring that chemical manufacturers and users will establish hazard identification systems within their workplaces. Furthermore, unlike the access standard, the hazards identification standard is designed to assure that hazards-related information will flow from the manufacturers and importers to the downstream employees of industrial users, who, because of the trade name problem, are themselves often unaware of the identities or hazards posed by chemicals in their workplaces. Accordingly, to provide anything less than the basic information afforded by these twin standards would deprive workers of the right to protect themselves from danger.

The two rules do, however, in some situations overlap; thus there may be a need to modify the language of the

access standard upon final promulgation of a chemical identification and labeling standard. Comments are invited as to which provisions, if any, in the access standard should be changed in light of the hazard identifiction standard. OSHA does not anticipate substantial alterations in the content of the Access standard, but does intend to make necessary conforming amendments so that similar terms are used consistently in both rules.

II. Background to the Hazard Identification Standard

A. Introduction

According to data obtained from the National Occupational Hazards Survey conducted by the National Institute for Occupational Safety and Health (NIOSH), approximately 25 million American workers, or one in four, are potentially exposed to one or more of the nearly 8,000 hazards identified by NIOSH (see references 1, 25, 26, and 27). Occupational exposure to the hazardous substances covered by this proposed standard is common. The proposed standard will provide information on potential hazardous exposures to the approximately 20.5 million people employed in the nearly 328,000 manufacturing facilities in SIC categories 20–39, including one million workers in the chemical industry (31). In addition, workers in other SIC categories will obtain partial information on potential hazardous exposures because the proposed standard requires that labels, once attached, remain affixed to containers with hazardous contents.

In its General Industry Standards (29 CFR Part 1910, Subpart Z), OSHA regulates approximately 430 toxic substances, a small percentage of the total number of toxic or hazardous materials present in the workplace. According to the Toxic Substances Control Act Chemical Substances Inventory (TSCAI) compiled by the Environmental Protection Agency (EPA), as of July, 1980, there are approximately 55,103 chemical substances which are manufactured, imported or processed for commercial purposes in the United States (4). The TSCAI figure includes only those substances which are covered by the Toxic Substances Control Act, and does not include many other substances, such as food additives, drugs, cosmetics, and pesticides, which can pose a hazard in the workplace. In addition, approximately 1,000 new chemicals are marketed each year. Thus, only gross estimates can be made of the total number of toxic or hazardous chemicals to which the American worker may be exposed, as well as the number of workers who are exposed to such substances. The data does indicate that both of these figures are extremely large.

The number of occupational illnesses resulting from occupational exposure to hazardous substances is difficult to quantify. The most comprehensive figures are compiled by the Bureau of Labor Statistics (BLS) in an annual survey of approximately 200,000 industrial facilities entitled, *"Occupational Injuries and Illnesses in the United States by Industry."* BLS reported approximately 168,000 new cases of occupational illness in 1976, and 162,000 in 1977. These figures do not include the number of workers totally disabled from occupational illness due to chemical exposures who have left the workforce.

An analysis of the survey reveals that 54.7 percent of occupational illnesses in 1976, and 57.9 percent of occupational illnesses in 1977 fell into the categories of illnesses (not counting malignant and benign tumors) most likely to be related to chemical exposures. This comes to a total of more than 180,000 illnesses in those two years, some of which are attributable to exposures which might have been avoided by proper labeling.

The BLS report also indicates that a large number of the total occupational illnesses recorded occur in manufacturing industries (SIC Major Groups 20–39). In 1976, employees in manufacturing industries reported 57.5 percent of all occupational illnesses, but accounted for less than 30 percent of total employment. The 20 industries with the highest rates of occupational illness were all manufacturing industries.

Although these figures are substantial, they probably underestimate the magnitude and severity of occupational illness and injury. The BLS reports that:

> The recording and reporting of illness continue to present some measuring problems, since employers (and even doctors) are often unable to recognize some illnesses as being work related. The annual survey includes data on only current and visible illnesses of workers; it does not include data on illnesses which might surface later.

Occupational diseases caused by chemical exposures are often not recognized as such, and thus under-reporting of chemically-caused occupational disease is a major problem. To assess the accuracy and completeness of worker compensation reports and OSHA Form 200 reports, the University of Washington conducted a two-year study for NIOSH which was published in 1975 (32). Medical examination of over 900 employees revealed 346 cases of "probable occupational disease". These were so classified only if the observed manifestations of the disease were consistent with those known to result from excessive exposure to a specific injurious agent, and the patient was known to have had significant contact with the particular agent during the course of a normal working day. Of these 346 cases, only 8 had been recorded on either the OSHA Form 200 or in worker compensation reports.

B. Survey Estimates of Potential Workplace Hazardous Exposures

The lack of adequate chemical substance identification in the workplace was investigated as part of the National Occupational Hazards Survey undertaken by NIOSH in 1972 (1, 25, 26, 27).

The NIOSH surveyors visited over 5,200 industrial plants that had been selected by the Bureau of Labor Statistics as a representative cross-section of industry type and size. General information was collected about each plant, such as its major product or service, the number of employees, and the availability and kind of medical care. The surveyors then conducted walk-through inspections of each facility to record worker exposures to specific health hazards. The NIOSH teams observed each process in the plants, recorded the number of workers in each job category, and listed the specific chemical and physical agents to which these workers were potentially exposed.

If an employee was exposed to a trade-name product, the surveyor recorded the name of the product, its manufacturer, and the ingredients listed on the product container. If labels on the containers did not list the ingredients, the surveyors tried to ascertain the composition from material safety data sheets or other sources at the plant. All these sources supplied the needed information for only 10% of the trade-name products.

The following is a summary of the NIOSH findings in regards to the adequacy of chemical substance identification in the workplace (25, 26, 27):

Table 1.—*NOHS Findings*

1. 85,000 individual trade-name products were identified.
2. These 85,000 products accounted for 70% of all recorded exposures. The remaining 30% of these exposures were either properly identified chemicals or physical agents.
3. The total number of 'hazardous' exposures represented by these trade-name products is not known, since NIOSH was unable to identify the chemical composition of all of these products.
4. In 90% of the trade-name product cases, neither the employer nor the employee knew the identity of the chemicals in the trade-name products.

NIOSH attempted to further identify the trade-name products by contacting the product manufacturers. This effort was complicated by the problem of "nested" trade names—that is, when the manufacturer supplied NIOSH with information on the chemical substances contained in trade-name products, approximately one-third contained secondary trade-name chemicals. If the secondary trade-name composed more than 10 percent of the mixture, NIOSH also pursued identification of it by contacting the manufacturer.

NIOSH contacted over 10,000 manufacturers to obtain additional information on the chemcial identification of the trade-name products. At the time they reported their findings to Congress in 1976, NIOSH had obtained product ingredient information on over 40,000 trade-name products. The following is a summary of NIOSH findings in regards to trade-name products (TRN) (25, 26):

Table 2.—*Potential Exposure to TRN Products Containing Hazards*

Total number of trade name products = 45,404
Total number of employees exposed to TRN products = 278,324
Total number of exposures for employees named above = 1,420,717
Of the total number of employees exposed to TRN products, the number exposed to OSHA-regulated chemicals = 126,028
Total number of exposures for the above employees = 308,567
Percentage of employees exposed to OSHA-regulated chemicals = 45%
Of employees exposed to TRN products which contain OSHA-regulated chemicals, the number of employees exposed to products whose composition is deemed to be a trade secret = 66,727
Total number of exposures for the above employees = 113,665

Table 3.—*Potential Exposure to TRN Products Containing Carcinogens*

Number of TRN products that contain at least one of the 15 OSHA *regulated** carcinogens = 427
Total number of employees exposed to TRN products containing carcinogens = 5,638
Total number of carcinogen exposures for employees named above = 7,132
Percentage of employees exposed to carcinogens = 2%
Total number of employees exposed to TRN products containing carcinogens which the manufacturers call trade secret = 2,830
Total number of exposures for employees named above = 3,274

*Number of regulated carcinogens = 16

The NOHS survey promoted the Committee on Government Operations, in its report on chemical dangers in the workplace, to state that they thought the NOHS "* * * disclosed alarming conditions." They further indicated that:

> [T]he problem of worker and employer ignorance of hazardous substances used in industry is far greater than previously supposed. The chief cause is the practice of identifying chemical compounds by trade names without the disclosure of ingredients, which thwarts even the most conscientious attempt to alert workers to exposures beyond specified limits.

They concluded:

> It is clear that the major objectives of the Act override narrow self-interest on the part of manufacturers. No trade secret can justify exposing great numbers of American workers to cancer-causing agents or other toxic chemicals. Any trade-name product containing a substance known to be hazardous or a carcinogen must be clearly labeled so that precautions may be taken.

The NOHS survey thus provided strong evidence that chemical substance identification was not sufficiently widespread to protect employees adequately, and that an OSHA standard in this area is necessary to provide such protection.

C. Previous Recognition of the Need for Labeling

For nearly sixty years, various government, industry and professional organizations have recognized the need to label hazardous substances, and have sought to identify relevant issues, as well as to develop comprehensive and consistent systems. Several of the more recent documents of significance will be discussed.

1. *Occupational Safety and Health Administration (OSHA) Standards:* The Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, was passed to assure safe and healthful working conditions for working men and women (5). Section 6(b)(7), one of the sections which delegates OSHA the authority to promulgate labeling requirements, states:

> Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Several of OSHA's safety and health standards for General Industry in 29 CFR Part 1910(3) were subsequently promulgated with such labeling requirements for a relatively small number of specific substances. (These standards are listed in Tables 4 and 5 of section (C) below).

2. *National Institute for Occupational Safety and Health (NIOSH) Criteria Document:* OSHA and NIOSH have long recognized the desireability of a uniform and complete system to identify hazardous materials found in the workplace. Under section 22(c)(1) of the OSH Act, which authorized NIOSH to develop recommended occupational safety and health standards, a criteria document was published in 1974 which was entitled, "A Recommended Standard . . . An Identification System for Occupationally Hazardous Materials" (7). The recommended standard was designed to inform employees of potentially hazardous materials which are encountered in the workplace by a three-component warning system, including the use of placards, labels, and Material Safety Data Sheets.

A "hazardous material" was defined by NIOSH as "a substance or mixture of substances having intrinsic properties capable of producing adverse effects on the health or safety of the worker". NIOSH recognized that all materials "can cause unwanted changes under some circumstances, but a careful assessment of properties and circumstances will classify common substances such as water and sodium chloride as practically nonhazardous materials from the viewpoint of the need for informing the worker".

NIOSH further refined their definition of hazardous by stating that a material would be considered hazardous if it met any one of the following criteria:

"(1) Toxicity—A toxic substance is one that has demonstrated the potential to: endanger human life by exposure via any route found in the workplace; produce short or long-term disease or bodily injury; affect health adversely; induce cancer or other neoplastic effects in man or experimental animals; induce a transmissible change in the characteristics of an offspring from those of its human or experimental animal parents; or cause the production of physical defects in the developing human or experimental animal embryo.

"In the absence of human or animal effects data described above, a toxic substance is one that produces death in experimental animals exposed to the substances in quantities and by routes which are reasonable * * * The following cut-off points apply to animal exposure data:

A single oral LD50 of up to 5,000 mg/kg.
A single inhalation exposure LC 50 of up to 10,000 ppm for gases, or 100,000 mg/cu m by volume for mists or dusts.
A single skin absorption (percutaneous) LD50 of up to 2,800 mg/kg."

"(2) Flammability—A flammable substance is one that will burn in air when exposed to a temperature of 1,500 F (815 C) for a period of five (5) minutes or less."

"(3) Reactivity—A reactive substance is one that will release hazardous amounts of energy when subject to shock, spark, or light, during uncontrolled polymerization, or when contacted by common substances, e.g., water, air, or steel, or is a strong oxidizing or reducing material."

NIOSH further recommended that all materials that are toxic, flammable, or reactive be rated as to their relative hazard. For example, a toxic substance could be rated in any one of five toxicity categories, ranging from "no significant health hazard" (zero rating) to "extreme health hazard" (rating of four). Specific criteria for determining in which category a substance should be included were also recommended by NIOSH. Information to be used by the employer to determine the appropriate hazard rating was to be assembled from "reference sources, expert opinion, and direct experience and familiarity with the material or specific combination of materials". NIOSH also noted that references are "major sources of information on hazardous materials, but many other sources are equally valuable and should not be neglected."

No specific guidance was provided for employers to assist them in making the hazard determinations necessary to comply with the requirements of the NIOSH recommended standard. NIOSH simply stated that following a review of available information, "a composite statement of the potential hazard from the standpoint of health effect, flammability, and reactivity can then be formulated. The proper relative hazard ratings are then assessed by a comparison of the summary data with the tables and relative rating definitions." For health effects assessments, employers were directed to use available human experience data before using animal data, and to rate on the basis of the "worst effect" when both acute and chronic data are available. NIOSH did not provide any examples of how specific substances would be rated according to their recommended classification scheme.

In addition to labels, NIOSH recommended that employers be required to have a Material Safety Data Sheet (MSDS) for each hazardous material or mixture of hazardous materials. A format for the MSDS was also recommended by NIOSH, and included the following categories of information:

1. Product Identification
2. Hazardous Ingredients
3. Physical Data
4. Fire and Explosion Data
5. Health Hazard Information
6. Reactivity Data
7. Spill or Leak Procedures
8. Special Protection Information
9. Special Precautions

3. *Report of the OSHA Standards Advisory Committee.* In 1974, the OSHA Standards Advisory Committee on Hazardous Materials Labeling was formed in accordance with Section 7(b) of the OSH Act (6). The purpose of this committee, which was comprised of experts representing employers, employees, the Federal govenment, state governments, and the public, was to develop generic guidelines for the implementation of Section 6(b)(7) of the OSH Act. The recommendations of the Committee involved a "total systems" approach to the problem of labeling. This approach included classification of hazards and the use of warning devices, such as labels and placards, coupled with the use of physical/chemical data and employee training programs. The Committee "identified and confined its discussion to four categories of hazards, namely, flammability hazards, health hazards, reactivity hazards, and materials hazardous by reason of being under pressure in their container". For each of these categories, a number of sub-categories were developed and the Committee recommended the criteria a substance would have to meet to be included in these sub-categories. Wherever possible, the Committee defined these criteria similar to currently used and accepted definitions. For example, the definition of "unstable (reactive) material" was that which OSHA already used in 29 CFR 1910.106(a)(20). The Committee recommended adoption of such a labeling standard to serve both employer and employee by providing a safer and more healthy working environment. The final report of the Committee was submitted to the Assistant Secretary of Labor on June 6, 1975.

In terms of health hazards, the Committee recommended that a labeling standard be developed by OSHA to cover any material which is:

—a carcinogen;
—a corrosive to eyes;
—a corrosive to skin;
—extremely toxic;
—highly toxic;
—an irritant;
—a mutagen;
—a strong sensitizer;
—a teratogen; or
—toxic.

The Committee defined each of these terms, and based their definitions on available test methods wherever possible. However, in some cases they determined that the issues involved were so complex that the Committee thought resolution of them should be left to the Secretary of Labor. Carcinogens, mutagens, strong sensitizers, and teratogens were thus defined very generally, and OSHA would not have been able to incorporate the Committee's recommendations into a standard without further refining these definitions.

The definitions of "extremely toxic", "highly toxic", and "toxic" were based on estimates of lethal dose. For example, the following are the criteria recommended for determining that a material is "extremely toxic":

"(i) a material that has a median lethal dose (LD50) of 5 milligrams or less per kilogram of body weight when administered orally to albino rats weighing between 200 grams and 300 grams each;⊖

"(ii) a material that has a median lethal dose (LD50) of 20 milligrams or less per kilogram of body weight when administered by continuous contact for 24 hours or less with the bare skin of albino rabbits weighing between 2 kilograms and 3 kilograms each; or

"(iii) a material that has a median lethal concentration (LC50) in air of 50 parts per million by volume or less of gas or vapor or 0.5 milligrams per liter or less of mist, fume or dust when administered by continuous inhalation for one hour or less to albino rats weighing between 200 grams and 300 grams each."

Given this type of definition for toxicity, it is clear that chronic effects other than carcinogenicity, mutagenicity or teratogenicity would not be specifically covered by the standard recommended by the Advisory Committee. The Committee did recommend that the Secretary retain the right to regulate "special" hazards, not otherwise specifically designated, and assumed this method would be used to cover chronic hazards.

The Advisory Committee did not provide any guidance for employers to determine whether a substance meets the recommended criteria for being toxic. No indication of where employers can find the toxicity data needed to comply with the standard is given. The Committee also did not indicate how employers should assess available data. The question of how to resolve conflicting test results to determine the applicable LC50 was not addressed.

4. *American National Standards Institute (ANSI) Standard.* Industry also recognized the need for an official standard for the precautionary labeling of hazardous chemicals used in the workplace. In 1944, the Manufacturing Chemists Association, since renamed

Chemical Manufacturers Association (CMA), a trade association composed of members of the chemical industry, established their Labels and Precautionary Information (LAPI) Committee. This committee produced the first published guide to precautionary labeling for hazardous chemicals (Manual L-1) in 1946. In 1970, the LAPI voiced their strong support for precautionary labeling being part of worker safety programs in the following statement:

> Precautionary information should, as far as is practicable, reach every person using, handling, or storing hazardous substances. The most practical means of disseminating this information has been found to be by precautionary labels, affixed to containers of hazardous substances, bearing appropriate precautionary statements expressed as simply and briefly as possible. (Manufacturing Chemists Association, *Guide to Precautionary Labeling of Hazardous Chemicals*, Manual L-1, 7th ed. 1970, p. 9).

A subcommittee of the LAPI Committee also assisted in the development of the American National Standards Institute (ANSI) standard entitled "American National Standard for the Precautionary Labeling of Hazardous Industrial Chemicals" (8). This standard, published in 1976, is considered to be the official guideline for voluntary use by industry for the precautionary labeling of hazardous chemicals used in industrial operations.

Some industry representatives have maintained that an OSHA labeling standard is not necessary because industry already voluntarily complies with the ANSI standard. However, findings of the National Occupational Hazards Survey (NOHS) demonstrated that this is not the case in many situations. The ANSI standard is nearly identical to the manual produced by the CMA for its member companies. As stated above, this manual was first available in 1946. However, the NOHS found that CMA member companies did not fare well in terms of identifying dangerous products to purchasers. As reported in 1976 by NIOSH to the House of Representatives' Committee on Government Operations (26), CMA members manufactured almost 9,000 of the trade-name products found in the NOHS, and designated over 3,000 of these as trade secrets. In addition, over 3,000 of the 9,000 trade-name products contained OSHA-regulated chemicals, and 1,440 of these products were among those that CMA members had designated as trade secrets.

The ANSI standard applies to the precautionary labeling of "hazardous chemicals used under industrial occupational conditions". "Hazardous chemical" is defined as "a chemical or mixture of chemicals that is toxic, highly toxic, irritant, corrosive, a strong oxidizer, a strong sensitizer, combustible, flammable, extremely flammable, dangerously reactive, or pressure-generating, or which otherwise may cause substantial illness during or as a direct result of any customary or reasonable foreseeable handling or use". Each of the specific listed hazards is individually defined by ANSI. However, no definition or guidance is provided to help employers determine what a "substantial illness" is, or which substances may cause such illnesses.

The definitions of "toxic" and "highly toxic" involve lethal dose determinations. Thus chronic effects are not specifically addressed by the ANSI standard. In fact, the ANSI standard is even less protective in terms of chronic effects than the Advisory Committee's recommended standard would be since even carcinogenicity, mutagenicity, and teratogenicity are not covered by ANSI.

Furthermore, the ANSI standard does not specify the precise mode of identification required, simply stating that it should be "adequate to permit selection of proper action in case of exposure". ANSI also does not specify what percentage of a mixture a hazardous component must comprise to trigger the identification requirements, but indicates that "those compounds which contributes substantially to the hazard(s) shall be identified".

The House of Representatives' Committee on Government Operations concluded on the basis of their evaluation of testimony presented at their hearings that the ANSI standard does not adequately cover chemical substance identification (26). There were two major reasons for their conclusions. First of all, the ANSI standard is a guide for industry, and there is no requirement for industry to comply with such a guide. Second, the Committee recognized that the ANSI standard does not address chronic effects. Their report stated:

> A second problem with the ANSI standard is that, like the MCA guide, it is deficient in recognizing potential harm from continuous low-level exposures. It does not include labeling guidelines for chemicals that can cause cancer or genetic defects. Without such labeling, all known hazards are not addressed.

Most recently, the issue of labeling in the workplace was addressed in "An Interim Report to the Congress on Occupational Diseases," submitted by the U.S. Department of Labor in June, 1980 (2). In this report, OSHA indicates the importance of including in its health standards requirements for the use of hazard warning signs or labels. In health standards which regulate workplace exposures to hazardous substances, such labeling provisions are considered to be necessary to the primary prevention of occupational disease by informing workers of the dangers due to exposure and of methods of prevention. Other primary means of preventing occupational disease, to be used in conjunction with labeling, include employee exposure monitoring, medical surveillance, and training, as well as compliance with permissible exposure limits to regulate employee exposures to hazardous substances.

D. Selected Labeling Regulations Which Are Currently in Effect

1. *Occupational Safety and Health Administration (OSHA).* OSHA's safety and health standards for General Industry, 29 CFR Part 1910, were either adopted from voluntary consensus standards, in accordance with Section (6)(a) of the OSH Act, or were promulgated by OSHA through the rulemaking process prescribed by section (6)(b) of the Act (3, 5). Several standards from both sources currently contain provisions for labeling hazardous materials which are present in the workplace.

A number of the standards OSHA adopted under section (6)(a) of the Act require employers to placard, label or mark various types of work sites or containers (see Table 1). For example, 29 CFR 1910.103 covers hydrogen. The standard requires the employer to permanently placard hydrogen storage locations with a warning equivalent to: "HYDROGEN—FLAMMABLE GAS—NO SMOKING—NO OPEN FLAMES". In addition, a portable container of hydrogen must be legibly marked with the name "Hydrogen", in accordance with "Marking Portable Compressed Gas Containers to Identify the Material Contained" ANSI Z48.1-1954.

Another OSHA safety standard which addresses labeling of hazardous materials is 29 CFR 1910.252, which covers welding, cutting and brazing. For example, containers of welding materials with significant amounts of cadmium in them must be marked as follows:

WARNING
CONTAINS CADMIUM—POISONOUS FUMES MAY BE FORMED ON HEATING

Do not breathe fumes. Use only with adequate ventilation such as fume collectors, exhaust ventilators, or air-supplied respirators. See ANSI Z49.1-1967.

If chest pain, cough, or fever develops after use, call physician immediately.

The following table summarizes the OSHA safety standards which include requirements for hazard identification:

Table 4.—*OSHA Safety Standards Adopted Under Section 6(a) of the Act Which Contain Labeling Requirements*

Standard and name of substance/hazard	storage labeling required	Container labeling required
1910.96 Ionizing radiation	×	×
1910.103 Hydrogen	×	×
1910.104 Oxygen	×	×
1910.111 Anhydrous ammonia.	×	×
1910.144 Color coding		
1910.145 Accident prevention signs and tags.		
1910.252 Welding, cutting, and brazing.	×	×

The only OSHA health standard adopted under section (6)(a) of the Act, 29 CFR 1910.1000, Air Contaminants, does not include labeling provisions. However, each of the other health standards, which were promulgated for individual substances under section (6)(b) of the Act, do include provisions for signs and labels.

The warnings required under each standard are specific to the substance being regulated. Each sign or label must include the precise chemical identification of the substance, as well as whatever hazard warnings or precautionary measures are indicated in the standard. Table 5 is a compilation of these standards, including the section number of each, the substance covered, and the hazard or other information to be noted on the label.

Table 5.—*Subpart Z standards Which Contain Labeling Requirements*

Sec. No. and substance	Information on label
1910.1001 Asbestos	Breathing dust may cause serious bodily harm.
1910.1003 4-Nitrobiphenyl	Cancer-suspect agent.
1910.1004 alpha-Napthylamine.	Cancer-suspect agent.
1910.1006 Methyl Chloromethyl Ether.	Cancer-suspect agent.
1910.1007 3,3'-Dichlorobenzidine (and its salts).	Cancer agent.
1910.1008 bis-Chloromethyl Ether.	Cancer-suspect agent.
1910.1009 beta-Napthylamine.	Cancer-suspect agent.
1910.1010 Benzidine	Cancer-suspect agent.
1910.1011 4-Aminodiphenyl	Cancer-suspect agent.
1910.1012 Ethyleneimine	Cancer-suspect agent.
1910.1013 beta-Propriolactone.	Cancer-suspect agent.
1910.1014 2-Acetylaminofluorene.	Cancer-suspect agent.
1910.1015 4-Dimethylaminoazobenzene.	Cancer-suspect agent.
1910.1016 N-Nitrosodimethylamine.	Cancer-suspect agent.
1910.1017 Vinyl Chloride	Cancer-suspect,extremely flammable gas under pressure.
1910.1018 Inorganic Arsenic.	Cancer-suspect, harmful if inhaled or swallowed.
1910.1029 Coke Oven Emissions.	Cancer hazard.
1910.1043 Cotton Dust	May cause acute or delayed lung injury.
1910.1044 1,2-dibromo-3-chloropropane.	Cancer hazard.
1910.1045 Acrylonitrile	Cancer hazard.

2. Fair Packaging and Labeling Act. Congress passed the Fair Packaging and Labeling Act (29) in 1966 to require information to be provided to consumers about the commodities they purchase. Congress stated: "Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons." The Act applies to anyone engaged in packaging or labeling consumer commodities. The Food and Drug Administration is responsible for enforcing the Act in regards to food, drugs, devices or cosmetics which they regulate, while other consumer commodities are regulated by the Federal Trade Commission.

Basically, the Act requires consumer commodities distributed in commerce to be labeled with:

(1) The identity of the commodity, and the name and place of business of the manufacturer, packer, or distributor; and

(2) The net quantity of contents, in whatever measure is appropriate for the package and its contents (weight, linear measure, area).

FDA and FTC have specific regulations describing their implementation and enforcement of the Fair Packaging and Labeling Act. Since the Act is directed towards consumers, compliance with its requirements does not provide information for employees in the workplace.

3. Environmental Protection Agency (EPA). In 1976, the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.)* was passed (18). This Act gives EPA broad authority to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment. Under TSCA, unreasonable risk to human health or the environment may be regulated wherever it occurs. TSCA also emphasizes delayed or chronic effects of chemical exposure, particularly cancer, gene mutations and birth defects.

Under Section 6(a)(3) of this Act, EPA may require that a substance, mixture or article be marked or accompanied by warnings and instructions with respect to its use, distribution and disposal. To date, no labeling rules have been promulgated under TSCA.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*) authorizes EPA to regulate pesticides (19). To carry out its statutory mandate to protect against "unreasonable adverse effects", EPA requires that pesticides be tested prior to registration, which licenses distribution and marketing, to determine their health and environmental effects. An array of acute, subchronic and chronic testing is required, together with environmental chemistry and safety data.

Acute effects testing generally includes acute oral, dermal and inhalation toxicity tests, and skin and eye effects potential. The following table summarizes the acute toxicity categorization scheme utilized by EPA (19):

Table 6.—*Toxicity Categories*

Hazard Indicators	I	II	III	IV
Oral LD50	Up to and including 50 mg/kg.	From 50 thru 500 mg/kg.	From 500 thru 5,000 mg/kg.	Greater than 5,000 mg/kg.
Inhalation LC50	Up to and including .2 mg/liter.	From .2 thru 2 mg/liter.	From 2 thru 20 mg/liter.	Greater than 20 mg/liter.
Dermal LD50	Up to and including 200 mg/kg.	From 200 thru 2,000	From 2,000 thru 20,000.	Greater than 20,000.
Eye effects	Corrosive: corneal opacity not reversible within 7 days.	Corneal opacity irritation reversible within 7 days; irritation persisting for 7 days.	No corneal opacity; reversible within 7 days.	No irritation.
Skin effects	Corrosive	Severe irritation at 72 hours.	Moderate irritation at 72 hours.	Mild or slight irritation at 72 hours.

Required subchronic and chronic toxicity testing varies, but may include assessment of oncogenic, mutagenic, teratogenic, reproductive, and metabolic effects; other adverse effects on the central nervous system or hematopoietic system; and histological changes in the organs, including but not limited to liver, kidney, and both male and female

reproductive systems. The extent of chronic testing for a particular pesticide depends on a number of factors, such as the intended use, type of application and chemical family.

It should be noted, however, that many registered pesticides have not been adequately tested to determine chronic effects, and therefore such data is not always available. EPA discussed this lack of data in the preamble to their regulations on conditional registration of pesticides (44 FR 27935; May 11, 1979):

> There are many pesticides registered that have not yet been addressed by either the generic standards program, or the RPAR program, and thus may not have been evaluated against the unreasonable adverse effects standard of FIFRA section 3(c)(5). The Agency intends to move ahead rapidly with both programs. Nevertheless, it will be some time before a significant number of pesticides are reviewed within these systems, and an even longer time before chronic hazard studies to serve as a basis for reaching regulatory decisions are completed by registrants. During this interim period, many of the risks associated with the use of pesticides will not be identifed or fully quantified * * *

EPA has issued proposed testing guidelines for many of the studies that may now be required during the registration process (21).

Based on the testing results, EPA determines whether a pesticide may cause unreasonable adverse effects, and therefore whether it may be registered. In conjunction with registration, EPA may classify a product for restricted use, a determination that additional restrictions are necessary to prevent unreasonable adverse effects. Further, a pesticide product must be labeled according to Agency-established requirements. Labeling is a significant adjunct to the registration process because under FIFRA, the label is the legal standard by which pesticide misuse is judged. Under Section 12 of FIFRA, it is a violation of the Act to "use a registered pesticide in a manner inconsistent with its labeling", and penalties may be levied under Section 14 of FIFRA for this violation.

EPA specifies that the pesticide label must include the following information (40 CFR 162.10):

1. Product name;
2. Company name and address;
3. Net contents;
4. EPA (Product) Registration number;
5. EPA (Producing) Establishment number;
6. a. Ingredients statement, including the name and percentage of each active ingredient (accepted common name, if there is one, followed by the chemical name);

b. A signal word, based on the acute effects of the pesticide (Danger, Warning, or Caution);

c. A child hazard warning, "Keep Out of Reach of Children";

7. A series of precautionary statements addressing human health, environmental effects on fish and wildlife, and physical/chemical hazards the product may pose;
8. A statement of practical treatment in the event of exposure;
9. If restricted use, a statement to that effect; and
10. Directions for use, storage, disposal, and, if applicable, reentry into areas where the pesticide has been used.

Beyond these specified contents, labels are developed by the individual companies seeking registration and thus may vary in terms of additional contents and appearance for the same product from different producers.

EPA has instituted a Rebuttable Presumption Against Registration (RPAR) procedure to assess the risks and benefits of pesticides that are identified as exceeding a threshold level of hazard (40 CFR 162.11). Initially, identification of RPAR candidates has been accomplished through the registration program. A pesticide placed within the RPAR system is fully evaluated relative to all products and uses affected to determine whether the adverse effects identified are unreasonable. Evidence of either acute or chronic "unreasonable" health effects may result in initiation of an RPAR proceeding. If the adverse effects are demonstrated to be unreasonable during the RPAR, cancellation or denial of registration action may result. Thirty substances have been placed in the RPAR system, and five have been completed.

4. *Food and Drug Administration (FDA).* The Food, Drug, and Cosmetic Act, administered by the FDA, provides for the labeling of substances which are ingested or come into close contact with humans (24). The following products must be labeled:

Foods
Cosmetics
Prescription drugs
Over-the-counter drugs
Animal drugs
Biologics
Diagnostics
Radiological products
Medical devices

The labels required by FDA are applied to the final products prior to consumer distribution, and do not provide any information or protection for employees in the workplace who may be exposed to hazardous substances during the production process.

Food is defined as articles used for food or drink for man or other animals, components of such articles, and chewing gum. Section 403 of the Act requires that foods be labeled with the following information:

1. Name and address of the manufacturer, packer, or distributor;
2. Net amount of food in the package;
3. Common name of all nonstandardized foods or the complete name of a food listed in the Standard of Identity;
4. Presence of any artificial flavoring, artificial coloring, or chemical preservative, indicated by the chemical name of the substance;
5. Ingredients by weight (except for certain standardized foods);
6. Food for dietary uses must include information on vitamins, minerals, and other dietary properties; and
7. Imitations must be labeled as imitations.

FDA maintains a list of substances which are directly or indirectly added to food and which are "generally recognized as safe (GRAS)" (21 CFR Part 182). To be included on the GRAS list, a substance's safety must be determined by scientists who are experts in food safety. FDA defines the "safety" of food additives as follows:

> "Safe" or "safety" means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use * * * (21 CFR 170.3(i))

Although FDA may determine that a substance is "safe" for purposes of their regulations, this does not mean that the same substances are necessarily "safe" for employees exposed in the occupational setting. Therefore, it seems reasonable that a number of the GRAS substances, as well as other food additives, will be evaluated as hazards under this proposed regulation.

Drugs are defined as articles recognized in the official United States Pharmacopeia, offical Homeopathic Pharmacopeia of the U.S., or official National Forumlary; or articles used to prevent, diagnose, or treat disease; or articles used to affect function or structure in man or animals (21 U.S.C. 321). Medical devices are regulated separately. Section 502 of the Food, Drug, and Cosmetic Act sets forth the following general labeling requirements for drugs:

1. Name and address of the manufacturer, packer, or distributor;
2. Net amount of drug in the package;
3. List of active ingredients, using established names (the established

name is the official name designated; if there is no such designation, the name used in an official compendium; or if a name is not otherwise available, the common name may be used);

4. "May be habit forming" if the drug contains certain substances such as opium;

5. Quantity of certain specified substances such as alcohol;

6. If a prescription drug:

a. "Caution: Federal law prohibits dispensing without prescription."

b. Quantity or proportion of each active ingredient.

c. Names and quantities of all ingredients if for injection.

d. Recommended dosage.

e. Full information on effects and purposes.

f. Established name in type at least half as high as trade name.

7. If an over-the-counter drug: a. Identity statement followed by general pharmacological category or principal intended action.

b. Quantity of contents.

8. Adequate directions for use including frequency, duration, and route of administration, preparation for use, and other dosage information; and

9. Adequate warnings (indications that the drug has narcotic or habit forming properties; warnings against use by persons having certain medical conditions or by children where use may be dangerous to health, precaution concerning safe dosage and manner of use).

FDA has promulgated extensive specific drug labeling provisions under these general requirements of the Act. These provisions are addressed to either the general categories of prescription or over-the-counter drugs, or to individual, specific drugs.

There may be several stages of labeling during the development and packaging of a drug product. The first involves bulk drug shipments from a pharmaceutical manufacturer to another establishment where the drug will be processed, labeled, or repacked in substantial quantity. This establishment then ships the drug product to a retail firm or other dispensing facility (e.g., a pharmacy). Then the drug is dispensed to a customer.

Bulk shipments are generally exempt from the specific drug labeling requirements of the Act but must bear the statement "Caution: For manufacturing, processing, or repacking." Bulk packages of dosage units (such as tablets or capsules) are not covered by this exemption. Certain bulk shipments of drugs must also bear the statement "Caution: Federal law prohibits dispensing without prescription" (21 CFR 201.122). If the bulk shipment is to be used in the manufacture, processing or repacking of a new drug, the shipper may be required to add to the warning as follows: "Caution: For manufacturing, processing, or repackaging in the preparation of a new drug or new animal drug limited by Federal law to investigational use" (21 CFR 201.122(b)).

Labeling requirments for products being shipped from the packager to the dispenser of the drug are different for prescription and over-the-counter drugs.

Generally, prescription drug labeling must meet the following requirements (21 CFR 201.56):

(a) The labeling shall contain a summary of the essential scientific information needed for the safe and effective use of the drug.

(b) The labeling shall be informative and accurate and neither promotional in tone nor false or misleading in any particular.

(c) The labeling shall be based whenever possible on data derived from human experience. No implied claims or suggestions of drug use may be made if there is inadequate evidence of safety or a lack of substantial evidence of effectiveness. Conclusions based on animal data but necessary for safe and effective use of the drug in humans shall be identified as such and included with human data in the appropriate section of the labeling * * *"

The information required is to be presented under the following subject headings, and in this order:

Description.
Clinical Pharmacology.
Indications and Usage.
Contraindications.
Warnings.
Precautions.
Adverse Reactions.
Drug Abuse and Dependence.
Overdosage.
Dosage and Administration.
How Supplied.

If necessary, the following headings may also be used:

Animal Pharmacology and/or Animal Toxicology.
Clinical Studies.
References.

FDA provides specific guidance indicating what information must be provided under each heading (21 CFR 201.57). In addition, for some individual drugs FDA has promulgated specific provisions requiring certain information to appear on the particular drug's label.

If the packager cannot fit all of this information about the drug on the container label, a package insert may be used to supplement the label.

The information FDA requires is intended for the use of the physician or pharmacist. Labels on dispensed drugs are regulated by the individual State Boards of Pharmacy, and thus vary from state to state.

FDA also has regulations specifying labeling requirements for over-the-counter drugs. Basically, the label must include a statement of identity and a declaration of the net quantity of the contents.

FDA has promulgated a number of regulations for specific drug labeling of both prescription and over-the-counter drugs.

For example, lozenges, mouth washes, gargles and other articles sold over-the-counter for relief of minor irritations of the mouth or throat can only be labeled "for the temporary relief of minor sore throats", if the following statement is also included: "Warning—Severe or persistent sore throat or sore throat accompanied by high fever, headache, nausea, and vomiting may be serious. Consult physician promptly. Do not use more than 2 days or administer to children under 3 years of age unless directed by physician."

Cosmetics are articles applied to the human body for cleanliness or to alter appearance. Soap is not classified as a cosmetic. Generally, under the Act a cosmetic label requires the name of the manufacturer, packer, or distributor and statement of weight, but does not require the listing of specific ingredients. An exception is coal-tar hair dyes which must be labeled to warn that they may cause skin irritations, and should not be used for eyebrows or lashes because they may cause blindness. However, FDA has promulgated in its regulations under the Act an additional provision which requires that each cosmetic package "bear a declaration of each ingredient in descending order of predominance, except that fragrance or flavor may be listed as fragrance or flavor" (21 CFR 701.3). The names of the ingredients are to be either the FDA adopted name, or in the absence of one, the common or usual name. If there is no adopted or common name, the chemical or technical name is to be used.

5. *Department of Transportation (DOT).* Section 105(a) of the Hazardous Materials Transportation Act, which was passed in 1975, gave DOT the authority to regulate the labeling of hazardous materials in transportation which may pose an unreasonable risk to health, safety, or property (22). The Secretary of Transportation is given the authority to designate which substances are hazardous. In addition, the Secretary has the authority to regulate substances which meet the definition of hazardous,

but are not specifically designated as such by the Secretary. The shipper is thus required to determine if an individual substance that is not on the list is hazardous, and thus must be labeled. Hazardous substances may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, poisons (dangerous to life, known to be a human health hazard, or presumed to be a hazard on the basis of animal testing results), oxidizing or corrosive materials, and compressed gases.

Over 1500 individual substances or categories of substances have been designated as hazardous (49 CFR Part 172). Some of the categories are general in nature, and thus the categories cover most substances which are hazardous, but are not specifically or individually designated as such. For example, one category is "drugs, not otherwise specified; Poison B". If a drug fits the definition for a Poison B, it would thus have to be labeled, even though it is not individually listed by DOT by substance name. A table which is part of the DOT regulations indicates the specific labeling requirements for each of these designations.

The hazardous substances which are categorized on the basis of their health effects are designated as either Poison A or Poison B. The substances categorized as "Poison A" are considered to be "extremely dangerous", and those categorized as "Poison B" are considered to be "less dangerous". Approximately 20 individual substances are listed as Poison A, as well as 6 general categories. Nearly 130 substances are considered to be Poison B, and there are about 20 general categories listed as such.

Under DOT regulations, 49 CFR Part 172, all dangerous goods or their packages must have the designated labels. The label must include the name, DOT identification number, and a statement of the hazard. In addition, the regulations require the placarding of each motor vehicle, rail car, or freight container containing any quantity of a hazardous material.

DOT regulations cover interstate shipment by truck, rail, water, an air but vary depending on the mode of transportation. The responsibility for labeling is placed on manufacturers, shippers, and the reconditioners and testers of containers in which the hazardous materials are transported. Both the carrier and the manufacturer are forbidden to transport a package which is improperly labeled.

6. *The Consumer Product Safety Commission (CPSC).* The CSPC regulates the labeling of toxic substances in household products used by consumers as part of its broad mandate to protect the public against unreasonable risk of injury (23). The CPSC administers the Federal Hazardous Substances Act (FHSA) which requires the labeling of hazardous substances. "Hazardous substance" is defined in the FHSA regulations as "any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably forseeable handling or use, including reasonably foreseeable ingestion by children." A "toxic" substance is one which "has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface." A "highly toxic" substance is defined by lethal dose testing results. (These definitions may be found in 16 CFR 1500.3).

The person or firm who releases a product into interstate commerce (usually the manufacturer) has the primary responsibility for determining if the FHSA applies to their product and thus warrants labeling (section (4) of the FHSA). However, if CPSC finds that there may be uncertainty as to the application of the Act in certain instances, or if the hazard is such that the general labeling requirements will not protect consumers, individual specific regulations may be required for hazardous substances. This authority has only been used in a few cases, such as charcoal briquettes (16 CFR 1500.12 and 1500.14) and methyl alcohol (16 CFR 1500.14). CPSC may also ban hazardous substances if the degree of hazard warrants discontinuing consumer use. For example, carbon tetrachloride is a banned hazardous substance (16 CFR 1500.17).

The FHSA requires the following information on a label or tag attached to a hazardous substance:

1. Name and place of business of the manufacturer, packer, or distributor;

2. Common or chemical name of the hazardous substance or of each component which contributes substantially to its hazard;

3. The signal word *"danger"* on substances which are extremely flammable, corrosive, or highly toxic;

4. The signal word *"warning"* or *"caution"* on all other hazardous substances;

5. Affirmative statement of the principal hazard or hazards;

6. Precautionary measures describing the action to be followed or avoided;

7. Instruction, when necessary or appropriate, for first-aid treatment;

8. The word "poison" for any hazardous substance defined as highly toxic;

9. Instructions for handling and storage of packages if special care is required;

10. Statement "Keep out of the reach of children" or if intended for use by children, adequate directions for the protection of children.

As stated above, if this information is not adequate to protect consumer health and safety, additional requirements may be applicable. For example, special labeling is required at certain concentrations for benzene, toluene, xylene, and petroleum distillates (16 CFR 1500.14).

7. *State Regulations.* Twenty-four states have regulations which address labeling. However, only nine states have regulations which apply to labeling in the workplace environment (9, 10, 11, 12, 13, 14, 15, 16, and 17).

Table 7 lists all of the provisions contained in the state regulations. Also listed, by individual state, are the specific provisions applicable to each. This table was prepared by OSHA to give a general overview of existing state laws based on a review of the written regulations supplied by these states. It should not be considered to be a legal interpretation of these state requirements. Most of the states do not have any provisions pertaining to the protection of trade secret information, nor do they provide employers with any specific guidance for determining which substances in their workplaces are covered by the regulations.

Table 7.—*Summary of State Labeling Provisions*

Provisions which may be included in state regulations:

1. Substance Identification:
   - (a) Requires substance identification by chemical name or common name(s).
   - (b) Requires substance identification by chemical name and common name(s).
2. Identification Criteria:
   - (a) Includes a list of regulated substances.
   - (b) The employer determines which substances are regulated on the basis of definitions.

Table 7.—*Summary of State Labeling Provisions*—Continued

(c) Sources of information the employer can use are provided.
(d) A combination of lists and definitions is used.
3. Requires the Use of Material Safety Data Sheets.
4. Information Required to be Provided on Labels or Equivalent.
(a) Requires hazards warning information.
(b) Requires precautionary measures information.
5. Requires Employee Training.
6. Recordkeeping Requirements:
(a) Provides for employee access to records maintained by employer.
(b) Requires retention of records by employer.
Provisions included in regulations of specific states:
California—1(a), 2(d), 4(a) and (b).
Connecticut—1(a), 2(a), 4(b), 5, 6(a).
Maine—1(a), 2(d), 5, 6(a) and (b).
Massachusetts—1(a), 2(a), 4(a) and (b).
Michigan—1(b), 2(b), 3, 4(a) and (b), 6(a).
New Jersey—1(a), 2(d), 4(a) and (b).
New York—1(b), 2(c) and (d), 3, 4(a) and (b), 5, 6(a) and (b).
Oregon—1(a), 2(b), 4(a) and (b).
Washington—1(a), 2(b), 4(a) and (b).

8. *European Economic Community (EEC).* Since hazardous substances are frequently traded between the U.S. and other countries, the labeling requirements of those nations may have an impact on American labeling practices. The standards established by the EEC, an organization composed of nine member nations, is the most widely known of available standards in foreign countries.

The EEC standards were initiated in 1967 by the Council of the European Communities. Since that time, the Council has issued four Directives concerning the classification, packaging and labeling of "dangerous" chemical products (30). The term "dangerous" is similar to OSHA's definitions of "hazardous". These Directives require each member nation of the EEC to develop harmonious laws, regulations, and administrative provisions regarding trade in these products within a determined period of time.

Each Directive focuses on a distinct category of dangerous materials or products as follows:

1. *"Substance Directive":* Concerns the classification, packaging, and labeling of dangerous substances (Directive 67/548/EEC, August 16, 1967; as amended by Directive 79/831/EEC, September 18, 1979).

2. *"Solvents Directive":* Concerns dangerous preparations (i.e. mixtures) and certain substances that are intended for use as solvents (Directive 73/173/EEC, June 4, 1973).

3. *"Paints Directive":* Covers paints, varnishes, printing inks, adhesives, and similar products (Directive 77/728/EEC, November 7, 1977).

4. *"Pesticides Directive":* Covers pesticide products (Directive 78/631/EEC, June 26, 1978).

The Substance Directive specifies fourteen categories of dangerous products and the criteria by which they are defined. The EEC categories encompass products that may present health, physical, and environmental hazards during use, handling, or disposal. Eight categories identify products that pose health hazards or degrees of hazards: very toxic, toxic, harmful, corrosive, irritant, carcinogenic, teratogenic, and mutagenic. There are five categories of materials that pose physical hazards: explosives, oxidizing, extremely flammable, highly flammable, and flammable. A final category includes products whose use threatens the environment: dangerous for the environment. A dangerous product is one which can be classified in one or more of these categories.

Containers of dangerous substances that are distributed within the EEC must be labeled with the following information: (1) The name of the substance, (2) the name and address of the manufacturer, importer, or distributor of the substance, (3) hazard symbol(s), if applicable, and key hazard terms, (4) appropriate Risk Statements, and (5) appropriate standard Safety Advice Statements. Terms such as "non-toxic" or "non-harmful" must not appear on any package containing a dangerous substance.

The EEC labeling standard use symbols as the primary hazard warning method. Associated with nine categories are six pictograms: explosives—an exploding bomb; oxidizing—a flame over a circle; extremely flammable and highly flammable—a flame; very toxic and toxic—a skull and crossbones; harmful and irritant—the St. Andrew's cross (a bold-face "X"); corrosive—a symbol showing the destructive effects of an acid dripping from test tubes onto a hand and a bar. Containers of a product which satisfy the criteria for any of these categories must bear the corresponding pictogram(s) and key hazard term(s) on their labels. The pictograms must be printed in black and appear on a rectangular orange-yellow background. Together the pictogram and the hazard term constitute the EEC hazard warning symbol.

For products that satisfy the criteria for more than one of the danger categories, the EEC prescribes procedures for determining which pictograms take precedence over others on the label. These requirements determine which of the hazards are to be highlighted on the label by symbols (and, therefore, which are left to be dealt with by means of appropriate risk statements). A label may contain no more than two symbols.

The EEC has established specific labeling requirements for nearly 1,000 dangerous substances, which appear in an appendix to the Substance Directive. These requirements specify precisely what information must appear on the product's label, including the nomenclature for identifying each substance, hazard symbols, and standard risk and safety statements. However, substances which meet the criteria for being dangerous but do not appear in this appendix, must still be labeled.

The Substance Directive will go into effect in September 1981. The Paints Directives became effective on November 7, 1979; the Solvents Directive on June 4, 1976; and the Pesticides Directive on January 1, 1981.

E. History of OSHA's Proposed Labeling Standard

OSHA's involvement in the identification and labeling of hazardous chemicals in the workplace began several years ago. In 1974, the Standards Advisory Committee on Hazardous Materials labeling was established under Section 7(b) of the OSH Act to develop guidelines for the implementation of Section 6(b)(7) of the Act with respect to hazardous materials. On June 6, 1975, the Committee submitted its final report which identified issues and recommended guidelines for categorizing and ranking chemical hazards. Labels, data sheets, and training programs were also prescribed.

In 1976, Congressman Andrew Maguire (New Jersey) and the Health Research Group petitioned OSHA to issue a standard to require the labeling of all workplace chemicals. The House of Representatives' Committee on Government Operations in 1976 and 1977 recommended that OSHA should enforce the health provisions of the OSH Act by requiring manufacturers to disclose any toxic ingredients in their products, and by requiring employers to disclose this information to workers (House Report No. 94-1688 and House Report No. 95-710).

On January 28, 1977, OSHA published an advance notice of proposed rulemaking on chemical labeling in the **Federal Register** (42 FR 5372). The notice requested comments from the public regarding the need for a standard which would require employers to label hazardous materials. Information was also requested regarding the provisions to be included in such a standard to assure that employees are apprised of the hazards to which they are exposed.

A total of eight-one comments were received from a variety of federal, state, and local government agencies, trade associations, businesses, and labor

organizations. In general, there was support for the concept of a chemical identification and labeling standard. A number of commenters said that such a standard should be comprehensive in scope, but not too complex in design. Many expressed the opinion that OSHA's standard should be compatible with the standards of other regulatory agencies with labeling authority, such as the Department of Transportation (DOT), and with existing voluntary labeling standards, such as that of the American National Standards Institute (ANSI). A few commenters expressed concerns about protection of trade secret information and about labeling chemical intermediates.

Various suggestions were put forth for determining which materials should be covered by the standard. Some commenters thought that chemicals which met specified definitions or other classifications should be regulated. Others preferred that a list of substances to be regulated be provided, for example, those substances in 29 CFR 1910.1000 (OSHA's list of air contaminants), in the NIOSH Registry of Toxic Effects of Chemical Substances (RTECS), or in the DOT hazardous materials list.

Virtually all commenters recognized the need for labels in the workplace, and for inclusion of warnings and descriptive information. However, opinions varied as to what form these labels and information should take, or if an existing system should be adopted. Similarly, there was general recognition of the need to inform employees of the hazards to which they are exposed by means of data sheets and training programs, although suggestions as to content and format varied.

In developing this proposal, OSHA has considered all of the regulations, documents, and comments described above. Consideration has also been given to all other available information, such as that presented at conferences and at meetings of professional societies, and meetings with interested members of the public and other Federal agencies.

In addition, as a member of the Interagency Regulatory Liaison Group (IRLG), OSHA is working to assure that the provisions of this standard will not conflict with other related federal policies and regulations. The IRLG, which was established to coordinate federal regulatory activities, consists of representatives from OSHA, the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), and the Food Safety and Quality Service of the Department of Agriculture. The "IRLG Labeling Regulations Task Force" and the "IRLG Labeling Education Task Force Group" are currently involved in planning research projects to determine the factors that contribute to effective labeling. OSHA recognizes the need for such research. However, the evidence found and presented in this document indicates that immediate action should be taken to protect employees. The IRLG deliberations and research findings will be entered into OSHA's rulemaking record as they become available, and will be given full consideration in the development of OSHA's final standard.

III. Summary of the Proposed Standard

The proposed hazards identification standard will establish a system designed to communicate to workers, employers and governmental agencies concerned with worker health, the essential facts necessary to assess the hazards of workplace chemicals. Chemicals are classified under the proposal as either "substances" or "mixtures." Information about the identities and hazardous properties of hazardous chemicals will be communicated primarily by means of labels and placards, and material safety data sheets. Container labels and placards will give workers immediate access to the identities of the hazardous chemicals and mixtures with which they work directly. Safety data sheets, when available, will provide workers and their representatives with detailed information about the properties and handling of hazardous chemicals and mixtures, supplementing the information on hazard warning labels. Hazard evaluation files will enable employees and their representatives to do their own hazard determinations and to check those done by the employer.

The key responsibility under this system for the evaluation of hazards lies with the manufacturer or importer of a substance or mixture of substances. This is because the manufacturer or importer is in the best position to know the chemical identity and properties of a substance or mixture.

The proposed hazard identification standard requires each manufacturer to evaluate each substance and mixture the manufacturer makes to determine if it is hazardous according to criteria the standard specifies. Importers of substances and mixtures destined for the workplaces of industrial users must evaluate them under the same criteria.

The evaluative procedures of the porposed standard do not require manufacturers and importers to test substances and mixtures for hazards. They do require a manufacturer or importer to determine whether any of the substances or mixtures which they manufacture or import poses a physical hazard (Category A hazard) or an acute or chronic health hazard (Category B hazard). To make this determination, the manufacturer is required to assemble scientific materials from specified sources, including both private and publicly available materials by means of the evaluation schemes set out in Appendices A and B.

Manufacturers and importers must maintain files on all chemicals and mixtures they manufacture or import. Each file must contain the references, studies, reports, or other documents upon which a conclusion of hazard, or lack of hazard, is based.

With certain shipments of chemical substances or mixtures from their premises, manufacturers and importers must forward the following information:

The precise identity of hazardous substances, and the identity of hazardous constituent substances which are part of a mixture;

An appropriate hazard warning and precautionary statement for the hazardous material shipped;

Where a substance or mixture has been determined not to meet the standard's criteria for a hazard, a statement to that effect.

This information must accompany shipments to any employer whose activities are classified under Division D (Manufacturing), Major Groups 20–39 of the Standard Industrial Classification Manual. These are employers who manufacture, process, formulate or use chemicals, and who are referred to in the proposed standard as "industrial users." This information must also accompany shipments to suppliers who will subsequently distribute a hazardous substance or mixture to an industrial user.

The proposed standard does not require manufacturers and importers to develop safety data sheets on the hazards of chemicals and mixtures. With the first shipment of a hazardous chemical or mixture to a workplace of an industrial user or a supplier of an industrial user, however, a manufacturer or importer must forward one copy of the most current safety data sheet which the manufacturer or importer does have concerning the dangers posed by the material shipped. A supplier must forward with every shipment to another supplier or to an industrial user the hazards-related information received from a manufacturer or importer. A supplier has no other duties under the proposed standard.

Industrial users are employers who manufacture, process, formulate or

otherwise use chemicals and mixtures. Thus, the manufacturer of a particular substance or mixture is also an industrial user. Protection of the employees of industrial users is the primary purpose of the hazards identification standard. To insure that employees of industrial users know the hazards of the substances and mixtures with which they work, the hazard identification standard would require such industrial users to:

Label containers of every hazardous substance in the workplace with the CAS number and common name of its contents, and with appropriate hazard warnings.

Label containers of mixtures with the CAS number and common name of its hazardous constituent substances, and with appropriate hazard warnings.

Provide employees with any available safety data sheets concerning the dangers posed by hazardous chemicals and mixtures in the workplace.

Update the information provided to employees as new information about the hazards of a substance or mixture become available.

Triggering the responsibility to label and to provide available safety data sheets is the determination that a substance or mixture is hazardous. In determining if a workplace substance or mixture is hazardous, only the manufacturer or importer of that substance or mixture need undertake a review and evaluation of internal records and of the scientific literature. Other industrial users of the substance or mixture may simply rely upon the determination made by the manufacturer or importer. These determinations will be evidenced by the hazard-related information received by industrial users with shipments of substances or mixtures from manufacturers, importers, or suppliers.

The proposed hazard identification standard would also provide employees, former employees, and their designated representatives, with access to safety data sheets relevant to the areas in which the requesting employee works or worked. A designated representative may be anyone the employee chooses, including, but not limited to, a union representative, a physician, or a family member. Unions representing employees in the workplace would have access to all safety data sheets in the workplace.

Under the proposed standard, employees, former employees, unions representing employees in the workplace and other designated representatives, OSHA, and NIOSH, may inspect any file containing the references and documents upon which hazard determinations for workplace chemicals and mixtures are based.

Safety data sheets and files containing hazard determination materials must be preserved for specified periods of time. The proposed standard makes provision for permanent transfer of these records in case an employer subject to its recordkeeping requirements goes out of business.

IV. Major Issues for the Rulemaking.

There are a number of major issues inherent in the provisions of the proposal concerning which OSHA specifically invites comment. A brief discussion of some of the most important of these issues follows. There are undoubtedly additional issues raised by this notice of proposed rulemaking which should and will be addressed, and OSHA may amend the proposed standard on the basis of comments received or alternatives discussed concerning such issues.

A. Issues of Scope and Type of Standard

1. *The generic approach to a hazard identification standard.* The proposed hazard identification standard embraces a generic approach to rulemaking. The standard sets out a list of defined hazards, mandates procedures which manufacturers and importers must follow to determine the existence of those hazards, and requires that substances and mixtures meeting any hazard definition be labeled and otherwise identified in various ways. Some industry representatives have strongly objected to the generic approach and have suggested that substances and mixtures in the workplace should be subjected to regulation by the standard on a case-by-case basis.

As discussed elsewhere in this preamble, OSHA believes that it is authorized by applicable law to undertake generic rulemaking. Moreover, OSHA believes strongly that the generic approach to rulemaking is particularly applicable to hazard identification. It is generally accepted among health scientists that literally thousands of chemicals in the workplace are capable of harming human health. Consequently, it would take many years to accomplish comprehensive and effective identification of hazardous chemicals in the workplace if there were separate rulemakings concerning each potentially hazardous workplace chemical. Indeed, in its entire ten (10) year history, through substance-specific rulemakings OSHA has been able to promulgate currently effective standards regulating only 20 chemicals.

The current proposed generic standard places the responsibility for the hazard determination process upon the manufacturer or importer (paragraph (i) of the standard). Without changing any of the other requirements of the standard or abondoning the generic approach, an alternative approach is conceivable in which the Agency itself could undertake to carry out the hazard determination process in the final rule. Thus, the final rule would retain the current scope of hazard coverage, the hazard determination process, the data evaluation scheme and the regulatory requirements concerning hazardous substances or mixtures.

The Agency could perform the hazard determination process in the following manner:

1. Appointed panels of experts would review classes of chemicals using the scientific materials mandated by Appendix A and the data evaluation scheme set out in Appendix B;

2. OSHA would review the expert determination of hazard and require conformity with the provisions of the standard for those substances or mixtures where it approves the expert panel's decision.

3. If an interested party disagreed with the Agency's hazard determination decision, then the Agency could apply a summary procedure to determine whether a hearing were required. Issues in the summary judgment procedure would be confined to the question of whether the quantity and quality of data underlying the positive hazard determination satisfied the rule's requirements.

The Federal Food and Drug Administration (FDA) has extensive experience in the use of the elements just described. Expert panels were utilized to evaluate 16573 claims of effectiveness for 4,000 drug formulations following passage of the 1962 Drug Amendment (see Note: *Drug Efficacy and the 1962 Drug Amendments*, 60 Geo. L. J. 185–224 (1971)). The FDA's summary judgment procedure has been upheld *(Weinberger v. Hynson, Westcoff and Dunning, Inc.*, 412 U.S. 609 (1973)). The summary judgment procedure involved regulations which defined, "* * * the essentials of adequate and well-controlled clinical investigations * * * (as a) * * * basis for the determination whether there is substantial evidence to support the claims of effectiveness * * * (21 CFR 314.111(a)(5)(ii) (1979)).

The Agency invites comments on the advisability of this alternative approach. The Agency did not choose this alternative because it believes that the hazard determination process which it has mandated in the proposal will result

in labeling of hazardous materials sooner.

OSHA solicits comments directed at the appropriateness of generic rulemaking in the context of the need for hazard identification in the workplace under either of the two alternative approaches described. Should OSHA conclude that generic rulemaking is inappropriate, OSHA may still adopt a two-tiered approach similar to its Cancer Policy (45 FR 5002 *et seq.*) Under such an approach, the hazard definitions and evaluation procedures proposed in the standard, with any appropriate modifications which arise from comments and testimony, would be adopted generically. Using these, OSHA would then formulate lists of hazardous chemicals which, either individually or in groups, may then be subjected to rulemakings to determine if they should trigger the informational requirements of the proposed standard.

2. *Employers covered by the standard.* The proposed standard is designed primarily to provide hazards-related information to employees of employers engaged in manufacturing. To this end, the standard regulates the activities of both manufacturers who produce chemicals (called "manufacturers" in the standard) and manufacturers who use chemicals (called "industrial users" in the standard), as well as importers and suppliers of hazardous chemicals. Under the standard, Division D (Manufacturing), Major groups 20–39, in the most recent revision of the Standard Industrial Classification Manual; Executive Office of the President—Office of Management and Budget, defines the class of manufacturers and industrial users covered by the standard. Employers excluded include those in agriculture and construction among others.

It should be noted, however, that the proposed standard intends that where an employer otherwise exempted from coverage works on the premises of a workplace covered by the standard, chemicals utilized by the exempted employer will be subject to the provisions of the standard.

Although evidence is presently lacking, the need for the protections of the hazards identification standard may well be as great in some industries excluded from coverage as they are in those covered. Accordingly, OSHA invites comment on the appropriate scope of coverage. Employers currently excluded from the scope of the proposal may be included in the scope of the final standard if evidence in the record ultimately warrants such inclusion. They and others interested in this issue are therefore given notice that they should be prepared to participate in the rulemaking and provide justification, if they so desire, of why particular classes of employers should or should not be excluded.

3. *Duty to disclose specific chemical identity and impact on trade secrets.* A keystone of the proposed hazard identification standard is the duty to provide workers with specific chemical identity of hazardous chemicals. As discussed elsewhere in this preamble, OSHA considers the disclosure of specific chemical identity in addition to basic hazard warning information as crucial to the goal of worker self-protection.

Certain industry representatives have stated that provision of the specific chemical identity of hazardous chemicals is inappropriate. They claim that workers and their representatives generally are neither properly trained or equipped to utilize the chemical identity of hazardous chemicals to decipher additional facts about their effects; nor to develop new modes of treatment for, or prevention of, such effects.

OSHA invites detailed comments on these contentions. OSHA also invites detailed comments from workers and their representatives concerning the need for and uses of the specific chemical identification which the proposed standard would make available to them.

OSHA is particularly interested in this issue because of the likely impact of this standard on employer trade secret interests. The trade secrets issue is presented by the proposal because, in some instances, disclosure of a hazardous substance's chemical identity may involve revelation of a trade secret.

In developing this proposal, therefore, OSHA has considered the effect of this standard on trade secrets. An extended legal analysis of OSHA's authority to issue standards requiring disclosures affecting trade secrets may be found in the preamble to the access to exposure and medical records standard (45 FR 35248–251). In general, OSHA believes that in rulemaking it must balance the safety and health interests in disclosure of hazards-related information with the employer's interest in trade secrets, but that it may require disclosure by rule, notwithstanding a trade secret interest, where non-disclosure could pose a significant risk to employees. In OSHA's view, this means that chemical identities of hazardous chemicals and their hazardous properties must be disclosed to employees, but that the secret chemical identities of non-hazardous chemicals, as well as secret process and formula information concerning hazardous chemicals, need not be disclosed. OSHA recognizes that the impact on trade secrets of this proposed rule is in some respects greater than the records access rule because of the element of "downstream" disclosure. On the other hand, the more focused scope of the chemicals covered by this standard and the percentage exclusion for chemical constituents of mixtures below 1.0% for non-carcinogens and 0.1% for carcinogens should eliminate some of the anticipated trade secret problems.

Industry representatives have suggested, however, that even where a substance is admittedly hazardous, disclosure of its identity should not automatically be required where a trade secret is involved. These representatives propose that industry be allowed in every case involving a claimed trade secret to challenge the need for disclosure. Presumably, the issue would be whether the potential for harm to workers risked by non-disclosure outweighs the damage to a firm by forced disclosure of its trade secrets in the individual case.

Once a firm has through its own evaluation found a chemical hazardous, OSHA believes that case by case adjudication is unjustified and unworkable. OSHA believes that each of the hazards it has identified in the proposed standard is significant. Consequently, if the potential for a hazard exposure in the workplace exists, disclosure of the identity of chemicals posing that hazard is clearly essential to providing the capability for workers to protect themselves from workplace hazards. Moreover, allowing individual challenges to the need for the disclosure of the chemical identity of hazardous chemicals might well create an administrative nightmare as thousands of challenges to disclosure were lodged. It could take years before a final decision were reached in any case. In the interim, with enough challenges, the standard's requirements for disclosure would be meaningless.

OSHA recognizes that the legal and policy issues surrounding the disclosure of trade secrets are troublesome and complex. OSHA solicits comments on all aspects of trade secrets disclosure and particularly on the following points:

—How important are trade secrets to the competitive structure of the industries covered under the proposal or which may be covered by any final standard?

—To what extent will the proposed standard require trade secrets disclosure?

—Are there ways to provide trade secrets protections greater than those afforded under the proposal, and still

insure that chemical identification is disclosed in a timely fashion to all those with a need to know?

B. Scientific Issues

The scientific elements occupy a central position in the proposed standard because the extent of regulation of a substance or mixture is controlled by the hazard determination process which, in turn, is constructed from these elements. The elements are most appropriately considered under three headings: scope of hazards covered, hazard determination process and the evaluation procedure.

1. *Hazards covered by the standard (general issues).* a. *Universal vs. hazard labeling.* The proposed standard would require provision of chemical identification and hazard warnings for chemicals which meet the criteria for any hazard as defined by the standard (see paragraphs (i)–(1) and Appendices A and B). Hazard definitions fall into two general categories, Category A and Category B, which generally correspond to physical and health hazards, respectively, and which together are calculated to embrace all significant workplace hazards.

By focusing on workplace hazards, the proposed standard falls short of a system of universal chemical identification. By contrast, some unions and other worker advocates have urged OSHA to require chemical identification of all substances in the workplace whether or not they pose proven hazards to human health. They claim that such identification is necessary to insure the capability of workers, and scientists assisting them, to identify the hazards of chemicals in the workplace before injury to worker health actually occurs. Without worker capability to conduct their own studies, these advocates claim that the identification of hazardous properties of workplace chemicals, especially those with long latency periods, will be unnecessarily delayed with a resultant increase in death or disablement of workers.

As previously stated, however, there is at least one major drawback to universal chemical identification of substances in the workplace: disclosure of chemical identity may, at times, reveal a trade secret. OSHA believes that the required disclosure of a trade secret is most clearly justified where the chemical involved poses a known hazard to human health. With universal chemical identification, the identity of chemicals which may turn out to be harmless would be revealed. This, in turn, risks the potential for unwarranted disclosure of industry trade secrets. To outweigh this important disadvantage, workers, and those assisting them, would have to show a comprehensive capability of using chemical identity to determine hidden hazardous effects of workplace chemicals with no present known potential to injure human health.

OSHA invites comments concerning the utility of a requirement for universal chemical identification in the workplace and any effects such a requirement might have upon trade secrets.

b. *General or workplace-specific hazard determinations.* Under the proposed standard, the determination of a hazard is not made dependent on the particular conditions under which the chemical will be used in a particular workplace. Instead, the proposal provides for a single hazards determination procedure.

On scientific grounds, OSHA believes that its proposed approach is preferable. Traditional public health preventive practice has considered a substance or mixture potentially hazardous for any occupational exposure once its toxicity, based upon definitions like the ones presented in this proposal, has been documented with sound toxicologic, clinical or epidemiologic studies. This current Agency position is consistent with the 1974 NIOSH criteria document (7).

Moreover, the Agency believes that adoption of the workplace-specific alternative would lead to an unreasonable demand on OSHA consultation and enforcement resources. Since manufacturers and importers have no reliable methods of knowing the conditions surrounding the end-use of their chemicals by industrial users, OSHA belives that the hazard determination process would need to be performed in that case by the industrial users themselves. Industrial users, as a class, in comparison to manufacturers and importers, have substantially less experience in making such basic hazard determinations for chemicals. As a consequence, industrial user hazard determinations would probably take longer, cost more and require greater OSHA involvement.

As a result of the single hazard determination approach of this proposal, some industry representatives have stated that the hazard definitions do not adequately take into account, and may in fact overstate, the true risk of potential hazards in the workplace. Thus, they feel it is unnecessary, or even harmful, to apprise workers of the hazards of chemicals tested in one physical form (solid, liquid, or gas) and presented in the workplace in another physical form. OSHA believes that, in the case of Category B health hazards, the physical form of a substance is largely irrelevant to the risk imposed by the exposure.

Moreover, these industry representatives would not apprise workers of the hazards of chemicals where the existence of a hazard was established at dosages, or by routes of administration, not frequently encountered in particular workplaces. OSHA invites further comment on this issue.

c. *Impurities, Intermediates, By-Products.* The proposed standard would require that impurities, intermediates, and by-products be evaluated and regulated, if known to be present (paragraphs (d)(2)(iv), (e)). OSHA does not intend that a manufacturer or importer perform chemical analysis to detect these materials in order to comply with this standard.

The Agency expects that its jurisdiction over these classes of materials, as potential workplace hazards, will extend to the point at which the Environmental Protection Agency assumes jurisdiction under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6907(a)(3), 6944).

OSHA invites comment on the appropriateness of including these categories of chemicals in the proposed standard.

2. *Hazards covered by the standard (definitional issues).* a. *General.* The proposed standard covers physical hazards, acute health hazards and chronic health hazards. The covered hazards are categorized into these three categories as follows:

Table 8

Category		
(A)	(B)	(B)
Physical hazards	Acute/subacute health hazards	Chronic health hazards
Corrosives	Highly toxic material.	Sensitizers.
Extremely flammable liquids.	Toxic materials	Carcinogens
Flammable materials.	Irritants	Reproductive toxins.
Aerosols, gases	Materials that have endangered or killed workers.	Materials that cause other chronic adverse health effects.
Liquids, solids	Materials that cause other acute adverse health effects.	
Combustible liquids.		
Pyrophoric materials.		
Strong oxidizers		
Reactive materials:		
Explosives		
Organic peroxides.		
Pressure-generating materials.		

Table 8—Continued

Category		
(A)	(B)	(B)
Physical hazards	Acute/subacute health hazards	Chronic health hazards
Water-reactive materials.	.....	
Compressed gases.	.....	

b. *Physical Hazards.* The Category A (physical) hazards are defined in terms of objective physical properties to facilitate compliance. The definitions for physical hazards are stated in terms of numerical criteria (flammability, combustability, compressed gas), chemical structure (organic peroxides) or reactive properties (corrosives, pyrophoric materials, strong oxidizers, explosives, pressure-generating materials, water-reactive materials). Based upon discussions with industry and the Agency's own expertise, OSHA believes that data and studies necessary to determine whether a substance meets the objective criteria of the physical hazards' definitions are available either in company files or in the scientific literature. To comply, a manufacturer or importer would evaluate such data or studies for the presence of physical hazards using sound scientific judgment. An extensive literature search is not required (see Appendix A) nor need the formal evaluation scheme be followed (see Appendix B).

In the case of mixtures, the Agency understands that compliance based upon material in the scientific literature will not often be possible because of the scientists' tendency to evaluate the effects of pure substances. However, the Agency believes, based on discussions with industry, that many manufacturers of mixtures obtain the requisite physical hazards data on a proprietary basis as a customary incident of offering the mixture for sale. The Agency has, therefore, provided for the use of such data when available (paragraph (a), Appendix A). In general, however, OSHA does not rely on such mixture data and the standard provides that where data for the mixture as a whole is unavailable, the hazard determination for a mixture reflect the hazards of the constituent substances (paragraph (i) of the regulation and Appendix A).

c. *Health Hazards.* In addition to physical hazards, OSHA has provided for broad coverage of health hazards. OSHA recognizes that Category B hazard determinations are inherently more complex than Category A hazard determinations. Category B (health) hazard determinations will require greater expenditures of professional time and will call for the exercise of more sophisticated professional judgments (see Appendix B) than do the more mechanical Category A hazard determinations. Nevertheless, OSHA does not believe that complexity of the task or occasional ambiguities of the data are sufficient reason to omit coverage of various health hazards. Each of the covered health hazards is justified on the grounds that the category represents well-documented medical and/or toxicologic adverse health effects. The Agency believes that it is prudent public health policy to reflect in the proposed standard that range of adverse health effects already documented by occupational physicians, toxicologists and other health professionals.

In view of the complexity inherent in Category B hazard determinations, the proposed standard provides assistance in the form of explicit directions to the manufacturers or importers. The standard describes the hazard determination process (Appendix A), details the materials (including the output of a required literature search) that must be used for the determination (Appendix A) and provides an evaluative scheme for such materials (Appendix B). The Agency believes that the explicit directions for compliance just described reflect the best current scientific practice and will reduce the ambiguities inherent in a less detailed standard, will facilitate compliance and result in many fewer enforcement actions. Extensive discussions with industry have produced no alternative evaluative schemes. Moreover, specification of the Category B hazard determinations process is required to obtain uniformity of labeling.

Nevertheless, representatives of the chemical industry have informally advised OSHA that they believe OSHA's proposed hazard definitions are deficient in at least the following general respects:

—Some hazard definitions could include insignificant health effects that almost any workplace substance or mixture will cause. If this is true, implementation of the hazard identification standard would lead to overlabeling in the workplace, and the value of informing workers of chemical hazards would be greatly reduced. OSHA believes that it has dealt adequately with this issue by setting a threshold level of severity for diseases, signs and symptoms requiring a positive hazard determination (paragraph (gg)(31)).

—The hazard definitions for some Category B hazards are too imprecise, and the science for establishing such hazards is, in any case, presently inadequate to indicate the existence of such hazards reliably.

OSHA invites comments concerning these criticisms and other issues regarding its categorization of hazards.

d. *Specific definitional issues.* In selecting the particular Category B (health) hazard definitions contained in the proposed standard, OSHA has made a series of science policy decisions. OSHA believes that identification of the specific science policy decisions involved in each definition will ensure that the scientific issues are fully aired in subsequent hearings. The following discussion is not meant to be exhaustive but, rather, is meant to identify the most important of these issues. The Agency encourages affected parties to identify and discuss additional science policy issues involved in either Category A or Category B hazard determinations.

OSHA invites comment on the following issues of scientific definition, which it regards as particularly noteworthy:

(i) "Highly toxic" and "toxic" substances or mixtures. As noted in the discussion concerning Table 10 (below), several other regulatory efforts have included these hazard categories. The Agency believes that the boundaries it has selected for the two toxicity classes, varying by route of administration, represent a reasonable composite of what other regulatory bodies currently require. However, the Agency invites comments on whether the upper boundaries for each toxicity class should be raised to more nearly approximate the higher values adopted under the Federal Insecticide, Fungicide, and Rodenticide Act (see 40 CFR 162.10(h)(1)).

(ii) "Irritant". The Agency has adopted a somewhat more expansive definition than that used by other agencies in that results of testing in other mammalian species also must be considered in the hazard determination. Other definitions (Table 10 below) have relied only upon data from human and selected mammalian species. The Agency believes that all available data from mammalian species should be used to classify a substance or mixture as an irritant unless such studies utilize inappropriate animal models (paragraph (a)(1)(vi) of Appendix B) or human data of a specified quality establish a lesser risk (paragraphs (c)(3), (5) of Appendix B).

(iii) "Sensitizer". The Agency definition is more expansive than that generally in use for the following reasons:

A. The definition requires consideration of mammalian data as a part of the hazard determination

process. The Agency believes that this represents sound scientific policy since there is substantial scientific experience identifying human sensitizers in non-human mammalian test systems. (Also see the discussion under "Irritants" concerning the use of non-human mammalian data in general).

B. The definition requires classification of a substance or mixture as a "sensitizer" if it produces an allergic or photodynamic reaction in medically disabled as well as normal humans. This provision was included to increase the protection afforded workers who already have hypersensitivity diseases. Such workers are known to be at substantially greater risk of developing a hypersensitivity reaction to new substances or mixtures to which they are exposed. The Agency believes that it is appropriate to utilize data derived from such sensitized individuals for the purpose of classifying a substance or mixture as a "sensitizer".

C. The definition requires a substance or mixture to be classified as a "sensitizer" if the material produces a photodynamic reaction. The Agency believes that this additional definitional scope is justified by the extensive documentation of this effect for such chemical as drugs.

(iv) "Carcinogen". The Agency has adopted the definition contained in its recently promulgated standard, "Identification, Classification and Regulation of Potential Occupational Carcinogens" (Cancer Policy) (29 CFR 1990.101 *et seq*, 49 FR 5282, January 22, 1980). Inasmuch as the OSHA Cancer Policy was the product of an intensive three-year Agency effort which considered the definitional questions, this definition is the most appropriate for OSHA regulatory purposes.

However, the Agency recognizes that the proposed hazards identification standard would require a conforming amendment to its Cancer Policy if the proposed standard is enacted in its present form. OSHA would issue such a conforming amendment at the same time as the hazards identification standard is finally issued. This conforming amendment would reflect OSHA's determination that the labeling of carcinogens should be governed by the hazard determination process of this standard, just as are the labeling determinations of other hazards. The Agency invites comment on the advisability of such a conforming amendment.

The present standard differs from the Cancer Policy in the following ways:

A. A substance or mixture could be determined to be a cancer hazard upon less data than that currently required by the Cancer Policy. In the case of human data, the present standard utilizes case reports (paragraph (b)(3) of Appendix B) and/or formal epidemiologic studies (paragraph (b)(1) of Appendix B) to determine whether a substance or mixture is a carcinogen. The Cancer Policy does not explicitly accept case reports as "suggestive" evidence establishing a substance or mixture as a Category II potential occupational carcinogen. (cf. 45 FR 5044 and 45 FR 5026, January 22, 1980).

B. The carcinogen hazard determination is self-executing under the present proposal while the Cancer Policy specifies that the identification of a carcinogen is one of the issues to be addressed in an individual substance rulemaking (29 CFR 1990.1469)).

C. Under this proposal, Category II potential occupational carcinogens would, without exception, be labeled as cancer hazards, while the Cancer Policy indicates that the need for labeling of Category II carcinogens as such would be determined on a case-by-case basis.

The Agency believes that its present policy position is justified by the following rationale. First, and foremost, a requirement that carcinogen identification occur in the context of an individual rulemaking would preclude the agency from enacting an effective hazard identification standard. The Agency's experience with individual substance rulemakings indicates that for carcinogens, as well as other hazards, it would be well into the next century before current scientific material could be filtered through such hearings. The present proposal's hazard determination process (Appendix A) and evaluation scheme (Appendix B) should provide equivalently accurate results in much less time. Second, there appears to be no sound scientific rationale which would justify treating cancer hazard determinations differently from other health hazards. The Agency invites comments on the elements of this rationale. In addition, the Agency solicits comments on whether the present labeling standard should continue the distinction between Category I and II potential occupational carcinogens contained in the Cancer Policy for purposes of this standard (45 FR 5284, January 22, 1980). The Agency is interested to know whether such a dichotomy would facilitate worker education programs regarding the dangers of carcinogens.

(v) "Reproductive toxin". The definition is based upon objectively ascertainable end results in humans or other mammals. The end results could represent measures of adverse reproductive outcomes which are commonly accepted by the scientific community. The relevance of such measures to the identification of a human reproductive toxin seems apparent to the Agency. The definition does not require a positive hazard determination based upon *in vitro* evidence such as chromosomal abnormalities, including sister chromotid exchanges, mutagenic assays, or measures of DNA repair. The Agency has presently excluded such evidence from consideration because it is uncertain of the precise clinical significance of such *in vitro* results. The Agency invites comments on whether it should require utilization of such *in vitro* assay results in the final standard.

(vi) "Endangered worker life or caused worker death". This hazard category has been inserted to cover the situation where a substance or mixture has killed a worker or produced serious life threatening illness in workers but where data are unavailable which would permit its classification as "toxic" or "highly toxic."

The Agency anticipates that this hazard category will be particularly useful in the case of mixture hazard determinations. The Agency believes that acute toxicology information permitting mixture categorization as "toxic" or "highly toxic" is frequently unavailable and, as a result, a mixture might avoid a positive hazard determinations, were it not for this category.

OSHA anticipates that categorization into the "endangered worker life" category or one of the categories "toxic" or "highly toxic" would be made in addition to the category "other acute, subacute or chronic adverse health effects." There is a need to identify both the former and latter types of hazards on the label in that the former three hazard categories represent immediate lethal or life-threatening dangers which require separate emphasis.

The Agency does not intend that data or reports concerning intentional (self) poisonings be used to determine inclusion in this category, except to the extent that such data or reports reveal pathophysiologic mechanisms relevant to potential actual or emergency working conditions which are not discussed elsewhere.

OSHA invites comments on any perceived ambiguities in the definition of this health hazard.

(vii) "Other acute, sub-acute or chronic adverse health effects." This category, which includes decreased mental alertness and behavior alterations, is expected to generate substantial scientific comment. The category was inserted to reach

documented health effects not otherwise covered. These include such well-documented health effects as erosion of the nasal septum by chromium compounds, intoxication due to involuntary solvent vapor exposures, and liver toxicity from carbon tetrachloride. The Agency believes that potential ambiguities in the scope of coverage have been adequately addressed by restricting the health effects covered to those above a threshold severity (paragraph (gg)(31) of the regulation.)

This health effect threshold is meant to be identical to that severity level which should trigger the filing of an occupational illness report under the Occupational Safety and Health Act (Section 8(c)(2) of the Act; 29 U.S.C. 657(c)(2); cf. 29 CFR Part 1904). Though under-reporting of occupational illness is well documented, the Agency believes that the experience gained over the past 10 years by manufacturers and importers in the filing of such illness reports will facilitate their identification of adverse health effects which must be labeled. Moreover, no adverse health effect need be labeled unless the effect has been reported in the scientific literature as described in Appendices A and B.

Thus, the utilization of a two-step inquiry should permit the manufacturer or importer to determine whether a particular adverse health effect is a Category B hazard within the scope of this standard. First, is the adverse health effect one that must generally be reported? Note that actual reporting is not the determining factor in view of documented under-reporting of occupational illnesses. Second, and this is common to all health hazard determinations, is there scientific material documenting the effect (Appendix A) and does such material establish the hazard on a scientific basis (Appendix B)? The Agency believes that rigorous application of this two-step process will resolve any uncertainty surrounding this particular determination.

OSHA does not intend that chemical substances or mixtures which are intentionally ingested over a long period of time in reasonable quantities as part of a normal diet should be classified as producing "other chronic adverse health effects" solely because studies document adverse health effects from immoderate use, e.g., NaCl and hypertension. The Agency solicits comments on whether this interpretation sufficiently clarifies any ambiguities perceived in this hazard category.

In addition, OSHA requests comments on whether an alternative definition for this hazard category is preferable. In developing the present definition, the Agency considered defining the hazard either in terms of specified pathologic effects, e.g., inflammation, or fibrosis, or by specifying a list of disease outcomes which would trigger labeling. The Agency decided not to adopt either of these alternatives because they were less protective than the one selected.

e. *Regulation of Physical Hazards By Other Agencies.* A comparison of the scope of physical hazards coverage by OSHA, other Federal regulatory agencies, voluntary industry standards and the European Economic Community (EEC) is provided in Table 9. In general, the definitions are approximately equivalent when various Federal agencies regulate the same hazard. OSHA based its physical hazards definitions on the voluntary industry standards developed by the American National Standards Institute (ANSI) so that there are only minor discrepancies in scope of coverage. There are more discrepancies between OSHA's physical hazard definitions and comparable definitions developed by the EEC.

During the course of this standard's comment period, the Agency will make an effort to harmonize the minor inconsistencies, largely involving test procedures, among Federal agencies. A more intensive harmonization effort between OSHA and EEC appears to be required and OSHA expects to participate in such an effort, together with other affected United States agencies.

Table 9.—*Comparison of Scope of Coverage of Physical Hazards by U.S. Regulatory Agencies, European Economic Community and American National Standards Institute*

OSHA physical hazards (Category A) 29 CFR	DOT 49 CFR	CPSC (FHSA) 16 CFR	EPA (FIFRA) 40 CFR	ANSI Z 129.1-1976	EEC 79/831/ EEC Article 2
Corrosive material	173.240(a), (b) similar.	1500.3(b) (7),(c)(3)	162.10(h) (Category I) similar.	(2) Similar	(i) Similar.
Extremely flammable liquid	NRS (see flammable material).	1500.3(b) (10), (c) (6)(i) similar.	162.10(h)(2)(iii) S.	(2) S	(c),(d) S.
Flammable material		1500.3(c) (6)(i)			
Aerosol	NRS (see flammable gas).	1500.3(c) (6)(vi)	162.10(h) (2)(iii) similar.	NSC (see flammable gas).	NC.
Gas	173.300(b) similar	NRS (see flammable).	NRS	(2) S	(d) Similar.
Liquid	173.115(d)S 173.115(a) similar.	1500.3(b) (10),(c) (6)(ii) similar.	162.10(h) (2)(iii) (includes combustibles) M.	(2) S	(e) (includes combustibles) M.
Solid	173.150M	1500.3(c) (6)(iii), (iv)	NC	(2) S	(d) Similar.
Combustible liquid	173.115(b)S	1500.3(b) (10)M		(2) S	NRS (see flammable liquid).
Pyrophoric material	173.115(c)S	NC	NC	(2) S	(d) Similar.
Strong oxidizer	173.151S	NC	NC	(2) Similar	(b)-Corresponds to OSHA definition for reactive material.
Reactive material					
Explosive material	173.50S	1500.3(c) (7)(i) (A)M		NC	(a) Similar.
Organic peroxide	173.151(a)S	NC		NC	NC
Pressure-generating	NC	1500.3(c) (7)(i) (b), (C)M.		(2)S	NC
Water-reactive	NRS (see flammable solid).	NC		NC	(d) M.
Compressed gas	173.300(a) similar	1500.3(c) (7)(i) (D)M	162.10 (ii)M	(2)S	

NOTE.—Reference is OSHA Standard; S = Same coverage; M = OSHA more inclusive; L = OSHA less inclusive; NRS = Not regulated separately; NC = No Category.

f. *Regulation of Health Hazards By Other Agencies.* Table 10 provides a comparison of the efforts of Federal agencies, ANSI and EEC to define health effects for the purposes of labeling regulations. All the organizations listed define and regulate all or most of the first four health hazards listed (highly toxic, irritant, sensitizer). Manufacturers and importers thus should be able to utilize their organizational experience in complying with the OSHA standard, though they must still perform the required OSHA hazard determination process. OSHA is particularly interested in comments which would lead to a harmonization of definitions among the various agencies involved. OSHA

expects to participate in international efforts aimed at harmonization in this area.

Regulatory experience with the remaining health effects that OSHA proposes to cover in this labeling standard is substantially more limited (see table 10). However, OSHA does not believe that lack of substanfial regulatory experience by other organizations concerning carcinogens, reproductive toxins, and the categories involving endangerment to human life and other adverse health effects should preclude OSHA's regulatory effort concerning these health effects. OSHA believes that the validity of the scope of hazards coverd in this standard should be judged solely on whether the scope of hazards regulated corresponds to the scope of hazards which the worker faces. OSHA further believes, on the basis of its accumulated expertise in the development of health standards, that the current consensus among occupational physicians, industrial hygienists, toxicologists and other health personnel is that workers face hazards in all the health effects categories defined. Moreover, the agency does not believe that the technical problems involved with defining or identifying carcinogens or reproductive toxins are inherently more difficult than those involved with sensitizers and irritants, two health effects which have been extensively regulated. The Agency would benefit from an exchange of ideas in this area between government, academic, labor and industry witnesses in the course of extensive rulemaking proceedings.

Table 10.—*Comparison of Scope of Coverage of Health Hazards by U.S. Regulatory Agencies, European Economic Community and American National Standards Institute*

OSHA health hazards definitions (Category B) 29 CFR	DOT 49 CFR	CPSC (FHSA) 16 CFR	EPA (FIFRA) 40 CFR	ANSI Z129.1–1976	EEC 79/831/ EEC Article 2
Highly toxic	Poisons "B" 173.343 Similar.	1500.3(b), (6), (c) (1) Similar (But see "Endangered Life," "Other Adverse Health Effects" below).	162.10 (h) (1) (Category I)S.	(2)M	(f) Similar, qualitative definition.
Toxic	NC	1500.3(b) (5), (c) (2) Similar.	162.10(h) (1) (Category II).	(2)M	(g), (h) qualitative definition.
Irritant	173.381 Different	500.3(b)(6), (c) (4)S.	162.10(h) (1) (Categories II–IV) Similar.	(2)M	(j) Similar.
Sensitizer	NC	1500.3(b) (9), (c) (5)M.	NC	(2)M	NC.
Carcinogen	NC	NC	162.11(a) (3) (ii) (A) Similar Rebuttable Presumption against registration.	NC	(1) Similar-imprecise definition.
Reproductive toxin	NC	NC	Same reference as carcinogen.	NC	(m), (n) Undefined.
Endangered worker life	173.326 Poison "A" Similar.	1500.3 (c) (1) (i)	162.1(a) (3) (i) M Rebuttable presumption against registration.	NC	NRS (see highly toxic and toxic).
Other adverse health effects	NRS (see highly toxic).	NC	162.1(a) (3) (ii) (B) M Rebuttable presumption against registration.	NC	NRS (see toxic).

NOTE.—Reference is OSHA Standard S=Same coverage; M=OSHA more inclusive; L=OSHA less inclusive; NRS=Not regulated separately; NC=No category.

3. *Hazard determination process.* a. *Description.* The hazard determination process is described in Appendix A of the proposed standard. (References in this section of the preamble are to Appendix A). A manufacturer or importer must utilize this process in determining whether a substance is hazardous. However, the extent to which the process is applicable varies depending upon whether a substance is being evaluated as a Category A (physical) hazard or Category B (acute or chronic health) hazard.

To determine whether a substance poses a Category A hazard, the manufacturer or importer need only evaluate material contained either in the National Library of Medicine's Toxicology Data Bank (TDB) or in a representative selection of standard reference works or relevant NIOSH documents (See App. A paragraph (b)(1)). In addition, the manufacturer or importer may use any other relevant data (paragraph (b)(1)(ii)). The manufacturer or importer is not required to undertake a literature search (paragraph (c)). The evaluation is to be based upon sound scientific judgment (paragraph (b)(3)) and the formal evaluation scheme described in Appendix B is not required.

OSHA believes that an abbreviated hazard determination process for Category A hazards is adequate to determine whether the substance possesses the physical properties specified in the Category A definitions. The data sources required are sufficient because the physical properties are based upon standardized physical or chemical tests which ordinarily demonstrate rather small variations in results, if performed as specified. Analogously, there is no need for an extensive evaluation scheme since there is widespread professional agreement on the interpretation of such test results.

In contrast, the hazard determnation process for Category B hazards for substances is more extensive, both in the scientific sources which are required to be consulted and the evaluation scheme to be applied. In addition to the sources required to be consulted for Category A hazard determinations, the manufacturer or importer is required to undertake a literature search using specified computerized data files, to obtain copies of the scientific studies so identified, and to evaluate such material using the scheme set out in Appendix B of the proposed standard (paragraph (c)). IN addition, a manufacturer's or importer's in-house health effects studies must be evaluated by the Appendix B scheme (paragraph (c)(1)(ii)). A manufacturer or importer need not evaluate search material or in-house health effects data for a particular health hazard, if he or she has elected to label the substance for the hazard based upon the TDB, standard reference works or NIOSH documents (paragraph (c)(1)).

Category B substance hazard determinations are necessarily more extensive than those required for Category A hazards because health effects studies involving animals or humans yield substantially more variable results than do purely physical

or chemical determinations and the interpretation of such results calls for more professional judgment. The Category B hazard determination process will ensure that the results of substantially all relevant scientific studies involving a substance are considered. Moreover, the Appendix B evaluation scheme should ensure uniform judgment outcomes based upon what the Agency believes is a sound scientific approach.

The present hazard determination process would not normally apply directly to mixtures. Mixtures are deemed to represent the same hazards posed by their constituent substances, with some qualifications (paragraph (i) of the standard). A similar assumption has been used by the European Economic Community in its directives (regulations) governing the labeling of preparations (mixtures) (73/173/EEC, 77/728/EEC, 78/631/EEC). If a manufacturer or importer is dissatisfied with the results of a hazard determination based upon its constituent substances, he is free to test the mixture. Of course, if a mixture has been evaluated for a particular hazard, then the manufacturer or importer must use his or her sound scientific judgment to determine whether a Category A hazard is present (paragraph (b)(3)) or the Appendix B evaluation scheme to determine whether a Category B hazard is present (see, in particular, paragraph (c)(5) in Appendix B). The proposed standard would not, however, require that a manufacturer or importer perform a literature search for mixture hazard determinations because OSHA believes that the yield from such searches would not justify the required expenditures of time and money. This belief is based upon a professional judgment that the scientific literature reflects a strong preference of epidemiologists and toxicologists for analyzing the properties of substances, rather than mixtures.

Thus, in view of the complexity inherent in Category B hazard determinations, the proposed standard provides assistance in the form of explicit directions to the manufacturers or importers. The standard describes the hazard determination process (Appendix A), details the materials (including the output of a required literature search) that must be used for the determination (Appendix A) and provides an evaluative scheme for such materials (Appendix B). The Agency believes that the explicit directions for compliance just described will reduce the ambiguities inherent in a less detailed standard, will facilitate compliance and result in many fewer enforcement actions. Moreover, specification of the Category B hazard determinations process is required to obtain uniformity of labeling.

b. *Performance vs. specification standard for the hazard determination process and evaluation scheme.* Some industry sources have objected to the approach taken in the proposal. They advocate a "performance" standard under which manufacturers or importers of a chemical would be free to determine the existence of a defined hazard by whatever procedures they consider appropriate.

These industry sources claim that there are alternatives to the hazard determination (Appendix A) and evaluative procedures (Appendix B) OSHA has chosen which are just as reliable. They also claim that these are presently in use, and that it therefore makes no sense to require firms to shift to the procedure OSHA prefers.

However, those making these claims have not, to date, actually described the procedures which might function adequately as alternatives to the procedures of the proposed standard. Nor have these sources informed OSHA of the hazard determination and data evaluation procedures presently employed by any particular firm. Consequently, OSHA presently has no information which would substantiate the claim that a performance standard is appropriate.

OSHA believes that it is appropriate and necessary to establish the quantity and quality of scientific evidence required in the hazards determination process. A performance standard would simply not guarantee that any firm would utilize an appropriate alternative to the hazard determination and evaluation procedures of the proposed standard. Under a performance standard, every firm would be free to utilize any procedure, or no procedure at all, to determine hazards.

Moreover, the enforcement mechanisms at OSHA's command are simply inadequate to protect against the very real possibility that under a performance standard a substantial number of firms might utilize procedures which are scientifically deficient or inconsistent to identify the hazards of workplace chemicals. There are thousands of chemicals which are manufactured in, or imported into, this country. Yet, OSHA has at its disposal only approximately 1500 inspectors, whose duties encompass enforcement of all requirements imposed by OSHA in the workplace. Obviously, in terms of total numbers and the considerable responsibilities already incumbent upon these inspectors, this inspection force would be utterly inadequate to ensure that each manufacturer and importer subject to the standard employed a reliable procedure to determine hazards.

OSHA is willing to consider reasonable alternatives to its proposed evaluation procedures. OSHA is also willing to offer the choice of a number of scientifically sound procedures, if they exist. Accordingly, OSHA solicits comments on these issues. Following comment, should OSHA choose to move to a performance standard, the agency may adopt Appendices A and B as recommended rather than mandatory procedures.

c. *Literature Search.* 1. OSHA has made a concerted effort in the course of revising earlier drafts to ensure that the search requirement is technically feasible. As a consequence of extensive discussion, and based upon sound science policy grounds, the Agency has decided not to include a search requirement for mixtures (paragraph (a)(2) of Appendix A), to permit manufacturers and/or importers to undertake hazard determinations jointly to the extent permitted by law (paragraph (a)(3) of Appendix A), and to extend compliance times for small manufacturers and importers (paragraph (ii)(1)(ii) of the standard). The delay in compliance dates for small manufacturers and importers will permit them to rely on hazard determinations of larger manufacturers or trade groups (paragraph (ii)(1)(ii) of the standard) by obtaining copies of their labels from a national label repository (subsection (w) of the standard).

The mandated literature search for Category B hazard determinations (paragraph (b)(2)(ii)(C) of Appendix A) appears well within the current search capability of existing computerized information services.

The following analysis, based upon material submitted in compliance with the Toxic Substances Control Act Inventory requirements (40 CFR Part 710), indicates that the present standard will impose a one (1) time increase in search requests of some 250,000.

Table 11.—*TSOSCAI Substances (33)*

Number of companies reporting a substance	percent of TOSCAI inventory	Number of substances reported (approximate)	Maximum of average number of companies reporting a substance	Estimated number of searches
—4	90	49,500	2.5	123,750
5–9	6.3	3,465	7	24,255
—10 (x=30)	3.7	2,035	30	61,050
Total				229,055

The estimate has been adjusted upward from that in the table to provide for search requests involving the other substances not on TOSCAI which must be evaluated (paragraph (d) of the standard). Taken together, such other substances contribute a comparatively small number to the total. The Agency wishes to stress that this is a "worst case" estimate in that the estimate has not been reduced to reflect the probable impact of joint evaluations or reliance on the national label repository in lieu of a search (paragraph (w) of the standard and paragraph (a)(3) of Appendix A).

On the supply side, OSHA understands that the recent expansion of the computer facilities for MEDLARS®, only one of the available computerized information services, has substantially increased search capacity. The August, 1980, search load of some 60,000 searches appears to represent less than half of the system's monthly capacity (Phone communication. NLM. 1980).

Thus, the Agency concludes that the literature search requirement is technically feasible. OSHA invites comments on the related issues of whether searches may be delayed in various regions because of a dearth of trained information system users and whether some manufacturers or importers lack access through inter-library loan programs to duplicates of the scientific material identified in the search.

While OSHA believes that the expansion of existing commercial information services will prevent any serious compliance problems in this area, the Agency intends to explore additional mechanisms for complying with the search requirement. Among the additional mechanisms under consideration are permitting reliance on duplicate copies of current searches (thus avoiding the actual search) with payment as appropriate and exploring creation of a central duplicating service for search materials. The Agency may, in addition, extend compliance dates if rulemaking comments so indicate.

d. *Use of TDB, standard reference works and NIOSH documents.* OSHA believes that TDB (paragraphs (b)(1) and (c)(1) of Appendix A), the NIOSH documents (paragraphs (b)(1)(5)(i)(B) and (c)(1) of Appendix A), and the standard reference works (paragraphs (b)(1)(i)(A) and (c)(1) of Appendix A) are essential elements of the hazard determination process. All these materials have been subject to scientific peer review and thus represent unusually reliable sources of scientific information. OSHA invites comments on whether alternative data sources should be considered.

The Agency does not, however, believe it would be productive in the rulemaking to urge consideration of a particular text not on the list of standard reference books, "Source Used to Prepared Toxicology Data Bank Records" (paragrahs (b)(1) and (c)(1) of Appendix A). Additional texts can already be used in determining whether a Category A hazard is present under paragraph (b)(1)(ii) of Appendix A. In the case of Category B hazard determinations, unrestricted expansion of the standard reference book list beyond that determined by the TDB expert scientist group would certainly cloud the compliance responsibility of the manufacturer or importer without necessarily improving the hazard determination process. OSHA believes that a current standard reference book list, developed by an expert committee, represents the most reliable list for the limited purposes for which it is intended, i.e., positive hazard determinations in the case of Category B hazards are ultimately dependent on evaluation of scientific studies and not on reference book content, unless the manufacturer or importer chooses to rely on the standard reference book (see paragraph (b)(2)(iii)). The standard provides for modification of the list.

e. *Search files.* The Agency also invites comments on the particular data files required for the literature search (paragraph (c)(1)(ii) of Appendix A) and whether equivalent alternative data files are available. CANCERLIT® is required because it is a unique source of information on the National Cancer Institute's carcinogen bioassay program. OSHA specifically invites comment on the extent of duplication resulting from the use of the three remaining data files: MEDLINE®, TOXLINE® and RTECS.

The Agency requires all three data files be used because it is current scientific practices to include all three in routine searches. Comments are also invited on the need for any additional data files. The Agency is aware of only the Excerpta Medica information file as a possible alternative but invites comment on this issue.

f. *Concentration of Constituent Substances and Mixtures Hazard Determination.* The proposed standard sets threshold limits for concentrations of hazardous substances in mixtures, above which, except in certain defined circumstances, such substances, and the mixtures in which they appear, are regulated by the standard. For non-carcinogens, the threshold value is at least 1.0% (by weight) of a mixture. For carcinogens, the threshold value is at least 0.1% (by weight) of a mixture (see paragraph (i)(2) of the standard).

OSHA believes that the uniform thresholds it has chosen are appropriate, and that the use of a uniform threshold is integral to the generic approach to regulation which the hazard identification standard embodies. Elimination of any threshold would greatly burden the hazard determination process and likely render it infeasible. On the other hand, adoption of a system which required the establishment of an individual threshold value for each substance, case by case, would in OSHA's view render the standard impossible to administer and enforce. There may, however, be acceptable formulas, taking account of the variables of potency and concentration, which can be applied reliably to determine whether constituent substances and the mixtures in which they appear should be regulated as hazards (see EEC directives for labeling mixtures 73/173/EEC, 77/728/EEC and 78/631/EEC). OSHA invites comments on this possibility and other issues germane to the threshold percentage exclusion question.

4. *Evaluation Procedure.* a. *In General.* The proposal mandates that a substance or mixture be classified as a Category B hazard, if the proprietary in-house studies or the studies identified in the literature search satisfy the following criteria:

1. The study is either "adequate and well-controlled" (paragraphs (a)(1) and (b)(1),(2) of Appendix B) or represents an acceptable "case report" (paragraphs (a)(2) and (b)(3) of Appendix B); and

2. The study establishes a "statistically significant" (paragraph (a)(6) of Appendix B) relationship between exposure to the substance and the subsequent occurrence of a covered hazard or "strongly suggests" such a relationship (paragraph (b)(3) of Appendix B); and

3. The relevant study conclusion is accepted by any subgroup of qualified experts (paragraph (b)).

OSHA believes that this hazard determination process and its

evaluation procedure represents the sequence and content of any inquiry that a reasonable and prudent modern scientist would undertake to determine whether a chemical is a Category B hazard. The evaluation procedure does not consider anecdotal material because the Agency does not believe that such "data" warrant a positive hazard determination under this standard. Nor does the evaluation procedure consider expert opinion evidence based upon structure-function or stereo isomer relationships. Although the Agency believes that such opinion evidence may be too problematic to warrant labeling, it invites comments on this point.

b. *Adequate and Well-controlled Study.* The definition of an "adequate and well-controlled" study is based upon the Epidemiology Work Group's "Draft I.R.L.G. Guideline for Documentation of Epidemiologic Studies" (34). The definition has been modified to meet the proposed standard's need to define a minimal set of criteria for evaluating studies that have already been performed. Consequently, while OSHA recognizes that some of the elements that have been dropped from the present definition would have enhanced the utility of some of the scientific studies that will be evaluated under this standard, their omission should not preclude consideration of such studies. The Agency invites comments on whether additional study elements should be required.

In addition, an alternative route of identifying an "adequate and well-controlled study" was provided to ensure that past studies which have achieved general professional acceptance would be considered in the evaluation. The Agency believes that publication of a study in a "peer review" journal (paragraphs (a)(1)(vii) and (a)(4) of Appendix B) provides sufficient scientific credibility as to warrant the standard's requirement that it be considered in the evaulation process. Such studies must still demonstrate "statistical significance" and be accepted by a subgroup of experts to warrant a positive hazard determination.

The Agency requests comments on its determination that a single adequate and well-controlled study shall trigger a positive hazard determination. In coming to this conclusion, OSHA weighed the possibility that there would be some false positive hazard determination under this approach, i.e., positive studies later invalidated, against the certainty that workers would experience prolonged exposures to hazardous chemicals if confirmation were required. NIOSH indicated the following periods required to complete a second study, assuming it is begun after the first study becomes available:

Table 12.—*Completion Times for Various Types of Epidemiologic Studies*

Types of study	Average time to completion (years)
1. Retrospective cohort mortality studies	[1] 3.9
2. Health hazard evaluations	.63
3. Case-control studies	.5

[1] Ten in period 1978-80.

Source: Personal communication from Mr. Richard Lemen, NIOSH, 1980.

Of course, this table seriously underestimates the actual duration of continued exposure. The capacity of the scientific community to undertake major epidemiologic studies is limited. Therefore, considerable time may elapse before a confirming study may even be begun. In view of the extraordinary shortage of trained epidemiologists and toxicologists, delays in undertaking studies will likely be substantial.

c. *Case Studies Use.* The proposed standard requires reliance on well-documented case studies (paragraphs (a) (2) and (b) (3) of Appendix B). OSHA believes that such studies should serve as a basis for a positive hazard determination, e.g., vinyl chloride monomer exposure and resultant hemangiosarcoma. In response to a request from OSHA, NIOSH investigated two relevant issues: 1) the historical utility of case reports and 2) the current utility of case reports that would be generated from the required literature search. OSHA invites comments on the issue of reliance on case reports for Category B hazard determinations. The following are summary tables:

Table 13.— *Historical Utility of Case Reports—Selected Examples*

I. Substances first identified by case reports in occupational settings which are now widely accepted as hazardous to health
- Hydrogen Sulfide
- Methyl Alcohol
- Carbon Disulfide
- Nitrogen Oxides
- Asbestos
- Benzene

II. Hazardous substances called to attention following case reports of occupational exposure but for which preliminary animal data existed
- Vinyl Chloride
- Bis (chloromethyl) ether
- DBCP (dibromochloropropane)

Table 13.— *Historical Utility of Case Reports—Selected Examples*—Continued

III. Hazardous Substances first identified as carcinogens by case reports of occupational exposures which have been supported by epidemiological studies
- Chromium
- Nickel
- Arsenic
- Benzene

IV. Hazardous Substances first identified from case reports of occupational exposure which have not been addressed by epidemiological studies
- DMAPN (dimethylaminopropionitrile)
- Sodium Hydroxide

V. Substances first identified as hazardous by case reports which were later discredited by epidemiological and/or animal studies
- Aniline
- Fibrous Glass
- Hair Spray

Table 14.—*An Assessment of the Appropriateness of the Use of Case Reports for the Determination of a Hazard*

	Number of case reports published	
	1960–1976	1977–1986
Case reports reviewed (5% sample)	10 (100%)	14 (100%)
Causal relationship sufficiently established	8 (80%)	11 (79%)
Reported situation amenable to labeling	7 (70%)	10 (71%)
Reported situation possibly covered by the standard proposed by OSHA	8 (80%)	7 (50%)
First indication of the hazard	3 (30%)	4 (29%)
Based Only on the Case Reports Which Were the First Indication of the Hazard		
Causal relationship sufficiently established	3 (100%)	3 (75%)
Reported situation amenable to labeling	2 (66%)	3 (75%)
Reported situation possibly covered by the standard proposed by OSHA	2 (66%)	3 (75%)
May possibly indicate labeling is appropriate	2 (66%)	1 (25%)

Source: Personal communication from Mr. Richard Lemen, NIOSH, 1980.

The Agency believes that these data clearly support the necessity for including case reports as one basis for a positive hazard determination, especially in view of the probable difficulty in mounting epidemiologic studies to confirm the case reports. The Agency invites comments on the advisability of its decision to require utilization of case reports.

d. *Statistical Significance.* The significance level has been set at 0.10 rather than the customary 0.05 level (paragraph (a)(6) of Appendix B). While the increased Type I error results, by definition, in an increase in false positive hazard determinations, there will be a corresonding decrease in false negative determinations. While the Agency believes that this is an appropriate strategy for a preventive

health standard, it recognizes that the significance level chosen is non-traditional and invites testimony addressed to this issue.

Testimony is also invited on the related question of whether the criteria which govern the use of inconsistent data are advisable (paragraph (c) of Appendix B). For example, the power (0.80) of data to detect a hazard of a specified magnitude (25% increase in risk) is consistent with that of the Cancer Policy (29 CFR 1990.144 (a), 1980). However the magnitude of the risk that must be detectable by the negative study has been decreased from 50% to 25%. The Agency believes that, given data or studies that indicate a potential hazard, the worker should be informed of the potential hazard unless extremely reliable negative data are available.

e. *Expert Opinions.* The final element of the data evaluation scheme requires that a substance or mixture be classified as a hazard if a subgroup of experts accepts the conclusion of statistical significance for results in an adequate and well-controlled study (paragraph (b)(1) of Appendix B) or accept the cause-effect relationship demonstrated in case report(s). This acceptance may be manifested in a variety of ways and a rebuttable assumption of such acceptance is established when at least one qualified independent expert has endorsed the results (paragraph (d) of Appendix B).

The Agency understands that this position regarding the role of experts is different from that which prevails in the course of adjudication. However, as a matter of policy, OSHA believes that labeling a substance or mixture as a hazard should not require support from the majority of experts. Such an *ad hoc* choice of consultants does not guarantee that the entire spectrum of professional opinion is adequately represented. Rather, the Agency believes that a substance or mixture should be classified as a hazard if evidence of the specified quality is available, two or more experts (including the author) concur in the conclusion that a hazard is present, and strong evidence to the contrary is not available at the time of hazard determination (paragraph (d) of Appendix B). The Agency invites comments on this approach.

C. Regulatory Issues

1. *"Performance" vs. "specification" requirements.* As previously stated in the discussion of hazard evaluation procedures, OSHA believes that employers should be required to follow specified procedures where established scientific principles are applicable. OSHA is not opposed, however, in appropriate technical areas, to setting goals ("performance" standards) and allowing employers to reach those goals by whatever means they consider practicable. For instance, the proposal sets performance standards for labeling piping systems (paragraph (r)) and labeling continuous operations (paragraph (t)(8)). OSHA will consider performance standards in other areas where it can be shown that specifying particular procedures is unnecessary, and invites comment on this issue.

2. *Content and format of labels and placards.* The proposed standard would require chemical identification and hazard warning information on labels and placards for hazardous chemicals. This is because OSHA believes that labeling is the most immediate and reliable way of communicating hazard related information to workers.

Some indusrty representatives have expressed concerns about this requirement. they believe that it will be difficult to include all required information in readable form on normal size labels. There have also been suggestions from both industry and representatives of workers that the hazard warnings set out in Appendix C are either too comprehensive or not comprehensive enough. OSHA invites comments upon all aspects of the label format requirements of the proposed standard. OSHA also invites alternative proposals for labeling format.

As previsouly stated, the requirement for disclosure of chemical identity is closely related to the trade secrets issue. Some industry representatives have suggested that confidentiality for trade secrets might be enhanced if chemcial identity of hazardous materials were maintained in reference books stored centrally and made available to workers upon request. In this way, employers could keep track of those receiving potential trade secret information and require confidentiality agreements from those to whom trade secret information is disclosed.

Advocates for workers have opposed this alternative to labeling on several grounds. First, it is cumbersome. The worker must make a request to see information he or she wishes to check. Second, the worker must leave the work area in order to check such information. Third, the employer knows which employees are making requests concerning the identity of hazardous materials, and unions fear this may lead to reprisal and harassment. OSHA invites comment on whether possible enhancement of confidentiality afforded by a reference book system outweighs the drawbacks of removing a requirement for workplace labeling.

3. *Disclosure of chemical identity in labels shipped in commerce.* A closely related issue involves the inclusion of CAS numbers on labels being shipped downstream to industrial users. The proposed standard requires that labels indicating the chemical identity (the CAS number) of hazardous chemicals be placed on containers before being shipped downstream to workplaces where such substances and mixtures will be used (paragraph (o)). Industry representatives have stated that this requirement will only compound the trade secrets problem because the identity of hazardous trade secret chemicals will be open to scrutiny, not only in workplaces, but in commerce to other employers who may be competitors. Worker representatives have countered that without a requirement that labels be in place when containers reach a downstream workplace, there is no certainty that containers of hazardous materials in downstream workplaces will be speedily and accurately labeled.

The proposed policy to require labeling before hazardous materials are shipped is grounded on several preliminary conclusions. OSHA has concluded that once manufacturers and importers are required to disclose the chemical identity of hazardous substances to both their own employees and the employees of downstream users, the incremental damage to confidentiality caused by requiring chemical identification to appear on labels in commerce is relatively inconsequential. OSHA has also concluded, in the absence of evidence to the contrary, that there is a substantial possiblity for tardy and inaccurate labeling if labels are not required to be in place upon arrival at a downstream workplace. OSHA invites comments on these points.

4. *Exclusion of small containers.* The proposed standard provides for certain exemptions from labeling requirements applicable to containers of hazardous materials in the workplace (paragraphs (u)(i), (gg)(12)). Of particular concern may be the exemption for containers of 5 gallons (19 liters) or less in volume which are used to transfer hazardous materials from one container to another in a particular work area. OSHA requests comments concerning the sizes and purposes of containers which should be exempted from labeling requirements.

5. *Access to records and documents required by the standard.* The proposed standard would provide access to a number of types of records and

documents by workers, their designated representatives, their unions, and OSHA and NIOSH (paragraphs (cc) and (dd)). In addition, the standard requires manufacturers and importers to maintain separate files containing the materials relevant to the hazard evaluation for each substance and mixture they produce or import (paragraph (m)). The material in these files is to be made available on request to employees and former employees in work areas where the substance or mixture is or was present (paragraph (dd)). In the event a firm goes out of business, the standard provides for the transfer of documents and records to NIOSH (paragraph (ee)).

OSHA believes that maintenance of the specified documents and records is essential to the ability of workers to protect themselves from workplace hazards for several reasons. First, these documents and records may provide important information relevant to chemical hazards which is not required to be on labels. Second, access to the materials upon which a manufacturer or importer bases hazard evaluations provides workers and their representatives the means to verify the determination made. Likewise, these materials provide OSHA with the ready documentation intrinsic to efficient enforcement of the standard.

The benefits of the access and record keeping provisions of the standard must be weighed against the burdens these provisions will impose upon importers, manufacturers, and industrial users. Information presently available to OSHA indicates that in some workplaces at least some of the material covered by the access and record keeping provisions of the standard is presently made available. Whether filing systems similar to those proposed by the standard are in general use is less clear.

Comments on a number of issues would be helpful to OSHA in making a jugment as to the adequacy of its proposals concerning access and recordkeeping. These include:

The nature of the burden these provisions will place upon industry, with particular reference to existing industry practices in the access and recordkeeping areas;

The use to which information to which access is provided by the proposed standard will be put by workers and their representatives;

Whether employers who use chemicals should be entitled to inspect the records and documents of manufacturers and importers pertaining to those chemicals;

Whether the classes of persons and groups to whom access to records and documents are granted should otherwise be expanded or limited; and

Suggestions for any alternative access and record keeping mechanisms which would reduce the burden on industry, or make access to information by workers easier or more efficent.

6. *Worker access to safety data sheets.* The proposed standard would provide material safety data sheets (if they exist) to workers upon request. There is no requirement that an employer affirmatively make copies available to each worker in the workplace. This provision is intended to minimize the administrative burden upon employers of providing copies in every work area.

Representatives of workers have objected to such a provision, claiming that to require workers to request these documents will leave workers open to employer harassment and discrimination. These representatives would prefer that copies of relevant material safety data sheets be posted in each work area. They also suggest that additional copies be made available in work area locations where they can be picked up without a specific request. Finally, these representatives have stated that worker health and safety requires that these documents be available for immediate inspection on the job where necessary.

OSHA does not have before it specific evidence that would justify the allegation that workers who request documents will be harassed or discriminated against. Nor does OSHA have before it evidence of the need for material safety data sheets to be immediately available on the job. OSHA invites comments on these issues.

7. *Material safety data sheets.* The proposed standard requires that, where available, copies of material safety data sheets (MSDS) for hazardous substances and mixtures be given to workers and their representatives upon request (paragraph (cc)). The proposed standard does not, however, require that manufacturers and importers of hazardous substances and mixtures produce an MSDS for each hazardous substance and mixture. Nor does the proposed standard define the content of any MSDS a manufacturer or importer decides to produce (see the definition of an MSDS in paragraph (gg)(29)).

OSHA chose to impose neither of these requirements because, under the proposed regulation, the MSDS is not the primary vehicle for communicating essential hazard related information to workers. On this assumption, to have imposed such requirements would have put a large and unjustifiable burden upon industry.

OSHA invites comments on whether the MSDS should play a more prominent role than presently contemplated in the information system proposed under the hazard identification standard. If so, OSHA also invites comment on whether a MSDS should be produced under some defined format for every hazardous substance and mixture to be used in the workplace.

8. *Substance-employee identification lists.* In developing this proposal, OSHA very seriously considered requiring manufacturers and industrial users to develop substance-employee identification lists for each work area. Such lists would provide a cross-reference between the hazardous chemicals present in a given work area and the identities of the employees working in the area.

The purpose of such a listing requirement would be to give workers an overall picture of the hazardous chemicals present in the areas in which they work, and which might, therefore, adversely affect their health. If required to be preserved for extended periods of time, e.g., 30 years, these lists would also provide an accurate record of potential chemical exposures affecting a worker over time, although the lists would not establish quantitative levels of exposure. This information, in turn, could provide epidemiologists valuable assistance in tracking down potential sources of occupational disease.

The costs and administrative burden connected with the creation and long term preservation of substance-identification lists would not be insubstantial. Yet, as the Regulatory Analysis of the proposed standard shows, a requirement for such lists may well yield results which dramatically increase the benefits of the hazard identification in terms of improved worker health and safety over time.

OSHA did not include a requirement for the development and preservation of substance-employee identification lists because while they potentially would establish a record of basic evidence essential to determining the effects of hazardous chemicals with precision, the extent of the burden they would impose upon manufacturers and industrial users is not yet clear. In particular, OSHA is uncertain about the burden development and maintenance of such lists would place upon downstream users of chemicals, such as automobile manufacturer, whose operations tend to be labor-intensive and to use thousands of chemicals. This type of industrial structure would obviously compound the difficulty of tracking and cross-referencing chemicals and employees, but to what degree is unknown. On the

other hand, these employers, as well as others, may now have in place systems for keeping track of chemicals and employees which might be adapted to the same use as substance-employee identification lists, or might at least reduce the burden of putting substance-employee identification lists in place.

Accordingly, to determine whether a requirement for substance-employee identification lists should be incorporated in the final standard, OSHA invites comment upon the uses to which workers, their representatives, governmental agencies, and medical researchers would put the information provided by substance-employee identification lists. OSHA also invites comments upon the burden which compilation of such lists would impose upon industry, with particular reference to the extent industry presently compiles and maintains similar information.

9. *The need for generic training requirements.* The proposed standard does not include any requirement that workers be trained to use the hazard identification information communicated to them. This is not because OSHA believes that training is unimportant to the overall effort to make workplaces healthful and safe. It is because OSHA sees the communication of hazard-related information and worker training as distinct tasks which are not necessarily interdependent for the provision of meaningful benefits. Thus, although the usefulness of hazard related information would undoubtedly be enhanced by appropriate training, such information is extremely helpful to workers in and of itself. Moreover, OSHA is aware that some employers already provide employees with adequate training in hazard identification.

Furthermore, OSHA believes there is a major advantage in creating a comprehensive communication and training system in several stages. This procedure minimizes the burdens upon industry by spreading cost and effort over time, while still providing substantial benefits to workers with the promulgation of each component of the overall system. OSHA believes this to be a sound approach, and comment on this view is invited.

10. *Impact on small business.* OSHA recognizes that the proposed standard may impose greater burdens on small business than it does on large firms. For example, as mentioned, some large chemical manufacturers have indicated that they already follow chemical evaluation procedures similar in scope to those proposed in the standard. Consequently, the burden in additional cost and effort which implementation of the standard would impose such firms is less than that upon smaller firms which have no such procedures in place.

The proposed standard attempts to minimize the differential burden upon large and small firms by establishing a repository for hazard warning information and by delaying the dates by which small manufacturers and importers must complete evaluation of chemicals they produce or import (paragraphs (w) and (ii)). The repository for hazard warning information will contain all information relevant to the results of the hazard evaluation for any chemical. This information will be available to manufacturers and importers. Delaying the compliance dates for small manufacturers and importers will allow them to utilize the hazard evaluations made by large manufacturers or importers for chemicals they also produce or import.

There may be other provisions which would ease the burden upon small business without sacrificing the comprehensiveness and accuracy on which the hazard identification standard relies to help protect worker health. OSHA invites comments and suggestions regarding these.

11. *Miscellaneous issues.* Finally, there are several specific issues upon which comment in response to publicly released preliminary drafts has been sparse, but which may be controversial. Accordingly, OSHA seeks comment on the following:

Is the partial exemption from regulation which OSHA has allowed for research chemicals in paragraph (f) appropriate?

Are the special enforcement provisions OSHA has developed in paragraph (hh) adequate?

Should the compliance dates mandate by paragraph (ii) be either shortened or legthened?

Are there measures to assure the communication of updated hazard related information preferable to those proposed in paragraphs (z)–(aa)?

D. Selected References

1. National Occupational Hazards Survey, DHEW (NIOSH) Publication No. 78–114, December, 1977.

2. An Interim Report to the Congress on Occupational Diseases, submitted by the U.S. Department of Labor, December, 1979.

3. OSHA Safety and Health Standards for General Industry, 29 CRR Part 1910, OSHA 2206, revised, November 7, 1978.

4. Toxic Substances Control Act Chemical Substances Inventory, and Supplements, U.S. Environmental Protection Agency.

5. The Occupational Safety and Health Act, Pub. L. 91–596, 91st Congress, S. 2193, December 29, 1970.

6. Report of the Standards Advisory Committee on Hazardous Materials Labeling to the Assistant Secretary of Labor of Occupational Safety and Health, U.S. Department of Labor, submitted June 6, 1975.

7. A Recommended Standard * * * An Identification System for Occupational Hazardous Materials, DHEW (NIOSH) Publication No. 75–126, 1974.

8. American National Standard for the Precautionary Labeling of Hazardous Industrial Chemicals, American National Standards Institute, ANSI Z129.1—1976.

9. H.P. 750—Legislative Document 958, State of Maine.

10. Title 8, Article 112, State of California.

11. Public Act No. 80–257 and 80–130, State of Connecticut.

12. Act 51, Public Acts of 1980, State of Michigan.

13. 7103–D, State of New York.

14. General Occupational Health Regulations 22–015, State of Oregon.

15. Chapter 149, Commonwealth of Massachusetts.

16. Chapter 296–64 WAC, State of Washington.

17. N.J.A.C. 12:130, State of New Jersey.

18. Toxic Substances Control Act, Pub. L. 94–469, October 11, 1976.

19. Environmental Protection Agency, Pesticide Programs, 40 CFR Part 162.

20. Environmental Protection Agency, Pesticide Programs, Registration, Reregistration and Classification Procedures (40 FR 28242, July 3, 1975).

21. Environmental Protection Agency, Registration of Pesticides in the United States Proposed Guidelines (43 FR 29696, July 10, 1978).

22. Department of Transportation, Hazardous Materials Transportation, 49 CFR Part 172.

23. Consumer Product Safety Commission, Federal Hazardous Substance Act Regulations, 16 CFR Part 1500.

24. Food and Drug Administration, Food for Human Consumption, 21 CFR Part 100; Drugs, 21 CFR Part 200; Cosmetics, 21 CFR Part 700.

25. Committee on Government Operations, House of Representatives, Transcript of Hearings Before a Subcommittee on Control of Toxic Substances in the Workplace, May 11, 12, and 18, 1976.

26. Committee on Government Operations, House of Representatives, Thirty-Fourth Report, Chemical Dangers in the Workplace, 1976.

27. Committee on Government Operations, House of Representatives, Tenth Report, Failure to Meet Commitments Made in the Occupational Safety and Health Act, 1977.

28. Transcripts of OSHA Hearings on "Access to Employee Exposure and Medical Records", Docket No. H–112.

29. Fair Packaging and Labeling Act, Pub. L. 84–755, s2, Nov. 3, 1966, 80 Stat. 1296.

30. European Economic Community Labeling Requirements, Directive 67/548/EEC, August 16, 1967, as amended by Directive 79/831/EEC, September 18, 1979; Directive 73/173/EEC, June 4, 1973; Directive 77/728/EEC, November 7, 1977; and Directive 78/631/EEC, June 26, 1978.

31. Bureau of Labor Statistics, Occupational Injuries and Illnesses in the United States by Industry, 1977.

32. Pilot Study for Development of an Occupational Disease Surveillance Method, DHEW–NIOSH 75–162, 1975.

33. Draft I.R.L.G. Guideline for Documentation of Epidemiologic Studies, Interagency Regulatory Liaison Group, November, 1979.

34. Creech and Johnson, *Angiosarcoma of the Liver in the Manufacture of Polyvinyl Chloride*, 16 J. Occ. Med. 150 (1974).

V. Legal Authority

This notice of proposed rulemaking is being published in conformity with the requirements of section 6(b)(2) of the Occupational Safety and Health Act, 29 U.S.C. 655(b)(2), for publishing a proposed rule promulgating an occupational safety and health standard in the **Federal Register**, and section 4(b) of the Administrative Procedure Act, 5 U.S.C. 553(b) regarding the publication of notices of proposed rulemakings in the **Federal Register**.

Authority for issuance of this standard is found in sections 6(b) and 8(g)(2) of the Act, 29 U.S.C. 655(b) and 657(g)(2). Section 6(b) governs the issuance of an occupational safety and health standard, which is defined in section 3(8) of the Act, 29 U.S.C. 652(8), 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 proposal comtemplates the issuance of a generic standard for the determination and communication of workplace hazards. This will require the adoption and use of one or more practices (e.g. labeling and access to records) which the secretary has reason to believe are reasonably necessary and appropriate to provide employees with safe and healthful employment and places of employment. The issuance of a generic standard is a necessary and effective means to carry out the purposes of the Act and to set priorities under the Act whenever the Secretary identifies common occupational health or safety problems which warrant common solutions (see the Cancer Policy standard, 45 FR 5002 et seq., and the access to exposure to exposure and medical records standard, 45 FR 35212 et seq.).

In particular, the proposed standard is a generic implementation of sections 6(b)(7) and 6(b)(5) of the Act, 29 U.S.C. 655 (b)(7) and (b)(5). Section 6(b)(7) pertinently states that:

> Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure * * *.

Section 6(b)(5) authorizes the Secretary, in promulgating standards dealing with toxic materials or harmful physical agents:

> * * * to 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 * * *.

The philosophy of this proposal is to require the identification and disclosure of a hazard to employees as soon as the scientific literature reliably indicates such a conclusion, even though the evidence or OSHA's priorities may not yet warrant comprehensive regulation of the hazardous chemical. This is consistent with the Supreme Court's statement in *Industrial Union Dep't (IUD)* v. *American Petroleum Institute (API)*, 100 S.C.T. 2844, at 2872, fn. 66 that Congress had an "information-gathering function" in mind when it enacted section 6(b)(7), and that requirements of this nature may be imposed at lower levels than can currently be set for the regulation of a toxic substance on the basis of a finding of significant risk. This is so because it is necessary to "keep a constant check on the validity of the assumption made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if it was initially set too high," id. at 2872, or, *a fortiori*, not at all.

The Secretary's authority to issue this proposed standard is further supported by 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." The authority thus granted to the Secretary is as broad as the purposes of the Act, 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)).
>
> Building upon advances already made through employee and employer initiative for providing safe and healthful working conditions (29 U.S.C. 651(b)(4)).
>
> 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)).

OSHA believes that this proposal, when issued in final form, will significantly advance these statutory goals.

In addition, Section 8(c)(1) of the Act, 29 U.S.C. 657(c)(1), authorizes the Secretary to issue regulations requiring employers to, "make, keep and preserve, and make available to the Secretary * * * such records regarding his activities relating to this Act as the Secretary * * * ¼deems½ necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses."

This proposal directs its major obligations toward those employers who are in the best position to develop information concerning chemical hazards or who are the primary users of chemicals in industry. To this end, "manufacturers" and "industrial users" are limited, by definition, to employers in Division D (Manufacturing), Major Groups 20–39, of the SIC Manual. In issuing standards, the Secretary may, under his section 6(g), 29 U.S.C. 655(g), priority-setting discretion apply the standard only to certain segments of business, thus "[giving] due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments."

The system of hazard identification and communication established by this proposal is also designed to impose the duty of hazard evaluation primarily on the manufacturers and importers who distribute hazardous chemicals in commerce. It would require the

disclosure of hazard related information not only to employees involved in the manufacture of chemicals but also to the employers to whom the chemicals are shipped for the benefit of the employees of such employers. This approach is similar to the one OSHA used in its benzene standard and which was approved in relevant part by the Court of Appeals in *American Petroleum Institute v. OSHA*, 581 F. 2d 493 (5th Cir. 1978) (standard vacated on other grounds), aff'd other grounds *sub nom. Industrial Union Dep't., AFL–CIO* v. *American Petroleum Institute*, 100 S. ct. 2844 (1980). The Court stated (*Id.* at 510):

> Placing the responsibility to warn downstream employees of concealed hazards on those upstream employers who create the hazards and know of the hazard is consistent with the remedial purpose of the Act and is within OSHA's broad authority to prescribe warning labels.

The Court was also influenced by the fact that the upstream employer's own employees were exposed to the same hazards and had to be warned via labels in any event. The responsibility to warn downstream employees placed on manufacturers by this proposal is not conceptually different than in benzene. As in benzene, their own employees are at least as much exposed to the chemicals which they must evaluate for hazards and provide warning for accordingly. OSHA recognizes, however, that importers may be in a different position than manufacturers since, if they are not themselves manufacturers, they may not have employees exposed in any significant way to the chemicals they ship and may have difficulty getting information concerning the identities and hazards of the chemicals they import from overseas' suppliers. Nevertheless, the proposal treats importers like manufacturers because it appears necessary that chemical identification and hazard warnings be developed at the earliest possible point in the chain of distribution after a chemical enters the Customs Territory of the United States to avoid a significant regulatory gap. Cf. *Mourning v. Family Publications Services*, 411 U.S. 356 (1973). OSHA specifically invites comment on how best to regulate hazardous imported chemicals so that employees may be informed of their chemical identity and warned of their hazards.

VI. Regulatory Analysis, Environmental Impact and Regulatory Flexibility Requirements

This proposal has been developed in conformity with pertinent laws, regulations, and executive orders. In particular, pursuant to Executive Order 12044 and the implementing Secretary's Order (44 FR 5370; January 26, 1979) OSHA has developed a Regulatory Analysis that extensively considers the expected benefits and economic impacts of the proposed standard, together with regulatory alternatives considered by the Agency. This document is available to the public from the following address: Docket Officer, Docket No. H–022, Room S–6212, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Tel: (202) 523–7894.

The Regulatory Analysis also serves as the Agency's draft Environmental Impact Statement (EIS) and Regulatory Flexibility Analysis. Under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as interpreted by 40 CFR Part 1500 *et seq.* (Council on Environmental Quality) and 29 CFR Part 11 (Department of Labor), (45 FR 51187 *et seq.*; August 1, 1980) OSHA is required to prepare a draft EIS if it determines that a proposed action will have significant environmental effects. Because OSHA has identified significant, albeit beneficial, effects external to the workplace resulting from this proposed standard, the Regulatory Analysis has accordingly been written so that it may simultaneously function as the draft EIS. The consolidation of documents in this manner is explicity permitted by 40 CFR 1506.4 and 29 CFR 11.12(d). In addition to assuring that the substantive subject matter required of a draft EIS has been addressed, OSHA has also undertaken to comply with the notice and filing requirements set forth in the NEPA regulations, 40 CFR 1506.6 and 1506.9 and 29 CFR 11.12(d).

In like manner, the Regulatory Analysis also contains an analysis of the proposed standard's impact on small businesses, as required by the Regulatory Flexibility Act of 1980, Pub. L. 96–353. As detailed in the Regulatory Analysis and in the preamble above, OSHA has not only considered the effects on small businesses, but also has taken steps designed to lessen the compliance burden on manufacturers and importers with 250 or fewer employees. The decision at this time to limit the scope of the proposed standard primarily to employers engaged in manufacturing (Division D, SIC Major Groups 20–39)—thereby excluding construction and other non-manufacturing industries from its scope—may also be seen in part as an attempt to minimize the impact of the proposed standard on small businesses.

To the extent necessary, OSHA will issue a final EIS and Regulatory Flexibility Analysis at the time of the final standard. It will also make final determinations regarding the technical and economic feasibility of the standard. To assist it in this task, the Agency specifically invites comments on any issue relating to the benefits, costs and other economic impacts, environmental consequences, and impacts on small business of the proposed standard.

VII. Public Participation

Interested persons are invited to submit written data, views, and arguments on this proposed standard. These comments must be received on or before April 18, 1981, and submitted in quadruplicate to the Docket Officer, Docket H–022, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Room S–6212, Washington, D.C., 20210; (202) 523–7894. Written submissions must clearly identify the provisions of the proposal which are addressed, and the position taken on each issue.

OSHA is scheduling public hearings in several locations to permit interested persons an opportunity to submit oral testimony concerning the issues raised by the proposed standard, including the economic and environmental impacts. The dates and cities for these hearings are as follows:

Date Hearing Will Begin in City

1. May 26, 1981, Washington, D.C.
2. July 7, 1981, Houston, Texas.
3. July 21, 1981, Chicago, Illinois.
4. August 11, 1981, Philadelphia, Pennsylvania.
5. September 1, 1981, San Francisco, California.

The addresses for the location of the hearing in each city will be announced in the Federal Register at a later date.

Notices of Intention to Appear

All persons wishing to participate in the public hearings must file a notice of intention to appear, in quadruplicate, on or before May 1, 1981, addressed to Mr. Tom Hall, OSHA Division of Consumer Affairs, Docket No. H–022, Room N3635. U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210; (202) 523–8024.

The notices of intention to appear must contain the following information:

(1) The name, address and telephone number of each person to appear;

(2) The capacity in which the person will appear;

(3) The approximate amount of time requested for the presentation;

(4) The specific issues that will be addressed;

(5) A detailed statement of the position that will be taken on each issue addressed; and

(6) Whether the party intends to submit documentary evidence and if so, a brief summary of that evidence.

Filing of Testimony and Evidence Before Hearing

Any party requesting more than 15 minutes for a presentation at the hearing, or submitting documentary evidence, must provide in advance the complete text of the testimony or documentary evidence to be presented. These texts shall be submitted in quadruplicate to the OSHA Division of Consumer Affairs, at the above address, and must be submitted by May 8, 1981.

These submissions will be available for inspection and copying at the OSHA Docket Office, Room S–6212, at the above address.

Each submission received will be reviewed to ascertain if the amount of time requested in the notice of intention to appear is appropriate. In those instances where the information contained in the submission does not justify the amount of time requested, a more appropriate time allocation will be made and the participant will be notified of the change. Any party who has not substantially complied with this requirement may be limited to a 15-minute presentation, and may be requested to return for questioning at a later time.

Conduct of Hearings

The hearings will begin at 9:30 a.m. with resolution of any procedural matters relating to the proceeding. The hearings will be conducted in accordance with 29 CFR Part 1911, allowing full development of the record and permitting all parties to exercise their rights of participation.

The hearing will be presided over by an Administrative Law Judge who will have all the powers necessary or appropriate to conduct a full and fair informal hearing as provided in 29 CFR Part 1911. Following the close of the hearing or of any post hearing comment period, the presiding Administrative Law Judge will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health.

All written and oral submissions, as well as other information gathered by the Agency, will be considered in any action taken. The record of this rulemaking, including written comments and materials submitted in response to this notice and notices of intention to appear at the public hearings, will be available for inspection and copying in the Docket Office, Room S–6212, at the above address, between the hours of 8:15 a.m. and 4:45 p.m.

VIII. Authority and Signature

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210.

(Secs. 6(b), 8(c), and 8(g). Pub. L. 91–596, 84 Stat. 1593, 1599, 1600; 29 U.S.C. 655, 657; 29 CFR Part 1911; Secretary of Labor's Order No. 8–76 (41 FR 25059))

Signed at Washington, D.C. this 13th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

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(x) Duty to update—importers and manufacturers.
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(aa) Duties upon receipt of updated information.

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VII. Definitions

(gg) Definitions.

VIII. Miscellaneous

(hh) Enforcement.
(ii) Compliance dates.
(jj) Appendices.
(kk) Effective dates.

I. General

(a) *Overview.*

Paragraphs (a) and (b) of this standard do not themselves impose requirements on employers but are intended to set forth the general purpose of this standard and to summarize (with appropriate cross-references) the major provisions of the standard which implement that purpose.

This standard establishes a system designed to communicate to workers and employers essential information concerning the hazards of workplace chemicals. Chemicals are classified under the standard as either substances (paragraph (gg)(40)) or mixtures (paragraph (gg)(30)). Employers covered by the standard generally fall into four categories: manufacturers (paragraph (c)(1)(i)), importers (paragraph (c)(1)(ii)), suppliers (paragraph (c)(1)(iii)), and industrial users (paragraph (c)(1)(iv)). Manufacturers and industrial users covered by this standard are those whose establishments are covered by Division D (Manufacturing), Major groups 20–39, in the most recent revision of the Standard Industrial Classification Manual; Executive Office of the President-Office of Management and Budget. In addition, other employers (i.e. those which fall under other SIC categories) are required to leave labels on containers they receive unless or until the container is put up for retail sale (paragraph (v)).

This standard requires (1) the evaluation of substances and mixtures to determine whether they are hazardous according to the criteria specified in the standard (paragraph (i)-(1); Appendices A and B) and (2) certain regulatory actions to be taken with respect to those substances and mixtures which are determined to be hazardous. The responsibility for hazard evaluation is placed on the manufacturers or importers of a substance or mixture because they are in the best position to make such an evaluation. The standard identifies 17 different kinds of hazards which must be evaluated (paragraph (gg)(22)). The evaluation procedures of the standard require manufacturers or importers to make use of information available in

their own records and to search relevant scientific literature for evidence of those hazardous (paragraphs (k)–(l)). Appendices A and B of the standard specify the accepted scientific principles which are to be followed when evaluating the evidence indicating a possible hazard. The evaluation procedures of the standard, however, do not require manufacturers and importers to perform any tests to determine the hazardousness of a substance or mixture.

Once a substance or mixture is determined by a manufacturer or importer to be hazardous under the standard, the standard requires each manufacturer and industrial user to:

(1) Label every container of every hazardous substance in the workplace with the precise chemical identity of its contents, and with appropriate hazard warnings, (paragraph (q) and Appendix C);

(2) Label every container of a mixture with the precise chemical identities of the constituent chemicals which are or may be hazardous, and with appropriate hazard warnings (paragraph (q) and Appendix C);

(3) Provide employees with any available material safety data sheets concerning the dangers posed by hazardous substances and mixtures in the workplace (paragraph (cc)); and

(4) Update the information provided to employees as new information about hazards becomes available (paragraphs (x)–(aa)).

To provide the information which industrial users need to protect their employees, the standard requires manufacturers and importers to:

(1) Maintain files (i.e. references, studies, reports or other documents used in the hazards evaluation procedure) on all substances and mixtures they manufacture or import (paragraph (m));

(2) Assure that the appropriate chemical identity and hazard warning labels are affixed to containers that are being shipped to industrial users and the suppliers of industrial users (paragraph (o)); and

(3) Provide with the first shipment to an industrial user or supplier of an industrial user one copy of any safety data sheet which the manufacturer or importer has developed concerning the hazards posed by the substance or mixture being shipped (paragraph (o)(6)). The standard, however, does not require safety data sheets to be developed or published if they do not otherwise exist.

To assure that industrial users receive the chemical identification and hazard warning information developed by the manufacturer or importer, the standard requires suppliers to forward this information which they receive from manufacturers or importers with their shipments of hazardous substances and mixtures to industrial users and to other suppliers of industrial users (paragraph (o)(5)). The standard permits industrial users, for the purposes of complying with their labeling and placarding duties, to rely on the hazard-related information which they receive from manufacturers, importers or suppliers. (paragraph (p)).

The standard requires that material safety data sheets and files containing hazard determination references and documents must be preserved for specified periods of time. (paragraph (bb)). Access to these records is generally provided to employees (including former employees), their designated representatives (including unions with collective bargaining rights in the workplace), OSHA and NIOSH (the National Institute for Occupational Safety and Health, Department of Health and Human Services). (paragraphs (cc) and (dd)). The standard provides for the transfer of these records when an employer subject to its recordkeeping provisions goes out of business (paragraph (ee)). The standard also requires each manufacturer and importer to send to OSHA, after completing a hazard determination on a substance or mixture, either a notice stating that the substance or mixture has not been found to meet the criteria for a hazard or a copy of the appropriate hazard warning for the substance or mixture. This information will be kept in a central repository and made available to other employees on request (paragraph (w)). The compliance dates of the standard have been extended by three months for manufacturers and importers with less than 250 employees so that they may take advantage of the hazard evaluations on file with OSHA (paragraph (ii).)

(b) *Purpose.*

The system of hazards evaluation and communication established by this standard will, by making information about workplace hazards generally available to workers, their representatives, OSHA and NIOSH, yield direct and indirect improvements in occupational health. Container labels will give workers immediate access to the identities and dangers of the hazardous substances and mixtures with which they work directly. Material safety data sheets will provide workers and their representatives with detailed information about the properties and handling of hazardous substances and mixtures, supplementing the information on hazard warning labels. Hazard evaluation files will provide the documentation to enable workers and their representatives to make their own hazard determinations and to check the employer's determinations.

II. Scope and application

(c) *Employers covered by the standard.*

(1) This standard applies to any employer who:

(i) Is engaged in the manufacturing or processing of a substance or mixture for distribution in commerce and whose business is covered by Division D (Manufacturing), Major Groups 20–39, in the most recent revision of the *Standard Industrial Classification Manual*, Executive Office of the President—Office of Management and Budget (hereafter "manufacturer"); or

(ii) Imports a substance or mixture into the Customs Territory of the United States (i.e., the 50 States, Puerto Rico, and the District of Columbia), and is the first person who, knowing the substance or mixture will be imported, controls the identity and total amount of the substance or mixture to be imported (hereafter "importer"); or

(iii) Receives a substance or mixture regulated by this standard and distributes such substance or mixture to an industrial user or another supplier of an industrial user in unaltered form, whether or not in its original container (hereafter "supplier"); or

(iv) Uses a substance or mixture received from a manufacturer, importer, or supplier, and whose business is covered by Division D (Manufacturing), Major Groups 20–39, in the most recent revision of the *Standard Industrial Classification Manual*, Executive Office of the President—Office of Management and Budget (hereafter "industrial user").

(2) This standard applies to employers who are neither manufacturers, importers, suppliers, or industrial users only to the extent set forth in paragraph (v).

(d) *Substances covered by the standard.*

(1) Any substance covered by this standard must be evaluated in accordance with paragraphs (i)–(1) and Appendices A and B.

(2) This standard applies to any substance which is:

(i) Listed in the Toxic Substances Control Act Chemical Substance Inventory, including UVCBs; or

(ii) A pesticide; or

(iii) A food additive, a prior sanctioned food additive, a color additive, cosmetic or a drug; and includes

(iv) A by-product, intermediate, or impurity known to be present during the manufacturing or processing of a substance or mixture. Impurities include impurities in food and tobacco.

Note.—There is necessarily a continuum between "intermediates," "by-products," and "impurities." Any material within this continuum is a material subject to regulation under this standard.

(e) *Mixtures covered by the standard.*

(1) Any mixture covered by this standard must be evaluated in accordance with paragraphs (i)–(1) and Appendices A and B.

(2) This standard applies to any mixture all of whose constituent substances are covered by paragraph (d).

(f) *Coverage of research materials.*

(1) Substances or mixtures used for scientific experimentation or analysis, or chemical research, or product development are covered only by the requirements to maintain a hazard evaluation file for each such substance or mixture (paragraph (m)) and to provide access to such file (paragraph (dd)), provided that:

(i) The quantities used are no greater than reasonably necessary for such purposes; and

(ii) The substance or mixture is used by, or directly under the supervision of, an individual assigned to conduct research or product development; and

(iii) The importer, manufacturer, or industrial user conducting, sponsoring, or initiating the experimentation, analysis, research, or product development, uses the substance or mixture only for these purposes and not for any commercial application, and

(iv) The substance or mixture is not known to be used by any other person for any commercial application.

(g) *Coverage of non-hazardous substances and mixtures.*

Any substance or mixture which is determined not to be hazardous under the criteria of paragraphs (i)–(1) and Appendices A and B is regulated only to the extent specified in paragraphs (o)(4), (bb) and (dd)–(ee).

(h) *Substances not covered by the standard.*

(1) This standard does not apply to:

(a) A source material, special nuclear material, or by-product material as defined in the Atomic Energy Act of 1954, 42 U.S.C. 2014 *et. seq.*, and the regulations issued there under; or

(b) Food or tobacco; or

(c) Wood in any of its physical forms need not be evaluated for flammability.

(2)(a) An importer need not evaluate any substance if it is to be distributed directly or indirectly in unaltered form to:

(i) A workplace covered by this standard for personal use by employees; or

(ii) A destination other than a workplace covered by this standard.

(b) An importer who does not know the contemplated use or ultimate destination of a substance must evaluate such substance for hazards.

III. Evaluation and Communication of Hazards—Duties of Manufacturers and Importers

(i) *Evaluation of substances and mixtures for hazards.*

(1) Each manufacturer and importer of a substance covered by this standard shall determine whether that substance is to be regulated as a hazard in accordance with the requirements of paragraphs (j)–(l) and the procedures set forth in Appendices A and B.

(2) The manufacturer or importer of a mixture shall determine that it poses the hazards of its constituent substances if:

(i) The mixture contains a constituent substance in an amount of at least 0.1% (by weight) which is determined to be a carcinogen, unless the mixture as a whole is determined not to be a carcinogen (Appendices A and B); or

(ii) Any of the constituent substances of the mixture in an amount of at least 1.0% (by weight) meets the definition for one or more Category A or Category B hazards, and the mixture as a whole cannot be evaluated for that Category A or B hazard because of a lack of adequate information about the mixture's effects.

(3) If there is adequate information (Appendix A) to evaluate a mixture for a particular Category A or Category B hazard, the mixture shall be determined to be hazardous if, evaluated as a whole, it meets the definition of such a hazard. In such case, its constituent substances need not be evaluated for the same hazards.

Note.—For purposes of paragraphs (2) and (3), "adequate information" means studies or data which meet the requirements of Appendices A and B.

(4) Where a hazard can be traced to a general chemical structure (i.e., a chemical family), but not to a particular substance, the most specific chemical structure to which the hazard can be traced, and which the mixure contains in an amount of at least 1.0% (by weight), shall be treated for purposes of this standard as a substance.

(j) *Categories of hazards.*

An importer or manufacturer shall determine hazardous properties of substances and mixtures under two distinct sets of criteria and procedures. To reflect this fact, hazardous properties have been grouped in two categories, "Category A" (physical hazards) and "Category B" (health hazards) according to the hazard determination criteria and procedures by which they are governed. The hazards in each category are set out under the definition of "hazardous," under paragraph (gg)(22).

(k) *Determination of Category A hazards.*

A Category A hazard exists if:

(1) The substance or mixture possesses the physical or chemical properties specified in the definition for any Category A hazard as determined by the procedure set out in Appendix A; and

(2) The substance or mixture is present in the workplace under normal or emergency working conditions in the physical state and chemical form in which its hazardous properties were ascertained.

(l) *Determination of Category B hazards.*

A Category B hazard exists if:

(1) A substance meets the definition for any listed category B hazard as demonstrated by the procedures set out in Appendices A and B; and

(2) The substance or mixture is present in the workplace under normal or emergency working conditions in the chemical form in which its hazardous properties were ascertained.

(m) *Maintenance of hazard evaluation files.*

Each importer or manufacturer must maintain and make available, for examination and copying (see paragraph (dd)), a separate hazard evaluation file for each substance and mixture in the workplace. Each file shall contain all publicly unavailable documents, and a list of all publicly available documents and their sources, submitted to or in the possession of the importer or manufacturer concerning the substance or mixture relevant to the hazard determination process.

(n) *Deletion from hazard evaluation files of trade secret information.*

(1) An importer or manufacturer may delete from any publicly unavailable document produced for an employee, former employee, or certified or recognized collective bargaining agent, trade secret information which discloses manufacturing processes, or which discloses the percentage of a substance in a mixture.

(2) An importer or manufacturer may also delete from any publicly unavailable document produced for an employee, former employee, designated representative, or collective bargaining agent, trade secret information which discloses the chemical name of CAS number of a substance or a mixture:

(i) Where the importer or manufacturer has determined that the substance or mixture to which such document pertains is not hazardous; or

(ii) Where the importer or manufacturer has not yet determined whether such substance or mixture is hazardous; or

(iii) Where the substance or mixture is used solely in research as described in paragraph (f).

(3) Information which an importer or manufacturer is required to disclose to any agency of the federal government, or to any state or subdivision of a state, and which is available to competitors or the public without compensation to the provider of the information, shall not be considered "publicly unavailable" information entitled to trade secret status.

(o) *Information to accompany shipments.*

(1) No shipment of a hazardous substance may be sent by a manufacturer or importer to an industrial user or supplier, unless each container is labeled with the following information:

(i) The common name of the substance;

(ii) The CAS number of the substance; and

(iii) The appropriate hazard warning label prescribed by Appendix C.

(2) No shipment of a regulated mixture may be sent by a manufacturer or importer to an industrial user or supplier, unless each container is labeled with the following information:

(i) The common name of the mixture;

(ii) The CAS numbers and common names of all hazardous constituent substances in a mixture listed in order of relative concentration, by CAS number, with the substance of greatest concentration being listed first; and

(iii) The appropriate hazard warning label prescribed by Appendix C.

(3) The chemical names of substances and constituent substances of mixtures may either be placed on labels prepared for shipment, or may be forwarded, with appropriate cross references to common names and CAS numbers, in a separate listing accompanying the shipment.

(4) No shipment of a substance or mixture determined not to be hazardous may be sent by a manufacturer or importer to an industrial user or supplier without a written statement that the substance or mixture has been evaluated in compliance with this standard and found not to meet the critiera for a hazard as defined by this standard. Any industrial user or supplier who receives such a statement must forward it with any shipment of such substance or mixture to any other industrial user or supplier.

(5) A supplier who receives a shipment from an importer or manufacturer accompanied by the information described in this paragraph shall carry forward such information in any further shipment using either the labeling or separate listing format.

(6) Each importer, manufacturer, or supplier shall supply with the first shipmetn of a hazardous substance or a hazardous mixture to any workplace of any industrial user or supplier, one copy of any available material safety data sheet concerning such substance or mixture.

(7) Each printing of a material safety data sheet must reflect the most current pertinent information in possession of the importer or manufacturer who supplies it.

(8) An importer or manufacturer who does not know the contemplated use or ultimate destination of a shipment shall forward information as required by this paragraph with the shipment.

(9) A shipment of a hazardous substance or mixture by an importer or manufacturer shall not be subject to the labeling requirements of this paragraph if another OSHA standard has specific labeling requirements affecting the substance or mixture different from those of this paragraph. In such cases, an importer or manufacturer shall label in accordance with the requirements of the specific standard and shall assure that the label remains affixed to the container when sent to an industrial user or supplier.

(10) A hazardous substance or mixture which has been finally processed to a solid state, whether originally a solid, liquid or gas, and is inert and not susceptible to decomposition in any workplace, shall be subject only to the requirements of paragraph (o)(4).

IV. Workplace Requirements

(p) *Responsibility to determine hazards—industrial users and suppliers.*

An industrial user or supplier receiving a shipment may rely upon the determination by a manufacturer or importer that a hazard does or does not exist as required to be forwarded by paragraph (o) with shipments of substances and mixtures. However, an industrial user who has actual knowledge of hazards posed by a substance or mixture generally, or as used in the workplace, which has not been communicated to the industrial user by the manufacturer or importer, must convey the information regarding such hazards, as required by this standard, to his or her employees.

(q) *Workplace labels for hazardous substances and mixtures.*

(1) Except as provided by paragraph (u), each manufacturer and industrial user shall ensure that each container of a hazardous substance in the workplace is labeled with the common name and CAS number of the substance within.

(2) Each manufacturer and industrial user shall ensure that each container of a hazardous mixture in the workplace is labeled with:

(a) The common name of the mixture.

(b) The common name(s) and CAS number(s) of the mixture's hazardous constituent substances, listing CAS number(s) first. Constituent hazardous substances shall be listed on the label in order of relative concentration with the substance of highest concentration being listed first.

(3) Each manufacturer and industrial user shall ensure that each container of a hazardous substance or mixture in the workplace is labeled with the appropriate hazard warning label indicated in Appendix C.

(r) *Workplace labels or placards—piping systems.*

(1) The hazardous contents of a piping system shall be indentified by labels or placards. Labels or placards shall be placed at reasonable intervals along the piping system in places accessible to employee view. Labels or placards shall show the common name, the CAS number, and the hazard warning for each hazardous substance and mixture flowing through the piping system.

(2) Whenever an employee is assigned to do maintenance or repair work on a pipe, the employee must be notified of at least the common name and the hazard warnings pertinent to the substance or mixture in the pipe.

(s) *Hazard warning labels of other agencies.*

(1) Each manufacturer and industrial user shall ensure that hazard warning labels affixed to containers of substances or mixtures to comply with the regulations of other Federal agencies are not removed or obscured after entering the workplace. Such labels need not be transferred to other workplace containers into which a substance or mixture is subsequently placed.

(2) In addition to the common names and CAS numbers required by paragraph (q), a manufacturer or industrial user may use labels affixed in accordance with requirements of the Department of Transportation, 49 CFR Part 172, and the Environmental Protection Agency, 40 CFR Part 162, in lieu of the hazard warnings required by paragraph (q) and indicated by Appendix C of the standard.

(t) *Label and placard display requirements.*

(1) A label must be displayed on, or securely affixed to, the surface of the container. For the purposes of this section, "securely affixed" means that a label can reasonably be expected to remain affixed and legible during foreseeable conditions and the period of use. If a hazardous substance or mixture is packaged in a container that has a separate inner liner, the hazard warning label must be securely affixed to the outer surface of the container and not to the inner liner.

(2) A label or placard must be prominently displayed. Prominent display shall be achieved by the use of distinct typography and colors that contrast sharply with the background, and in the use of suitable size, design, and placement. In addition, any label which is affixed to comply with this standard shall contain a statement to that effect.

(3) A label or placard must be clearly legible to a person with normal vision. A label or placard must not be obscured by any other marking on the container (such as advertising) that could substantially reduce its legibility.

(4) All required label or placard text must be printed in English, and may be printed in languages other than English as well.

(5) A label or placard may include additional hazard warning information not required by this section, provided that the additional information does not contradict or detract from the required information. Terms such as "safe," "non-toxic," or "harmless" shall not appear on the label or placard.

(6) Chemical identification and hazard warning components may be included on a single label or appear on separate labels.

(7) A manufacturer or industrial user who refills a labeled container of a hazardous substance or mixture must remove or mask the hazard warning label before refilling the container with another substance or mixture.

(8) A manufacturer or industrial user need not change labels or placards to reflect every stage of a continuous reaction or every change in the contents of a container or pipe, provided the manufacturer or industrial user adopts any alternative system or format which:

(i) Utilizes labels and placards;

(ii) Accurately conveys the same information as would changing individual labels or placards contemporaneously with changing the contents of the container or pipe;

(iii) Is immediately accessible to employees nearby; and

(iv) Assures that all employees assigned to work on pipes or their attachments, labeled or placarded under this paragraph, are informed at all times of the chemical identity and hazard warnings appropriate to the contents of such pipes or containers.

(u) *Exceptions from workplace labeling and placarding requirements of this section.*

A manufacturer or industrial user need not label workplace containers as required by paragraph (q) or use placards as provided for in paragraph (r) if:

(1) The container is five gallons (19.0 liters) or less in volume, is used to transfer hazardous substances or hazardous mixtures from labeled containers, and is intended only for use in the work area where the transfer occurs; or

(2) Another OSHA standard has specific labeling or placarding requirements affecting a substance or mixture which are different from those of paragraph (q), in which case the manufacturer or industrial user shall label or placard in accordance with the requirements of the specific standard; or

(3) The hazardous substance or mixture, whether originally a solid, liquid or gas, has finally been processed to a solid state and is inert and not susceptible to decomposition in the workplace.

(v) *Labeling duties of other employers.*

Each employer who is not a manufacturer, importer, industrial user or supplier, and who receives a container labeled in compliance with this section, shall not remove or obscure the label unless and until the container is actually put up for retail sale.

(w) *Label reference service.*

(1) Upon completion of the hazard determination for a substance a manufacturer or importer of such substance shall forward to the Assistant Secretary within 60 days of such determination either:

(i) Notice that the chemical substance has been evaluated and determined not to meet the criteria for a hazard as defined by this standard; or

(ii) Notice that the substance is hazardous.

(2) Each notice shall include the common name, the chemical name, and the CAS number of the substance in question.

(3) The notice for a hazardous substance must also include all hazard warning information required by this standard to appear upon the container label.

(4) The Assistant Secretary will maintain a registry of the information required to be reported under this paragraph.

(5) Any manufacturer or importer may have access to the notices submitted for any substance appearing in the registry. The manufacturer or importer requesting this information must identify a substance by either its chemical name or its CAS number. OSHA will not release any information concerning the common name or trade name of any substance, or the identity of any manufacturer or importer of a substance.

(6) Information obtained from the registry may be relied upon to comply with the hazard determination and hazard warning requirements of this standard. Users of the registry are, however, under a continuing obligation to ensure that hazard determinations and hazard warnings are up to date.

(7) OSHA will charge users of the registry a reasonable fee reflecting the cost to OSHA of providing the requested information.

V. Updating Hazard Information and Hazard Determinations

(x) *Duty to update—importers and manufacturers.*

(1) Whenever an importer or manufacturer acquires private or public information:

(a) Concerning new hazards a hazardous substance or mixture has been found to pose;

(b) Concerning additional information about the hazards such substance or mixture has been found to pose; or

(c) Indicating that a substance or mixture previously determined to pose a hazard does not pose such hazard, the hazard determination for such substance or mixture and the information pertinent to it shall be updated accordingly.

(2) The procedures governing the determination of hazards under paragraphs (i)–(1) and Appendices A and B shall govern the determination of new hazards under this paragraph.

(y) *Duty to update—industrial users.*

Whenever an industrial user has actual knowledge, contrary to the information previously received with the shipment of a substance or mixture, that the substance or mixture is hazardous, or poses hazards additional to those of which he or she was informed, the industrial user shall revise the hazard determination for use in the workplace. An industrial user need not forward the revised determination, or the information underlying it, however, unless the information underlying the revised determination was actually generated by the industrial user. Likewise, where an industrial user discovers new information about the hazards of a currently hazardous

substance or mixture, such information need to be forwarded only if actually generated by the industrial user.

(z) *Communication of updated hazard determinations and information.*

(1) Updated hazard determinations and hazard information generated or received by an importer or manufacturer shall be distributed promptly as follows:

(i) To each industrial user, or supplier, to whom the importer or manufacturer has supplied the substance or mixture to which the updated determination or information refers within the lesser of:

(A) The period from the effective date of this standard (see paragraph (kk)) to the date the updated determination was made or the updated information was acquired; or

(B) The 24 month period immediately preceding the date the updated determination was made or acquired.

(2) Updated determinations and information generated by an industrial user shall be distributed promptly to the importer, manufacturer, or supplier who last supplied the substance or mixture to the industrial user.

(3) A supplier who receives an updated determination or updated information shall distribute it to the last manufacturer or importer who supplied the substance or mixture to the supplier. In addition such determinations and information shall be distributed promptly to each industrial user and supplier of an industrial user to whom the supplier has supplied the substance or mixture to which the updated determination or information refers within the lesser of:

(i) The period from the effective date of this section (see paragraph (kk)) to the date the updated determination was made or the updated information was acquired; or

(ii) The 24 month period immediately preceding the date the updated determination was made or the updated information was acquired.

(aa) *Duties upon receipt of updated information.*

(1) Each manufacturer and industrial user shall promptly make updated hazard information available with all relevant material safety data sheets.

(2) Each importer, manufacturer, industrial user, or supplier shall promptly revise relevant labels and information to accompany shipments to reflect accurately updated hazard determinations.

VI. Recordkeeping and Access Requirements.

(bb) *Records preservation.*

(1) Each manufacturer and industrial user shall preserve a copy of a material safety data sheet (if any) until it is replaced by a more recent copy or until the hazardous substance or mixture to which it pertains is no longer present in the workplace.

(2) Each importer and manufacturer shall preserve the hazard evaulation files required by paragraph (m) for three years.

(3) Each manufacturer and industrial user shall preserve the statement that a substance or mixture has been evaluated and determined not to meet the criteria for a hazard as defined by this standard unless and until the substance or mixture to which it applies is determined to be hazardous or the substance or mixture is no longer present in the workplace.

(cc) *Access to records.*

Within 48 hours of a request for any hazardous substance or mixture in a work area, each manufacturer or industrial user shall supply a copy of any available material safety data sheet, and the chemical name of any hazardous substance or constituent hazardous substance of a mixture, appropriately cross-referenced to the common name and CAS number, in writing to:

(1) Any employee assigned to, formerly assigned to, or about to be assigned to that work area.

(2) Any former employee who was assigned to that work area.

(3) The designated representative of any such employee or former employee.

(4) The recognized or certified bargaining representative for any employee in the workplace.

(5) The Assistant Secretary.

(6) The Director.

(dd) *Access to hazard evaluation files.*

(1) Within 7 calendar days of a request, each importer or manufacturer shall make available for examination and copying all publicly unavailable reports, studies, or other documents used, or being used, to assess whether a substance or mixture is hazardous by this standard, or to develop material safety data sheets or hazard warnings. Such materials shall be made available to the same persons specified in paragraph (cc).

(2) Where reports, studies, or other documents used, or being used, by the importer or manufacturer for such purposes are publicly available, the importer or manufacturer may, within the same time limits, provide a list of each document source, for examination and copying, instead of the reports, studies, or other documents themselves.

(ee) *Transfer of records.*

(1) Whenever an importer, manufacturer or industrial user ceases to do business, he or she shall transfer all records subject to this standard to his or her successor. The successor shall receive and maintain these records.

(2) Whenever an importer, manufacturer or industrial user ceases to do business and there is no successor to receive and maintain the records subject to this standard, the importer, manufacturer, or industrial user shall notify present or former affected employees who leave the employer's employment after this standard becomes effective of their rights of access to records. Notification shall be given at least three (3) months prior to disposal of such records. Former employees shall be considered notified if written notification has been sent to their last known address with a request to forward such notification.

(3) Whenever an importer or manufacturer ceases to do business and there is no successor to receive and maintain records, or whenever an importer or manufacturer intends to dispose of any hazard evaluation files, the importer or manufacturer shall:

(i) Notify the Director in writing of the impending disposal of records at least three (3) months prior to the disposal of the records. Upon request by the Director, the importer or manufacturer shall transfer such records to NIOSH; or

(ii) Transfer the records to the Director if so required by a specific occupational safety and health standard.

(ff) *Duty of a manufacturer or industrial user to inform employee of right of access.*

A manufacturer or industrial user shall inform his or her employees of their rights of access to information under the standard. A manufacturer or industrial user may comply with this requirement using any reasonable format, except that:

(1) The information on access required by this paragraph shall be permanently displayed in an area readily observable to employees in each work area, and

(2) The display format shall contain the words "Worker's Right to Know" in conspicious lettering.

VII. Definitions.

(gg) *Definitions.*

(1) The following terms shall have the meaning contained in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 *et seq.*, and the regulations issued under that Act: "food," "cosmetic," "drug," "food additive," "prior sanctioned food additive," "food ingredient generally recognized as safe," and "color additive."

(2) "Access" means the right and opportunity to examine and copy.

(3) "Assistant Secretary" means the Assistant Secretary of Labor for

Occupational Safety and Health, U.S. Department of Labor, or designee.

(4) "By-product" means a substance or mixture produced without separate commercial intent during the manufacture or processing of another substance(s) or mixture(s). A "by-product" is covered by this rule whether or not it is volatile.

(5) "Carcinogen" means a substance or mixture which meets the definition of a Potential Occupational Carcinogen as specified in 29 CFR 1990.103 and qualified in 29 CFR 1990.143–.144, (45 Fed. Reg. 5282, *et seq.*, January 22, 1980) or is identified in a previous Occupational Safety and Health Administration regulation as a carcinogen (29 C.F.R. Part 1910, Subpart Z).

(6) "CAS number" means the unique identification number assigned by the Chemical Abstracts Service to substances.

(7) "Chemical identity" means the "CAS number" or the "chemical name" of a substance.

(8) "Chemical name" is the scientific designation of a substance in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature.

(9) "Combustible liquid" means any liquid having a flash point at or above 100°F (37.8°C) but below 200°F (93.3°C), except that this term does not include any liquid mixture having one or more components with a flash point at or above 200°F (93.3°C) which together make up 99 percent or more of the total volume. (For test method, see definition of "flash point").

(10) "Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used by an industrial user to identify a substance or mixture other than by its chemical name.

(11) "Compressed gas" means:

(i) A gas or mixture of gases having in a container an absolute pressure exceeding 40 pounds per square inch at 70°F (21.1°C); or

(ii) A gas or mixture of gases having in a container an absolute pressure exceeding 104 pounds per square inch at 130°F (54.4°C), regardless of the pressure at 70°F (21.1°C).

(iii) A flammable liquid having a vapor pressure exceeding 40 pounds per square inch absolute pressure at 100°F (37.8°C), as determined by the American Standard Method of Test for Vapor Pressure of Petroleum Products (Reid Method), Z11:44–1973 (ASTM D 323–72).

(iv) The contents of a self-pressurized container.

(12) "Container" means any bag, barrel, bottle, box, can, cylinder, drum, stationary storage tank, pipe, pump, reaction vessel, stack, oven or the like that contains a substance or mixture and those inner surface is in direct contact with the substance or mixture. "Container" does not include a container with total contents of less than 500 milliliters (1.057 pints) in volume or less than 500 grams (1.102 pounds) in weight.

(13) "Corrosive material" means a substance or mixture which causes visible destruction of, or irreversible alterations in, living tissue by chemical action at the site of contact. A material is considered corrosive if, when tested on the intact skin of the albino rabbit by the method described by the U.S. Department of Transportation in Appendix A to 49 CFR Part 173 (Oct. 1, 1979), it destroys or changes irreversibly the structure of the tissue at the site of contact following an exposure period of no more than four hours.

(14) "Designated representative" means any individual or organization to whom an employee or former employee gives written authorization to exercise such employee's rights under this standard.

(15) "Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

(16) "Emergency" means any occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which may or does result in an uncontrolled release of a hazardous substance or hazardous mixture into the workplace.

(17) "Employer" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons engaged in a business affecting commerce who have employees. The term person does not include the United States or any state or political subdivision of a state.

(18) "Explosive material" means a substance or mixture that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

(19) "Extremely flammable liquid" means a liquid having a flash point at or below 20°F (−6.7°C) (For test method see definition of "Flash point")

(20) "Flammable" material means a substance or mixture that falls into one of the following categories:

(i) "Flammable aerosol." A substance or mixture dispensed from its container as a mist, spray, or foam by a propellant under pressure which, when tested by the method described in 16 CFR 1500.45 (Jan. 1, 1979), projects a flame longer than 18 inches when the valve is fully open or a flashback (a flame extending back to the valve) at any valve opening;

(ii) "Flammable gas." A gas which at atmospheric temperature and pressure, forms a flammable mixture with air when present at a concentration of 13 percent or less by volume, or the flammable range with air is wider than 12 percent regardless of the lower limit;

(iii) "Flammable liquid." A liquid that has a flash point above 20°F (−6.7°C) but below 100°F (37.8°C), except that this term does not include any liquid mixture having one or more components with a flash point at or above 100°F (37.8°C) which together make up 99 percent or more of its total volume (for test method, see definition of "Flash point");

(iv) "Flammable solid." A solid, other than an explosive that can cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or that can be readily ignited and, when ignited, continues to burn vigorously and persistently after removal of the source of ignition. A material is considered a flammable solid if, when tested by the method described in 16 CFR 1500.44 (Jan. 1, 1979), it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

(21) "Flash point" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24–1979 (ASTM D 56–79))—for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closted tester, Z11.7–1979 (ASTM D 93–79))—for liquids with a viscosity equal to or greater than 45 SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278–78)).

Note.—For mixtures, if the result of any test method described in paragraphs (i)–(iii) is above 100°F (37.8°C), evaporate a fresh sample to 90 percent of the original volume and retest. The lower of the two values shall be taken as the flash point.

(22) "Hazardous" substance or mixture means a substance or mixture which meets the definition for one or more of the terms in the two following groups of hazards:

Category A Hazards

(i) A corrosive material;
(ii) An explosive material;
(iii) An extremely flammable liquid;
(iv) A flammable material;
(v) A combustible liquid;
(vi) A pyrophoric material;
(vii) A strong oxidizer;
(viii) A reactive material;
(ix) A compressed gas;

Category B Hazards

(x) A highly toxic material;
(xi) A toxic material;
(xii) An irritant;
(xiii) A sensitizer;
(xiv) A carcinogen;
(xv) A reproductive toxin;
(xvi) A material that has acutely endangered the life of a worker of either sex, whether normal or medically disabled, or has caused death from exposure via the respiratory tract (excluding asphyxiation), skin or mouth except that substances or mixtures shall not be placed in this category if available data permit their classification as "highly toxic" or "toxic"; or
(xvii) A material that causes the immediate or delayed onset of other acute, subacute or chronic adverse health effects in humans of either sex, normal or medically disabled, or experimental or domestic animals, if animal models of these human health effects are available.

Note.—Category B hazard (xvii) includes the immediate or delayed onset of acute, subacute or chronic dimunition in mental alertness or behavior alterations in humans of either sex, normal or medically disabled, or in experimental or domestic mammals if animal models of these human health effects are available.

(23) "Highly Toxic material" means a substance or mixture that kills within 14 days:

(i) At least half of a group of 10 or more albino rats weighing between 200 and 300 grams each, when administered orally at a single dose of 50 milligrams or less per kilogram of body weight (LD50); or

(ii) At least half of a group of 10 or more albino rabbits weighing between 2 and 3 kilograms each, tested at a dosage of 200 milligrams or less per kilogram of body weight, when administered by continuous contact with the bare skin for 24 hours (LD50); or

(iii) At least half of a group of 10 or more albino rats weighing between 200 and 300 grams each, tested at a concentration in air of 200 parts per million or less by volume of gas or vapor, or 2 milligrams or less per liter of mist, fume, or dust when administered by continuous inhalation at a steady concentration for one hour or for four hours when there is difficulty maintaining a steady concentration (LC50).

(24) "Impurity" means a substance which is unintentionally present with another substance or mixture.

(25) "Intermediate" means any substance which is present during the manufacture of other substances or mixtures and which either (1) is consumed in whole or in part in the course of manufacturing the other substances or mixtures or (2) is intentionally present for the purpose of altering the rate of such chemical reaction(s) (this latter category includes "catalysts").

(26) "Irritant" means a substance or mixture, not a corrosive, which on immediate, prolonged or repeated contact with living human or mammalian tissue induces the immediate or delayed onset of an acute, subacute or chronic local inflammatory response in the skin, eyes, or mucous membranes by chemical action. A substance or mixture is considered a skin irritant if it receives a score of five or more when tested by the method described in 16 CFR 1500.41 (Jan. 1, 1979). A substance or mixture is considered an eye irritant if a positive result is obtained when tested by the method described in 16 CFR 1500.42 (Jan. 1, 1979).

(27) "Label" means written, printed, or graphic matter displayed on or affixed to the containers of a substance or mixture.

(28) "Lableled container" means a container bearing hazard warning and content labels in accordance with the requirements of the section.

(29) "Material safety data sheet" means any safety data sheet or technical bulletin which contains information regarding the physical, chemical, and hazardous properties of a substance or mixture, e.g., OSHA Form 20.

(30) "Mixture" means any combination of two or more substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a reaction if none of the substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the substances comprising the combination were combined.

(31) "Other adverse health effects" means diseases, signs, or symptoms which (1) are caused wholly, or in part, by occupational exposures to a hazardous material; (2) occur either immediately or after a latency period which may extend into the retirement period; and (3) for which a reasonably prudent employee would seek medical treatment or a job transfer in order to mitigate or resolve the "other adverse health effect," or (4) which causes loss of consciousness or vision, restriction of worker motion, or has been associated with a reduction in working-life expectancy or total life expectancy. Reductions in working-life or total life expectancy shall be based, directly, upon standard life table methodologies or, indirectly, upon relative or attributable risk methodologies or proportional mortality studies.

(32) "Pesticide" shall have the meaning contained in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) and the regulations under that Act.

(33) "Pipes" means any conduits for the transport of gases, liquids, semi-liquids, or fine particulate dust.

(34) "Piping system" means pipes of any type, including fittings, valves, and pipe coverings.

(35) "Pyrophoric material" means a substance or mixture that will ignite spontaneously in dry or moist air at or below 130°F (54.4°C).

(36) "Reactive material" means a substance or mixture that is able to undergo a violent, self-accelerating exothermic chemical reaction with common materials or by itself and includes a substance or mixture that falls within any of the following categories:

(i) "Organic peroxide." An organic compound that contains the bivalent —O—O— structure and which may be considered a structural derivative of hydrogen peroxide, in which one or both of the hydrogen atoms has been replaced by an organic radical.

(ii) "Pressure-generating material." A substance or mixture which may spontaneously polymerize, with an increase in pressure, unless protected by the addition of an inhibitor, or by refrigeration or other thermal control; or which may decompose to release gas in its container.

(iii) "Water-reactive material." A substance or mixture that reacts with water to release heat or a gas which is hazardous.

(37) "Reproductive toxin" means a substance or mixture which causes fetal wastage or undergrowth, malformation, growth retardation, or functional disorders in the products of mammalian conception, or prematurity or diminished fertility in mammals. For the purposes of regulation, it is immaterial whether a specific locus of action has been identified, assignment to this category being based upon the enumerated end-results.

(38) "Sensitizer" means a substance or mixture that causes humans of either sex, normal or medically disabled, or other mammals to develop either a hypersensitive allergic reaction involving normal tissue upon reapplication of the substance or mixture, or a photodynamic reaction. The hypersensitive reaction may be of the anaphylactic, immediate, delayed or fixed type, and may be of acute, subacute or chronic duration.

(39) "Strong oxidizer" means a substance or mixture that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

(40) "Substance" means any organic or inorganic entity of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction, or occurring in nature, and any chemical element or uncombined radical, except mixtures. For purposes of this section, a "UVCB" shall be treated as a chemical substance.

(41) "Toxic material" means a substance or mixture that kills within 14 days:

(a) At least half of a group of 10 or more albino rats weighing between 200 and 300 grams each, when administered orally at a single dose or more than 50 milligrams but not more than 500 milligrams per kilogram or body weight (LD 50); or

(b) At least half of a group of 10 or more albino rabbits weighing between 2 and 3 kilograms each tested at a dosage of more than 200 milligrams but not more than 1,000 milligrams per kilogram of body weight, when administered by continuous contact with the bare skin for 24 hours (LD 50); or

(c) At least half of a group of 10 or more albino rats weighing between 200 and 300 grams each tested at a concentration in air of more than 200 parts per million but not more than 2,000 parts per million by volume of gas or vapor, or more than 2 milligrams but not more than 20 milligrams per liter of mist, fume, or dust when administered by continuous inhalation at a steady concentration for one hour or for four hours when there is difficulty maintaining a steady concentration (LC 50).

(42) "UVCB" means a substance or mixture listed in the Toxic Substances Control Act Inventory which is of unknown or variable composition, a complex reaction product or biological material and which has been assigned a CAS number.

(43) "Work area" means a room or defined space in a room or open area where substances or mixtures are manufactured, handled, used, reacted, processed, packaged or repackaged, or transported and where employees are present. For the purposes of this section, each importer, manufacturer, industrial user or supplier shall designate a work area for each employee if no such designation now exists.

(44) "Workplace" means an establishment at one geographical location containing one or more work areas.

VIII. Miscellaneous

(hh) *Enforcement.*

To the extent and in the manner allowed by law, and for the purpose of determining compliance with this section, employees of OSHA, designated by OSHA, may enter the premises of any importer, manufacturer, industrial user, or supplier to take or require samples of the contents of any container. Pursuant to inspections to determine compliance with this section, the importer, manufacturer, industrial user, or supplier, whose premises are being inspected shall supply to any investigating OSHA employee, upon request, copies of any existing inventories of the substances and mixtures on the premises. These enforcement powers are in addition to OSHA's other enforcement powers which are not specified in this section.

(ii) *Compliance dates.*

(1)(i) Each manufacturer or importer of a substance or mixture who has two hundred and fifty or more employees shall comply with the provisions of this section as they apply to such substance or mixture within the following time frame:

(A) Regarding a substance, within one year of the effective date of this standard;

(B) Regarding a mixture, within two years of the effective date of this standard.

(ii) Each manufacturer or importer of a substance or mixture who has fewer than two hundred and fifty employees shall comply with the provisions of this section as they apply to such substance or mixture within the following time frame:

(A) Regarding a substance, within fifteen months of the effective date of this standard;

(B) Regarding a mixture, within twenty-seven months of the effective date of this standard.

(2) Each industrial user and supplier shall comply with the provisions of this section within the following time frame:

(i) Regarding a substance, within two years of the effective date of this standard;

(ii) Regarding a mixture, within three years of the effective date of this standard.

(jj) *Appendices.* The Appendices following this standard are mandatory unless otherwise stated.

(kk) *Effective dates.*

Appendix A—Hazard Determination Procedures

General

(1) A manufacturer or importer must evaluate each substance and mixture specified by paragraphs (d) and (e) of the standard for each of the Category A and Category B hazards listed in paragraph (gg)(22) of the standard. Appendix A describes the materials a manufacturer or importer must review, and the evaluative procedures a manufacturer or importer must follow, to determine whether a substance or mixture poses a particular Category A hazard. Appendix A also describes the materials a manufacturer or importer must review in considering whether a substance or mixture poses a particular Category B hazard. Generally, however, materials must be evaluated under the procedures and criteria of Appendix B to determine whether a particular Category B hazard exists.

(2) Unless a manufacturer or importer has hazard data or studies concerning a mixture as a whole and meeting the evaluative criteria of these Appendices, a mixture shall be deemed to pose the hazards of its hazardous constituent substances. For any particular hazard, available data and studies concerning a mixture as a whole meeting these criteria shall take precedence over conflicting data and studies concerning the constituent substances of the mixture.

(3) Hazard determinations may be undertaken individually or jointly by any group of manufacturers and importers.

(b) *Category A Hazard determinations.*

(1) To determine whether a substance or mixture poses a particular Category A hazard, a manufacturer or importer shall utilize the following materials:

(i) Any relevant data or statements contained in the National Library of Medicine's Toxicology Data Bank (TDB) file for a substance, or if there is no relevant information in the TDB, then any relevant information contained in a representative selection of standard reference works and documents published by the National Institute for Occupational Safety and Health.

(A) Standard reference works are textbooks and handbooks listed in the most recent compilation of "Sources Used to Prepare Toxicology Data Bank (TDB) Records" developed by the expert National Institutes of Health scientific peer review group responsible for evaluating information on TDB substances. A selection of standard reference works shall be considered representative if the selected references reflect all applicable techniques for measuring the Category A hazard being evaluated. Where more than one edition of a textbook or handbook is listed, the latest edition which discusses the hazard shall be used.

(B) Where a substance is not listed in TDB, the following NIOSH documents shall be reviewed: Criteria Documents; Special Hazard Reviews; Occupational Hazard Assessments; or Current Intelligence Bulletins.

For further information, contact: Publications Dissemination, DTS, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, Cincinnati, Ohio 45226.

(ii) The manufacturer may also use any other relevant data in evaluating a substance or mixture for a Category A hazard.

(2) In the event that the data or statements identified indicate inconsistent conclusions, e.g., categorization as both an extremely flammable and flammable liquid, the manufacturer or importer shall classify a substance or mixture in the greatest hazard category. Where the inconsistency involves the presence or absence of a hazard the manufacturer or importer shall classify the substance or mixture as a hazard.

(3) In evaluating statements or data, the manufacturer shall exercise sound scientific judgment. Statements or data indicating a hazard may be disregarded if the physical measurements on which they are based are shown to be incorrect.

(c) *Category B Hazard Determinations.*

(1) *Materials To Be Reviewed.* To determine whether a substance or mixture poses a particular Category B hazard, a manufacturer or importer shall review statements and data in the TDB. If the substance is not listed in TDB, the manufacturer or importer shall review all standard reference works and relevant NIOSH documents specified in paragraph (b)(1) of this Appendix. A determination that a substance or mixture does not pose a particular Category B hazard may not be based upon data or statements discovered through this initial review. However, a positive determination that a substance or mixture poses a particular Category B hazard may be based upon statements or data discovered through this review, without further evaluation for that hazard. If a manufacturer or importer chooses not to base a positive hazard determination upon data or statements in the TDB, standard reference works, and NIOSH documents then to determine whether a substance or mixture poses the particular Category B hazard in question, the manufacturer or importer shall:

(i) Review unpublished studies or data subject to the manufacturer's or importer's custody or control, or the custody or control of the manufacturer's or importer's employees, agents, and contractors; and

(ii) Conduct a literature search, including available back files, utilizing the following four (4) computerized files or commercial on-line files containing at least the equivalent information: Medline ®, Toxline ®, Cancerlit ®, and RTECS.

For further information on the data files cited contact: National Library of Medicine, 8600 Rockville Pike, Bethesda, Maryland 20209, Telephone: (301) 496–6193.

Data Files:

Medline ®: This data base contains references to biomedical journal articles published in the current, as well as the two (2) preceding years. Medline ® can also be used to update a search periodically. Coverage of previous periods (back to 1966) is provided by back files. An English abstract, if available, is frequently included.

Toxline ®: (Toxicology Information Online) contains a collection of references published since 1976 together with earlier references concerning mutagens and teratogens. Coverage of previous periods (in some cases, antedating 1965) is provided by Toxback. Almost all references have abstracts or indexing terms.

Cancerlit ®: A large data file concerned with various aspects of cancer. All references have English abstracts.

RTECS: (Registry of Toxic Effects of Chemical Substances, formerly the Toxic Substances List) is a compilation prepared by the National Institute for Occupational Safety and Health (NIOSH). There is no back file. RTECS contains acute and chronic toxicity data.

(2) *Search Parameters.* The literature search shall:

Use CAS number, chemical name, generic name, trade name and brand name to identify the toxicologic and epidemiologic literature for the substance. Additional search parameters may be specified by a manufacturer or importer, as necessary, to expedite the search performance.

(3) *Search Output.* The material identified in the literature search shall be obtained and used for hazard determinations by the party performing the evaluation, under the following conditions:

(i) In the case of material published entirely in English (including material with a foreign language summary), all such material shall be evaluated.

(ii) In the ase of material published entirely in a foreign language (including material with an English summary), such material shall be evaluated only if:

(A) The material is available for review by the manufacturer or importer as part of the National Library of Medicine inter-library loan program or any other inter-library loan program; and

(B) An English version of the summary indicates the possible existence of a regulated hazard not documented in the English literature.

(iii) Notwithstanding paragraphs (1) and (2), the manufacturer or importer has actual knowledge of the content of the foreign language material.

(4) Relevant unpublished studies and data, and relevant studies or data disclosed by a literature search, shall be evaluated as required by Appendix B.

(5) A review of unpublished studies and data, and a review of the materials covered by a literature search may not disclose evidence which meets the evaluative criteria of Appendix B demonstrating whether the substance or mixture poses the Category B hazard in question. In such cases, if the initial review of the TDB, or standard reference works and relevant NIOSH documents, disclosed or cited to relevant data or studies, these data or studies shall be evaluated as required by Appendix B.

(d) *Updating.* Following the initial evaluation of any substance or mixture for all Category A and Category B hazards, a manufacturer or importer shall remain current with the scientific

literature in a manner generally accepted by the scientific community.

Appendix B—Evaluation of Scientific Materials Relating to Category B Hazards

This Appendix describes how relevant unpublished data and studies and relevant material disclosed by a literature search is to be evaluated in determining whether a substance or mixture poses a Category B hazard. This Appendix is applicable both to evaluation of evidence concerning substances and mixtures as a whole. Substances regulated by 29 CFR Part 1910, Subpart Z are deemed to be hazardous without the need for an independent evaluation but must be evaluated to determine the particular hazard they pose.

(a) *Definitions*

(1) "Adequate and well-controlled study" means a study whose design and presentation incorporate principles that have been developed and recognized by the scientific community as essential to the production of valid scientific conclusions. A study which incorporates the following principles shall be considered "adequate and well-controlled" for the purpose(s) of this section:

(i) *Study subjects (Cases):* Study subjects shall constitute a representative sample from the source population. In the case of cross-sectional studies (see paragraph (3)(i) of this subsection of this Appendix) the study and comparison population are the same. This means that:

(1) The extent to which the study subjects represent the population from which they are drawn is documented.

(2) Although random selection of study cases is preferred, a systematic selection process which minimizes bias is acceptable.

(3) Selection and exclusion criteria are documented.

(ii) *Comparison subjects (Controls):* Comparison subjects shall constitute a representative sample from an appropriate comparison population. The term "appropriate comparison population" shall include populations used in studies utilizing matching techiques. This means that:

(1) The extent to which the comparison subjects represent the population from which they are drawn is documented.

(2) Although random selection of comparison cases is preferred, a systematic selection process which minimizes bias is acceptable. Where appropriate, an historical control is suitable for establishing that a substance or mixture is hazardous.

(3) The appropriateness of the control population is addressed.

(iii) *Data Collection.* The methods of data collection shall be fully described. This means that:

(1) The risk factors, including degree of exposure, are characterized.

(2) The diagnostic criteria for the health conditions are indicated.

(3) The steps taken to minimize observer bias in data collection–e.g., double-blind evaluation techniques, are documented.

(4) The potential sample biasing effect of differential response rates in study and comparison subjects is considered, where the situation arises.

(iv) *Analytic methods.* The analytic methods shall be identified precisely. This means that:

(1) Where differential response rates occur between study and comparison subjects, the method used to compensate for this differential is identified;

(2) Steps taken to identify observer bias are described;

(3) The use of appropriate methods to control confounding, e.g., matching or statistical techniques, such as blocking or covariance analysis, are documented; and

(4) The various quantitators of hypothesis testing, e.g., Type I and II error probabilities and one-tailed versus two-tailed tests, are specified.

(v) *Documentation.* The study shall provide sufficient documentation of results so as to permit adequate peer review.

(vi) *Animal studies.* In the case of paragraph (gg)(22)(xvii) of this regulation, other acute or chronic adverse health effects, the animal effects must be generally accepted as a model for the indicated human health effects.

(vii) Regardless of paragraphs (i)–(vi) of this definition of "adequate and well controlled," a study shall be considered "adequate and well-controlled" for the purposes of this section if the study has been published in a peer-reviewed journal in which the articles are published entirely in English (except for a foreign language summary), or the conclusions of the study have been substantially endorsed in standard reference works or NIOSH documents or material identified in the literature search (See Appendix A) or in other published material, by at least one (1) other independent qualified expert.

(2) "Case report" means, for the purposes of this section, a statistically uncontrolled report involving two or more cases which asserts a cause and effect relationship between exposure to a substance or mixture and the subsequent occurrence of adverse effects. At a minimum, to be acceptable for further evaluation under this Appendix, a "case report" must describe, at least qualitatively, the level and duration of exposure and specify the diagnostic criteria for the morbid condition described.

(3) "Epidemiological study" means a study employing one of the following sample designs:

(i) "Cross-sectional design" in which an evaluation is made of the differential prevalence of disease where individuals are classified by level of exposure and relevant characteristics and where neither disease nor exposure is selected for;

(ii) "Case-control design" in which an evaluation is made of the differential exposure to a substance or mixture for individuals who are initially selected according to the presence or absence of a specific disease or injury and relevant variables.

(iii) "Cohort design" in which an evaluation is made of the differential incidence of disease among two or more groups, the individuals of which are classified by level of exposure to a specific agent and relevant characteristics, each group being free of the outcome variable at the outset and followed over some period of time.

For purposes of this section, the term "cohort design" shall include "proportional mortality studies" in which the percent distribution of causes of death of a group exposed to a hazardous material is compared with that of an appropriate control group.

(4) "Peer-review" journal means a scientific journal which routinely distributes articles submitted for publication to one or more qualified experts whose judgment as to the quality of an article, including the appropriateness of its conclusions, is an important determinant in the journal's decision whether to publish the article.

(5) "Qualified expert" means a person who, because of his or her education, training, experience or a combination of these factors, is capable of evaluating and interpreting data on the hazards associated with exposure to, or of contact with, a substance or mixture.

(6) "Statistically significant" means a Type I error of 0.10 or less (significance level of 10 percent or less) for the particular statistic used for significance testing. The Type I error level may be based upon a one-or-two tailed significance test, at the investigator's discretion. In uncommon circumstances, the determination of a probability level in a particular study may be informal, e.g., the uniform occurrence of a tumor

following exposure which would otherwise be rarely encountered.

(b) *Ascertaining Hazardous Materials.* A substance or mixture shall be classified as a Category B hazard under paragraph (1) by an importer or manufacturer, if one or more of the following reports is found:

(1) A single adequate and well-controlled epidemiologic study demonstrates a statistically significant association between exposure to the substance or mixture and a covered hazard, and the conclusion that the hazard is the result of the exposure, in whole or in part, is accepted by any subgroup of experts qualified in epidemiology, biostatistics, clinical pharmacology or human genetics; or

(2) A single adequate and well-controlled laboratory experiment involving domestic or experimental mammals demonstrates a statistically significant relationship between exposure to the substance or mixture and a covered hazard, where the exposure is through routes of administration other than cavity instillation or implantation in any organ system and the conclusion that the hazard is the result of the exposure, in whole or in part, is accepted by a subgroup of experts qualified in biostatistics, pharmacology, physiology, toxicolity or genetics; or

(3) Case-reports involving a total of more than two individuals strongly suggest the conclusion that there is a cause and effect relationship, in whole or in part, between exposure to the substance or mixture and the subsequent occurrence of a covered hazard and the conclusion that such a relationship exists is accepted by a subgroup of experts qualified in the relevant scientific discipline.

(c) *Resolving a Material's Status Where Data or Analyses Are Inconsistent.*

In determining whether a substance or mixture is a Category B hazard, the following rules of data construction for evaluating studies shall apply:

(1) When comparing studies of the same type (human or animal) which yield conflicting results, the importer or manufacturer shall consider a substance or mixture as hazardous if a subgroup of qualified experts, considering the available studies, would conclude that the substance or mixture is hazardous. Studies which yield differing estimates of disease, all of which are greater than zero, shall not be considered in conflict;

(2) When considering inconsistent studies of different types (human and animal), the importer or manufacturer shall rely upon human data if the human data indicate a greater hazard than the animal data.

(3) The importer or manufacturer may rely upon human data if such data indicate a lesser hazard in humans than in animals, provided that the group of exposed human subjects was large enough for an increase in hazard incidence or prevalence (whichever statistic was used in the study) of 25% above that in controls not exposed to that substance to have been detected 80% of the time and the studies meet the criteria of subsection (a) of this Appendix. However, negative case reports in humans, i.e., no hazard on exposure, usually will not negate positive animal data.

(4) Where alternative analytic statistical techniques produce inconsistent results in terms of statistical significance, the study shall be considered to demonstrate statistical significance, provided that the alternative techniques demonstrating significance is acceptable to a subgroup of experts qualified in epidemiologic or toxicologic study methods.

(5) An importer or manufacturer may conclude that a mixture dos not present the same hazards as a hazardous constituent substance, provided that the group of animal or human subjects exposd to the mixture was large enough so that an increase in hazard incidence or prevalence equal to that established for the substance or 25% above that in unexposed controls, whichever is the lesser, would have been detected 80% of the time and the studies meet the criteria of subsection (a) of this Appendix.

(d) *Creation of a Rebuttable Presumption by Expert Opinion.* The determination that a subgroup of qualified experts accepts the conclusions of a study may be evidenced by informal memos, correspondence, evaluation or reference to published material such as the references, handbooks or NIOSH materials (See Appendix A). When the conclusions of a study have been substantially endorsed by at least one qualified independent expert, i.e., an expert not an author of the original study or a collaborator of any of the authors at the time of the endorsement, the conclusions of the study shall be rebuttably presumed to be acceptable to a subgroup of qualified experts, in the absence of strong evidence to the contrary.

(e) *Delabeling.* A determination by an importer or manufacturer that a substance or mixture is hazardous may be withdrawn by that importer or manufacturer if:

(1) Subsequent to the hazard determination, the methodology of the study or studies upon which the hazard determination is based are found to be critically flawed or inappropriate, i.e., the association originally observed is subsequently shown to be due to sample bias, observer bias or a confounding variable; or

(2) The availability of a negative adequate and well-controlled study or studies results in a revision of the opinion of qualified experts such that no subgroup of experts, considering all the relevant evidence, accepts the association or relationship between exposure to the substance or mixture and the covered hazard.

Appendix C—Hazard Warnings Information

Introduction

This APPENDIX specifies the hazard warnings for hazardous substances and mixtures. In using this APPENDIX, the following rules apply in communicating hazard warnings for mixtures:

1. Hazard warnings must appear for hazardous mixtures.

2. Hazard warnings must appear for hazardous constituent substances of a mixture where such substances pose hazards for which the mixture as a whole was not evaluated.

3. The priority of hazard warnings as set out in this Appendix is not affected by whether a hazard attaches to a mixture as a whole, or to one of its constituent substances.

(a) *Label Elements for Hazardous Warnings—Summary of Requirements.*

A hazard warning must include the following elements:

(1) Signal word, as prescribed in paragraph (b)(1) of this Appendix;

(2) The word POISON and the skull and crossbones symbol for highly toxic materials, as prescribed in paragraph (b)(2) of this Appendix;

(3) Statement of hazards, as prescribed in paragraph (b)(3) of this Appendix;

(4) Precautionary statements, as prescribed in paragraph (b)(4) of this Appendix;

(5) Additional labels elements, if appropriate, or specified in subsection (c) of this Appendix.

(6) Hazard warning elements (1)–(3) must be cross-referenced to the CAS number and common name of the substance or common name of the mixture producing the hazard.

(7) In the event that precautionary statements or additional label elements are contradictory in the case of mixture, the manufacturer or importer shall

resolve the contradiction using sound scientific judgment.

(b) *Label Elements—Description.*

(1) *Signal Word.* If a substance or mixture has more than one hazard a hazard warning label shall include only the signal word (DANGER!, WARNING!, OR CAUTION!) that corresponds to the category of its most severe hazard.

(2) *The Word POISON and the Skull and Crossbones Symbol.* A hazard warning for a highly toxic material must include the word POISON and the skull and crossbones symbol. On a hazard warning label, the word POISON and the symbol, in any color, must appear on a background of distinctly contrasting color. The symbol must appear in immediate proximity to the word POISON. Use the word POISON and the symbol, in addition to, and not in place of, the signal word DANGER!

(3) *Statement of Hazards.* A hazard warning label must include the statement of hazards prescribed in Table 1 for Category A hazards and Table 2 for Category B hazards for the appropriate hazard class. If the hazard may have a delayed onset, the hazard warning shall also indicate this. Subsection (d) of this APPENDIX lists examples of useful statements of hazard which may be used in addition to those mandated by Tables 1 and 2 of this APPENDIX. If a substance or mixture has more than one hazard, its hazard warning must include a statement of hazard of each hazard. If a substance or mixture has more than one hazard, statements of hazard for which the signal word "DANGER!" is required, together with the signal word, must precede statements of hazard for which the signal word "WARNING! or CAUTION!" is required, and statements of hazard for which the signal word "WARNING!" is required together with the signal word, must precede statements of hazard for which the signal word "CAUTION!" is required.

(4) *Precautionary Statements.* A hazard warning must describe appropriate precautionary measures (such as "Keep away from heat, sparks, or open flames" or "Wear rubber gloves") to avoid injury as a substance or mixture is used in the workplace. If a substance or mixture has more than one hazard, its hazard warning must include appropriate precautionary statements for each hazard. If precautionary statements can be combined for different classes of hazards, eliminate any redundant phrases.

Table I.—*Hazard warning statements for Category A hazards*

Class of hazard	Signal word	Statement of hazard
Corrosive:		
Eye	Danger	Corrosive: Causes severe eye burns.
Eye and skin	do	Corrosive: Causes severe eye and skin burns.
Dangerously reactive material:		
Explosive	do	Explosive.
Water-reactive	do	Dangerous when wet: Reacts violently with water.
Organic peroxide	do	May form explosive organic peroxides.
Extremely flammable liquid.	do	Extremely flammable.
Pyrophoric material	do	Extremely flammable: Catches fire if exposed to air.
Strong oxidizer	do	Strong oxidizer: Contact with other material may cause fire.
Flammable material	Warning	Flammable.
Pressure-generating material.	do	May generate dangerous pressure.
Compressed gas	Caution	Contents under pressure.
Combustible liquid	do	Combustible.

Table 2.—*Hazard warning statements for Category B hazards*

Class of hazard	Signal word	Statement of hazard
Toxic:		
By inhalation	Warning	Toxic: May be fatal if inhaled.
By absorption	do	Toxic: May be fatal if absorbed through skin.
By ingestion	do	Toxic: May be fatal if swallowed.
Highly toxic:		
By inhalation	Danger! Poison.	Highly toxic: Fatal if inhaled.
By absorption	do	Highly toxic: Fatal if absorbed through skin.
By ingestion	do	Highly toxic: Fatal if swallowed.
Endangers human life.	do	Highly toxic: May be fatal if inhaled, absorbed, or swallowed.
Carcinogens	Danger	May cause (optional: Organ/system) cancer.
Reproductive toxins	do	May cause birth defects. May cause reproductive problems.
Irritant:		
Eye	Warning	Irritant: Causes eye irritation.
Eye and skin	do	Irritant: Causes eye and skin irritation.
Lung	do	Irritant: Causes lung (chest) irritation.
Sensitizer:		
Lungs	do	Sensitizer: Causes respiratory reaction.
Skin	do	Sensitizer: Causes allergic skin reaction.
Other adverse health effects.		Exposure may cause (specify disease(s), sign(s) or symptom(s)).
Includes mental or behavior alterations.	Warning	Or may cause acute or chronic health effects.

(c) *Additional Label Elements.*

(1) A hazard warning or other listing must include the following elements, if they are appropriate:

(i) Antidotes, as prescribed in paragraph (2); or

(ii) Instructions in case of fire, spill, or leak, as prescribed in paragraph (3).

(iii) Instructions for container handling and storage, as prescribed in paragraph (4).

(2) *Antidotes.* If there is any appropriate antidote that is generally available and may be administered by a layman, the hazard warning must include it.

(3) *Instructions in Case of Fire, Spill, or Leak.* If there are any special instructions for confining and extinguishing fires and for cleaning up spills or leaks, the hazard warning must include them.

(4) *Instructions for Container Handling and Storage.* If there are any special instructions for container handling and storage, the hazard warning must include them.

(5) *Optional Additional Information.* A hazard warning may include additional hazard warning information that is not required by this Part, provided that the additional information does not contradict or detract from the required information. Terms such as "safe," "non-toxic," or "harmless" must not be used on a hazard warning.

(d) *Useful Phrases for Category A and Category B Hazard Warnings.*

This subsection of the APPENDIX contains a listing of additional warning phrases that a manufacturer or importer of a hazardous substance or mixture may use together with the required hazard warning. The Agency is providing this subsection of this APPENDIX simply as a listing of useful warning phrases. OSHA does not require that a manufacturer or importer of a hazardous substance or mixture use any of these additional phrases with a hazard warning.

(a) *Statements of Hazard.*

(1) *Liberates Gas.* Liberates Poisonous Gas. Fire Liberates Poisonous Gas. Contact With Acid Liberates Poisonous Gas. Contact With Water or Acid Liberates Poisonous and Flammable Hydrogen Sulfide Gas.

Spills Liberates Dangerous Gas. Contact With Water or Moist Air Liberates Irritating Gas. Liberates Heavy Gas Which May Cause Suffocation.

(2) *Fire Hazard.* Contact With Water May Cause Flash Fire. May Catch Fire If Allowed To Become Damp. Spills May Cause Fire. Heat, Shock, or Contact With Other Materials May Cause Fire. Contact With Other Materials May Cause Fire, Especially if Heated Reacts Violently With Water to Liberate and Ignite Hydrogen Gas. Powerful Oxidizer.

May Form Flammable Dust-Air Mixtures.

(3) *Explosive.* Heat, Shock, or Contact With Other Materials May Cause Explosion.

Contact With Other Materials May Cause Explosion, Especially If Heated.

May Form Explosive Peroxides. Forms Shock-Sensitive Mixtures With Certain Other Materials. May Explode if Water Content is 10 percent or Below.

(4) *Pressure Hazard.* Contamination May Result in Buildup of Dangerous Pressure. Liquid (GAS) (VAPOR) Under Pressure. Extremely Hazardous Liquid (GAS) (VAPOR) Under Pressure.

(5) *Miscellaneous.* Cannot Be Made Nonpoisonous.

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Friday
January 16, 1981

Part XII

Department of the Interior

Bureau of Land Management

Draft Wilderness Management Policy; Opening of Public Comment Period

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Draft Wilderness Management Policy

AGENCY: Bureau of Land Management, Interior.

ACTION: Draft wilderness management policy and opening of public comment period.

SUMMARY: The Draft Wilderness Management Policy describes how the Bureau of Land Management (BLM) proposes to manage lands administered by the BLM which are designated by Congress as part of the National Wilderness Preservation System. The BLM's Wilderness Management Policy will apply to public lands specifically designated as wilderness by an Act of Congress. The document closely parallels the existing wilderness management policy of the U.S. Forest Service.

DATES: Comments by April 1, 1981.

ADDRESS: Comments or suggestions should be sent to: Director (430), Bureau of Land Management, 1800 C Street N.W., Washington, D.C. 20240. Comments will be available in Room 5600 of the above address during regular business hours (7:45 a.m. to 4:15 p.m.) Monday through Friday.

FOR FURTHER INFORMATION CONTACT: David E. Porter, Division of Wilderness and Environmental Areas, (202) 343-6064. Requests for copies of this draft should be addressed to: David E. Porter, Division of Wilderness and Environmental Areas (430), Bureau of Land Management, 1800 C Street NW, Washington, D.C. 20240. Copies will also be available from the Bureau of Land Management State Directors in the Western States.

SUPPLEMENTARY INFORMATION: Publication of the Draft Wilderness Management Policy opens a 75-day public comment period beginning January 16, 1981, and closing April 1, 1981. Copies of this will be available from the Bureau of Land Management in approximately two weeks. To compensate for this delay, a 75-day, rather than a 60-day, public comment period is provided. During this time, the public is encouraged to comment on the policy, standards and guidelines proposed in the draft.

Dated: January 12, 1981.

Ed Hastey,

Associate Director.

Draft—Wilderness Management Policy

January 16, 1981.

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Chapter I—Introduction

I. A. The Purpose of This Document

The purpose of this document is to describe how the Bureau of land Management (BLM) proposes to manage lands administered by the BLM which are designated by Congress as part of the National Wilderness Preservation System. This is a draft document which is being published for public review and comment. The document has been written to parallel closely the existing wilderness management policy of the U.S. Forest Service, as published in the Forest Service Manual, because the same statutory direction applies to both agencies.

At present, the Bureau of Land Management administers no wilderness areas. the Bureau is developing a Wilderness Management Policy at this time for the following reasons: (1) to inform BLM field officials, Congress, and the public as to how BLM will manage wilderness areas, so this can be taken into account during BLM wilderness studies and during deliberations on wilderness recommendations affecting BLM public lands, and (2) to provide guidance ready for BLM personnel to use in managing future BLM wilderness areas at such time as Congress designates them.

BLM's Wilderness Management Policy will apply to public lands administered by BLM that have been specifically designated as wilderness by an Act of Congress. The Wilderness Management Policy has a different purpose than BLM's *Interim Management Policy and Guideline for Lands Under Wilderness Review*. The *Interim* Management Policy is an interim measure governing lands under wilderness review. The Wilderness Management Policy governs lands designated by Congress as wilderness. (Appendix C of this document summarizes BLM's wilderness review process.) If Congress designates a wilderness study area as wilderness, the Interim Management Policy ceases to apply, and instead the Wilderness Management Policy applies thereafter. If Congress decides that a particular wilderness study area will *not* be designated as wilderness, the Interim Management Policy ceases to apply, and instead the area is managed as ordinary public lands, with the uses and activities indicated in the pertinent BLM planning documents for the areas.

B. Mandate From Congress

The BLM wilderness review program stems from Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA). In FLPMA, Congress gave BLM its first unified, comprehensive mandate on how the public lands should be managed. The law establishes a policy of generally retaining the public lands in Federal ownership, and it directs the BLM to manage them under principles of multiple use and sustained yield. The BLM is to prepare an inventory of the public lands and their resources, including identification of areas having wilderness characteristics. Management decisions for the public lands are to be made through a land-use planning process that considers all potential uses of each land area. All public lands are to be managed so as to prevent unnecessary or undue degradation of the lands.

Under FLPMA, wilderness preservation is part of BLM's multiple-use mandate, and wilderness values are recognized as part of the spectrum of resource values and uses to be considered in the inventory and in the land-use planning process. Section 603 of FLPMA specifically directs the BLM, for the first time, to carry out a wilderness review of the public lands. (The complete text of section 603 appears in Appendix A of this

document. The BLM's wilderness review process implementing section 603 is summarized in Appendix C.)

Section 603(c) of FLPMA tells the Bureau how to manage public lands designated as wilderness, in these words:

> Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The Wilderness Act of 1964 contains a number of provisions addressing the administration and use of national forest wilderness areas. Those most pertinent to BLM wilderness management are cited in the following paragraphs. Section 2(a) says:

> . . . it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefit of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally-owned areas designated by Congress as "wilderness areas," and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness. . . .

Section 4 of the Wilderness Act is devoted to the use of wilderness areas. Section 4(b) says:

> Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

Section 4(c) prohibits certain activities, in these words:

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Sections 4(c), 4(d), and 5 provide special exceptions to the prohibitions in section 4(c) by providing for the following activities:

- Existing private rights.
- Measures required in emergencies involving the health and safety of persons within the area.
- Activities and structures that are the minimum necessary for the administration of the area as wilderness.
- Use of aircraft and motorboats, where already established.
- Measures necessary in the control of fire, insects, and diseases.
- Any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if carried on in a manner compatible with the preservation of the wilderness environment. (This includes mineral surveys conducted on a planned, recurring basis by the U.S. Geological Survey and Bureau of Mines.)
- Continued application of the U.S. mining and mineral leasing laws until December 31, 1983.
- Water resource developments may be authorized by the President where he determines that such use will better serve the interests of the United States and the people thereof than will its denial.
- Livestock grazing, where already established.
- Commercial services necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.
- Adequate access to surrounded State-owned and privately-owned lands, or such lands shall be exchanged for Federally-owned land.
- Ingress and egress to surrounded valid mining claims and other valid occupancies.

Section 5(c) provides land acquisition authority, in these words:

> Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this Act as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

In addition to the basic management authority contained in the Wilderness Act, management provisions may appear in the legislation establishing each wilderness area. Standard provisions included in most wilderness legislation make clear that the effective date of the new law will apply wherever the Wilderness Act's management provisions mentioned the effective date of the Wilderness Act, and, for areas administered by the Department of the Interior, make clear that the Secretary of the Interior will continue to administer the areas.

In some cases, special provisions have been incorporated into the legislation (e.g., special mining area in the recently enacted River of No Return Wilderness in Idaho). These provisions override the general management provisions of the Wilderness Act and must be regarded as specific direction for management of the area in question.

Congress has subsequently commented on wilderness management in House and Senate committee reports and conference reports accompanying wilderness legislation. These reports are part of the legislative history of the laws they accompany and can be helpful in determining the intent of Congress where the language in the law itself is unclear. Although reports on wilderness laws passed after 1964 do not become part of the legislative history of the Wilderness Act, they nonetheless indicate the interpretation given to the Wilderness Act by the congressional committees during their consideration of the subsequent legislation. Such report language addresses a variety of subjects. For example, guidelines for administering grazing use in wilderness areas appear in the Conference Report (House Report 96–838) on the Central Idaho Wilderness Act of 1980 (P.L. 96–312). House Report 95–540 on the Endangered American Wilderness Act of 1978 discusses the interpretation of the Wilderness Act as it relates to such uses and activities as: hunting and fishing; trails, bridges, and trail signs; control of fire, insects, and diseases; cabins and sanitary facilities; shelters and campsite facilities; and weather modification and special equipment.

The provisions of FLPMA, the Wilderness Act, and future Acts of Congress designating specific BLM areas as wilderness are BLM's mandates on the management of wilderness areas. All activities in wilderness areas must be carried out in conformance with these mandates.

C. Meaning of the Congressional Mandate

The congressional mandate contains three basic concepts which form the basis for BLM's Wilderness Management Policy.

- *Wilderness Preservation Concept:* Congress has directed the BLM to perpetuate the wilderness resource by managing wilderness areas so that their wilderness character is preserved unimpaired.

• *Wilderness Use Concept:* Congress has directed the BLM to provide opportunities for the public to use wilderness areas for recreational, scenic, scientific, educational, conservation, and historical purposes in a manner so as to leave the wilderness area unimpaired for future use and enjoyment as wilderness.

• *Nonconforming Use Concept:* Congress has directed the BLM to accommodate in wilderness areas certain activities, existing uses, and private rights which are generally nonconforming to wilderness preservation and wilderness use.

The meaning of each of these concepts is discussed below.

1. *Wilderness Preservation Concept.* The Wilderness Act directs that wilderness areas be managed to provide for "the preservation of their wilderness character." The factors which make up an area's wilderness character are spelled out in the Wilderness Act's definition of wilderness (section 2(c)). These factors are referred to in FLPMA collectively as "wilderness characteristics," and they fall into three broad categories:

a. Naturalness—A wilderness area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." Wilderness areas must be managed to ensure that this description remains accurate.

b. Outstanding Opportunities for Solitude or a Primitive and Unconfined Type of Recreation—A wilderness area "has outstanding opportunities for solitude or a primitive and unconfined type of recreation." Solitude is defined as (1) the state of being alone or remote from habitations; isolation; (2) a lonely, unfrequented or secluded place. The emphasis is on the opportunities a person has to avoid the sights, sounds, and evidence of other people within a particular area, rather than on opportunities for solitude in comparison to habitations of man. Primitive and unconfined types of recreation are defined as those activities that provide dispersed, undeveloped recreation which do not require facilities or motorized equipment. In most cases, opportunities for solitude and primitive recreation go hand-in-hand, and both are dependent on naturalness. Wilderness areas must be managed to insure that these opportunities are not impaired.

c. Special Features—Congress specified that wilderness areas "may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." These are optional wilderness characteristics; an area may meet the Wilderness Act's definition of wilderness without having these special features, but they are usually present in wilderness areas, and in some cases they may be a prime reason for wilderness designation. Also, these features may contribute to an area's opportunities for primitive recreation. Wilderness areas must be managed to ensure that these features are not impaired.

In order to preserve these wilderness characteristics in perpetuity as Congress directed, the management of BLM-administered wilderness must be based on a *principle of nondegradation.* Under this principle, the central thrust of BLM wilderness management is to prevent degradation of natural conditions, opportunities for solitude or primitive recreation, and special features.

It is recognized that there is often variation in the level of naturalness, solitude, types of primitive recreation and special features present within a wilderness area—or between different wilderness areas. The principle of nondegradation means that wilderness areas will be managed to provide for the protection and perpetuation of the values of the wilderness resource and prevent deterioration caused by other resource activities or by visitor use, and, when necessary, to restore deteriorated sites to an acceptable condition. (Of course, some of the nonconforming uses authorized by Congress are exempt from the nondegradation principle, as is explained below.)

Most uses will result in some change in the condition of the wilderness resource. Some uses cause little or no change, while others have the potential for serious change. Therefore, it is necessary to define the acceptable level of change. This must be established using the conditions prevailing in each wilderness at the time of congressional designation as a benchmark, determining what human-caused changes can be allowed without causing degradation and what measures can be taken to bring situations below the level of acceptable change back within an acceptable level. This may influence the ways in which recreational, scenic, scientific, educational, conservation, and historical uses are done in the area, so their impact on the wilderness resource can be kept within the acceptable level of change.

In the case of some of the nonconforming uses, such as mining, provided for by Congress in the Wilderness Act and subsequent legislation, the condition of the wilderness resource may be degraded as a result of an allowed use; the nondegradation principle does not apply. However, in such cases, the principle of nondegradation and the acceptable level of change should be used as an analysis tool for the reasonable mitigation of impacts, consistent with the applicant's exercise of the allowed use, and as a standard for determining the condition to which the area will be returned where and when rehabilitation is appropriate.

In this document, the principle of nondegradation is reflected in the policies and guidelines for specific activities.

Two equivalent terms used many times in this document reflect the wilderness preservation concept—"preservation of wilderness character" and "protection of the wilderness resource."

2. Wilderness Use Concept. Section 4(b) of the Wilderness Act provides fundamental guidance on how wilderness areas shall be used, in these words:

> Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in the Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

Wilderness areas are thus open to use and provide a variety of benefits to society. Use might be "on-site," taking direct advantage of the multiple resources of the area, or the use and benefits may be derived "off-site," such as through enjoyment of the scenery at a distance from a nearby highway, through indirect benefits from the area's resources (i.e., water quality, wildlife, etc.), or just the knowledge that the area exists.

There is a limit to the extent to which such uses as recreation and education may take place within wilderness, because the Wilderness Act also says that they must occur in a manner so as to leave the wilderness unimpaired for future use and enjoyment as wilderness. Provision may be made for recreational, scenic, scientific, educational, conservation, and historical use of wilderness areas in ways that do not jeopardize the conditions of naturalness, the opportunities for solitude or a primitive and unconfirmed type of recreation, or the special features that existed at the time an area was designated as wilderness by Congress. All public use will be administered to ensure that the wilderness resource is kept unimpaired.

Public use for recreation purposes is generally a prevalent use of wilderness. However, the Wilderness Act makes it clear that recreation is only one of the purposes of the National Wilderness Preservation System. Sometimes there are places within wilderness where particularly sensitive values—such as colonial bird nesting sites—may dictate that recreation activities be restricted or entirely excluded. The recreation-use capacity, based on social and ecological elements, will be established for each wilderness area, and will be considered in determining how much recreational use to allow.

A second factor which may limit the use of wilderness has to do with the nonconforming use provisions of the Wilderness Act and subsequent legislation. Permitted activities such as mining or grazing may displace any of the public purposes listed in section 4(b) either temporarily or permanently.

3. *Nonconforming But Accepted Use Concept.* Congress specially provided for certain activities and existing uses which otherwise would have been prohibited in wilderness areas under the general management provisions of section 2(a), 4(b) and 4(c). For a complete list of these nonconforming but accepted activities, refer to section I.B.; generally they are: existing private rights; aircraft and motorboats; control of fire, insects, and diseases; gathering of resource information; mining; grazing; water resource development; commercial recreation services; and access to non-Federal inholdings.

FLPMA directs that all uses of the public lands be conducted so as to prevent unnecessary or undue degradation of the lands. In wilderness areas, this means that the BLM must manage the nonconforming but accepted uses described above so as to prevent unnecessary or undue degradation of the area's wilderness character, insofar as is consistent with the congressional mandate for the particular use in question.

II. Management Policy for BLM-Administered Wilderness

The policy guidance in this chapter is followed in Chapter III by guidelines for specific activities, based on these policies and on their interaction with other applicable policies for the management of public lands.

No policy document can address every potential situation. Managers must use their best judgment in applying these policies and guidelines to particular situations. In cases not covered by specific guidance, managers will resolve questions by testing alternative courses of action against the policies in this chapter to arrive at the alternative that is most consistent with the policy as a whole.

A. General Policy

1. The Department of the Interior's policy is, except as stated in paragraph 2 below, to manage wilderness areas under the administration of the Bureau of Land Management so as to preserve their wilderness character, and to manage them for the use and enjoyment of the American people in a manner that will leave them unimpaired for future use and enjoyment as wilderness. The wilderness areas will be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

2. The Department's policy is to allow the nonconforming but accepted uses specifically permitted in wilderness areas by the Wilderness Act and subsequent laws in a manner that will prevent unnecessary or undue degradation of the area's wilderness character.

3. The Department's policy is to manage BLM wilderness areas consistent with the policies above so as to augment multiple use management of adjacent and nearby lands through protection of watersheds and water yield, wildlife habitat, natural plant communities, and similar natural values.

B. Specific Policy Guidance

1. *Preservation of Wilderness Character.* BLM wilderness areas will be managed so as to be affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; so as to maintain the area's outstanding opportunities for solitude or primitive and unconfined recreation; and so as to protect any ecological, geological, or other features of scientific, educational, scenic, or historical value which the area may contain.

a. *Naturalness.* BLM will foster a natural distribution of native species of wildlife, fish, and plants by ensuring that natural ecosystems and ecological processes continue to function naturally. BLM will work to prevent the extinction by human causes of plants and animals found in the areas. BLM will minimize human influence on wildlife populations. Sport hunting, fishing, and trapping will continue as authorized by State law, when carried out in a manner consistent with preservation of an area's wilderness character.

The BLM will allow fire, insects, and diseases to play a natural role in the wilderness ecosystem, except where these activities threaten human life, property, or adjacent nonwilderness lands, or where these would result in unacceptable damage to the wilderness resource. (The guidelines in Chapter III will indicate some types of unacceptable damage.)

The BLM will keep watersheds, water bodies, water quality, and soils in a natural condition and will allow associated ecological processes previously altered by human influences to return to their natural condition.

The level of acceptable change will be defined in the wilderness management plan for each wilderness area, and the BLM will, at a minimum, endeavor to restore those sites which have dropped below this level.

b. *Solitude.* BLM will maintain and enhance the area's outstanding opportunities for solitude by providing natural settings with few reminders of human activity or civilization.

c. *Special Features.* BLM will maintain unimpaired the ecological, geological, and other features of scientific, educational, scenic, or historical value found in BLM wilderness areas.

2. *Visitor Use.* BLM wilderness areas will be managed to provide for their use and enjoyment in ways that are consistent with preservation of their wilderness character and that will leave them unimpaired for future use and enjoyment as wilderness.

Visitor use may be related to any of the following public purposes: recreational, scenic, scientific, educational, conservation, and historical use.

Visitor use facilities may be installed if they are the minimum necessary for the health and safety of wilderness visitors or for the protection of the wilderness resource. (See also "minimum tool," in section B.5. below.) facilities that are solely for the convenience of the visitor are not compatible with preservation of wilderness character and therefore will not be provided in wilderness areas.

The recreation-use capacity of the wilderness area will be determined, and will be used by managers to anticipate and avert degradation of the area's wilderness character.

If visitor use threatens to impair the area's wilderness character, managers will limit the threatening use to prevent impairment. Methods of reducing visitor's impact, such as low-impact camping techniques, will be preferred over outright limitations on visitor use. In case of conflict between visitor uses that depend upon a wilderness setting and those that do not, the uses dependent upon a wilderness setting will be favored.

Visitor use in wilderness involves certain risks to the visitor as a consequence of isolation from the conveniences of a technological world. The visitor accepts these risks in entering a wilderness area. In emergencies involving the health and safety of persons within the area, managers will take appropriate measures, such as search and rescue operations.

3. *Nonconforming Uses.* a. Valid Existing Rights. Private rights existing as of the date an area was designated as wilderness will be recognized. In some cases, such rights may involve activities addressed elsewhere in this document under standards prescribed by the Wilderness Act. (One example of this is valid mining claims, addressed in section (j).) Valid existing rights in situations not covered by these policies will be considered by the BLM on a case-by-case basis, in consultation with the Regional Solicitor, to determine the nature of the rights and the extent to which the BLM must regulate the exercise of those rights pursuant to the Wilderness Act and other laws.

b. *Aircraft and Motorboats.* Use of aircraft or motorboats may be permitted to continue in wilderness areas where such uses were established prior to the date the area entered the National Wilderness Preservation System. Such use will be monitored on a regular basis to determine if its continuation is appropriate. Use may be regulated as necessary to protect resources in the area.

c. *Control of Fires, Insects, and Diseases.* Where fire, insects and diseases threaten human life, property, or resources on adjacent nonwilderness lands, or where they would cause unacceptable damage to the wilderness resource, measures may be taken as necessary to control them. Allowable actions will be specified in the wilderness management plan for each wilderness area.

d. *Gathering Information About Resources.* Any activity, including mineral prospecting, for the purpose of gathering information about natural resources in wilderness, will be permitted provided it is carried on in a manner compatible with the preservation of the wilderness resource. (This section does not affect mineral prospecting activities conducted under the mining laws, which are covered in section (h) below. The Wilderness Act extends the mining laws to wilderness areas administered by BLM or the U.S. Forest Service until January 1, 1984.)

(1) No form of overland mechanical transport may be used in connection with prospecting for minerals or any activity for the purpose of gathering information about individual resources, unless approved by the BLM.

(2) Any person desiring to use motorized equipment, to land aircraft, or to conduct mineral prospecting or for other purposes is required to notify the BLM in writing. Approval documents will provide for the protection of public land resources, including wilderness values, protection of the public, and restoration of disturbed areas. Performance bonds may be required.

e. *Proposed Water Resource Facilities.* If the President authorizes new water resource facilities or activities, pursuant to section 4(d)(4)(1) of the Wilderness Act, the BLM will manage those authorized operations to prevent unnecessary or undue degradation of the area's wilderness character. (Existing water resource facilities are discussed in (f) below, and water facilities for livestock grazing are discussed in (g) below.)

f. *Existing Water Resource Facilities.* Some wilderness areas may contain minor water resource facilities that were found to be substantially unnoticeable in the area. If such structures are present and were explicitly recognized by Congress as being acceptable in a specific wilderness, they may be operated and maintained to keep them in an effective, usable condition. Maintenance may not change the location, size, or type of the facility, or increase the storage capacity of a reservoir.

g. *Livestock Grazing.* Grazing of livestock, where established prior to the effective date of the Act designating the area as wilderness, shall be permitted to continue subject to the BLM grazing regulations 43 CFR 4100. Existing grazing may include not only the utilization of the forage resource, but also the use and maintenance of livestock management improvements and facilities associated with the grazing activity at the time of designation and which are in compliance with an approved Allotment Management Plan.

Congressional guidelines regarding "Grazing in National Forest Wilderness Areas," published in House Report 96–1126, dated June 24, 1980, will be implemented in all BLM-administered wilderness with pre-existing grazing. These guidelines will be applied using the normal planning and environmental assessment process and will be integrated into all management plans for the wilderness area.

h. *Minerals Management.* Until December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall extend to BLM-administered wilderness areas to the same extent as applicable prior to the date the wilderness was incorporated into the National Wilderness Preservation System.

(1) *Mining Claims.* Holders of unpatented mining claims validly established on any BLM-administered wilderness prior to inclusion of such unit in the National Wilderness Preservation System are accorded the rights provided by the United States mining laws as then applicable to public land involved. Persons prospecting or locating mining claims in BLM-administered wilderness on or after the date on which the said unit was included in the National Wilderness Preservation System are accorded similar rights subject to the provisions of the Wilderness Act and subsequent establishing legislation. All claimants must comply with reasonable conditions for the protection of resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment of its wilderness character.

Timber on mining claims within BLM-administered wilderness may be cut only for the actual development of the claim or uses reasonably incident thereto. Any severance or removal of timber, other than that necessary to provide clearance, shall be in accordance with sound principles of forest management and shall be done in such a manner as to minimize the adverse effect on the wilderness resource. In the development and operation of mining claims, claimants will be required to prevent erosion and the obstruction, pollution, or siltation of streams, lakes, or springs or deterioration of the land.

A bond as prescribed in 43 CFR 3809.1–9 may be required. All reasonable measures will be required to reclaim disturbed lands as soon as feasible after operations cease, and in every case needed work will be accomplished within one year after operations cease, unless provided otherwise by the BLM. Whenever possible and feasible the objectives of reclamation shall be to restore the surface as nearly as possible to its original conformation. Where such measures are impractical or impossible, the objective shall be to provide for the maximum achievable slope stability. Reclamation shall in cases include revegetation where feasible and practical. If revegetation by natural means will not occur in time to prevent serious soil loss or other damage to wilderness values, revegetation by planting may be required, with

preference given to the use of native species.

If an application for patent has been filed but not acted upon when the requirements of the immediately preceding paragraph would normally be invoked, the requirements will be suspended while the patent application is under consideration. However, those requirements for the prevention of erosion and pollution, siltation or obstruction of streams, lakes, or springs or deterioration of the land will continue to be observed.

The title to timber on patented mining claims validly established after the land was included in the National Wilderness Preservation System will remain in the United States, subject to a right of the patentee to cut and use timber. The patentee may cut and use as much of the mature timber as is needed in the extraction, removal and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available. The cutting shall comply with the requirements for sound principles of forest management as set forth in stipulations issued by the BLM.

In the development and operation of mining claims, claimants will be required to prevent unnecessary or undue degradation of the land.

(2) *Mineral Leasing.* Authority to issue mineral leases in wilderness is reserved to the Director. The Director's decision to issue leases will be based on an evaluation of all environmental and land use values, alternatives for operations, and mineral values.

(3) *Stipulations.* Reasonable stipulations for the protection of the wilderness character of the land will be incorporated into mineral leases, permits, and licenses covering lands within BLM-administered wilderness. Stipulations will be consistent with the use of the land for purposes for which they are leased, permitted, or licensed.

(4) *Common Varieties.* Permits shall not be issued for the removal of mineral materials commonly known as common varieties under the Materials Act of July 31, 1947, as amended and supplemented.

(5) *Withdrawal.* Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated as wilderness are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing, unless Congress specifically provides otherwise in the law designating the area as part of the National Wilderness Preservation System.

i. *Commercal Services.* Commercial services such as those provided by packers, outfitters, and guides may be provided within wilderness areas to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

j. *Access to Non-Federal Lands.* States or persons, and their successors in interest, who own land completely surrounded by a wilderness area shall be given such rights as may be necessary to assure adequate access to that land. Adequate access is defined as the combination of routes and modes of travel which will, as determined by the BLM cause the least lasting impact on the wilderness resource, and at the same time serve the reasonable purposes for which the State or private land is held or used.

No road shall be constructed across wilderness until authorized by the BLM. Access by routes or modes of travel not available to the general public may, when fully justified, be permitted by written authorization. The authorization will prescribe routes and modes of travel which will result in the least lasting impact on wilderness values and, at the same time, serve the reasonable purposes for which the land is held or used. A performance bond will usually be required. Where the exercise of rights of access to surrounded State or private land would be detrimental to wilderness values, the BLM shall, before granting access, attempt to acquire such land by purchase or by exchange.

4. *Prohibition of Certain Uses.* Except where subject to existing private rights, where necessary to meet minimum requirements for the administration of the wilderness area or as specifically provided for elsewhere in these policies, there shall be no temporary road, no use of motor vehicles, motorized equipment, or motor boats, no landing of aircraft, no other form of mechanical transport and no structure or installation within wilderness areas. There shall be no commercial enterprise or permanent road, except where subject to existing private rights or as specifically provided for in these policies.

5. *Minimum Tool.* Tools, equipment, or structures may be used for management when they are the minimum necessary for protection of the wilderness resource or when necessary for the health and safety of the visitor. Management will use the *minimum* tool, equipment, or structure necessary to successfully, safely, and economically accomplish the objective. When establishing the minimum tool, equipment, or structure necessary for a mangement need within wilderness areas, economic factors should be considered the least important of the three criteria. The chosen tool, equipment, or structure should be the one that least degrades wilderness values temporarily or permanently.

For the purpose of the above paragraph, accepted tools, equipment, and structures may include but are not limited to: fire towers, patrol cabins, pit toilets, temporary roads, spraying equipment, hand tools, fire-fighting equipment caches, fencing, and controlled burning. In special or emergency cases involving the health and safety of wilderness visitors or the protection of wilderness values, aircraft, motorboats, and motorized vehicles may be used.

6. *Existing Structures and Installations.* After Congress has designated a wilderness area, an inventory will be made of structures and installations existing in the area, critically evaluating the purposes and need for each, and its historical significance. If a structure or installation has historical significance, it may be retained as a historic feature of the area. If it does not have historical significance, it may be maintained for continued use either if it meets the "minimum tool" policy in paragraph 5 above, or if it is necessary for a use specifically permitted by the Wilderness Act or by the law designating the affected wilderness area. Any structure or installation that does not qualify for retention under the above criteria will be removed.

In maintaining or modifying existing structures and installations, the manager should consider the potential for using native materials and alternative technological approaches to make them as unobtrusive as possible.

7. *Acquisition of Non-Federal Lands.* Non-Federal lands within wilderness areas will be acquired by purchase or exchange when and where possible. BLM will seek to acquire the mineral rights as well as the surface rights. Acquisition of privately-owned lands will occur only if the private owner concurs with the acquisition, or if the acquisition is specifically authorized by Congress to be accomplished by eminent domain.

8. *Research and Collection of Management Information.* BLM-administered wilderness areas will provide opportunities for research and scientific activities that use wilderness areas for study of natural environments and ecosystems. Information collection activities by resource managers for wilderness and other purposes may also be conducted in wilderness. All research and collection of management information within the wilderness area will be conducted in an unobtrusive manner, by methods compatible with the preservation of the area's wilderness

character. (Refer to section II. B. 3. d. for policy on gathering information about resources.)

9. *Buffer Zones and Adjacent Lands.* No buffer zones will be created around wilderness areas to protect them from the influence of activities on adjacent land.

Adverse impacts upon the wilderness resource from activities both within the wilderness and on adjacent lands will be addressed in environmental assessments or environmental impact statements, as appropriate. Mitigation of impacts from outside wilderness will not be so stringent as to preclude or seriously impeded such activities.

10. *Visitor Information and Education.* Part of the wilderness experience valued by many visitors is the freedom from rules and regulations. Visitor education will be used to achieve management objectives where feasible. Only the minimum amount of regulation necessary to achieve desired objectives will be used.

To protect the natural appearance of wilderness areas, visitor informational and educational programs, signs, and poster boards will normally be located outside of the wilderness boundary. An exception to this general rule is that informational or regulatory signs may be placed within wilderness areas as a management tool to correct specific problems and protect the wilderness resource or for the health and safety of visitors when these signs meet the "minimum tool" standard (see section II B. 5.).

Informational and educational meterials pertaining to the management of BLM-administered wilderness in general, or for specific wilderness areas will be readily available to the wilderness user at BLM offices. Such materials will inform visitors of the responsibilities and risks involved in visiting a wilderness area.

11. *Administration.* a. *Wilderness Management Plans.* A wilderness management plan will be developed for each BLM-administered wilderness area as a means of applying the Wilderness Management Policy to that specific area. The plan will be tailored to the local conditions of each wilderness by adopting any specific objectives appropriate to the area, consisent with the Wilderness Management Policy. Plans should reflect the different kinds of environmental settings, history of use, special congressional guidance, and management situations pertaining to the individual wilderness area. The wilderness management plan will describe the strategy to be used to implement both the Wilderness Management Policy and the specific objectives adopted for the area.

b. *Coordination.* When a wilderness area's boundaries overlap BLM administrative boundaries, management will be coordinated between District and State Offices to ensure uniformity in management practices.

When a wilderness area involves contiguous lands administered by BLM and by another Federal agency, the BLM will remain an active manager of lands under its administration, unless it has been determined that more effective management can be achieved by transferring the land to the other agency or by some form of cooperative management. State Directors have the option of approving cooperative management agreements with other Federal agencies on a case-by-case basis. Wherever appropriate, a joint management plan by all agencies involved will be encouraged.

Coordinated planning efforts will also involve State fish and wildlife agencies and all other State, county, and local agencies that may be affected by wilderness management activities.

c. *Wilderness Management Personnel.* Wilderness management personnel may be employed to help implement the provisions of a wilderness management plan on the ground. They can facilitate protecting the wilderness resource by assisting visitors with suggestions, advice, and information; enforcing regulations; performing minor trail repairs; and removing trash. Wilderness management personnel can reduce site-specific problems, such as the overuse of popular camp areas, by relocating camp sites and performing rehabilitation work. The manager may also use wilderness management personnel to gather information about existing conditions within an area. During their patrols, these employees can gather information about resource trends and visitor use. The decision to employ wilderness management personnel should be made on a case-by-case basis. Their use may or may not be required, depending on local conditions.

Chapter III. Guidelines for Specific Activities

The guidelines in this chapter are an application of the policies set forth in Chapter II to various activities that may or may not take place in BLM-administered wilderness areas. These guidelines are also based on other applicable laws and on other policies and regulations of the Department of the Interior. In addition, wherever feasible, these guidelines correlate closely with the wilderness management policies of the U.S. Forest Service, as that agency is the other multiple-use resource managing agency that administers lands in the National Wilderness Preservation System.

These guidelines will be used in developing a Wilderness Management Plan for each BLM-administered wilderness area, containing guidance on how specific activities will be treated in that area. Until such time as a Wilderness Management Plan is approved by the State Director, decisions on specific activities in a wilderness area will be made by BLM field officials based on these guidelines.

Decisions on any activities not addressed in these guidelines will be made on the basis of the policies in Chapter II.

A. Recreation and Visitor Use

BLM-administered wilderness areas shall provide a variety of uses including, but not limited to, recreational, scenic, scientific, educational, conservation, and historical.

The wilderness resource will be dominant in all management decisions where a choice must be made between preservation of wilderness character and visitor use. There are places and times within wilderness where unique values may require that recreation and visitor use activities be restricted or entirely prohibited in order that an enduring resource of wilderness be preserved. The highest priority among various kinds of visitor use will be accorded those activities which (1) are most dependent upon the wilderness environment and cannot be reasonably accommodated outside of wilderness, (2) least affect the wilderness environment.

Consideration msut be given to the ability of the wilderness resource to sustain visitor use without loss or degradation of the wilderness resource itself. Carrying capacity, both psychological and physical, may vary widely between kinds of visitors, mode of travel, length of stay, kind of wilderness (desert, water, high mountain, etc.), size of wilderness area, and season of use. The leading management tool and document to consider these factors and set guidelines for managing visitor use will be the Wilderness Management Plan. These plans will describe the level at which an area is able to absorb use and impacts and describe measures needed to protect wilderness values.

The following specific guidance applies to visitor use within BLM wilderness:

1. *Visitor Management.* Visitor management techniques will be utilized in wilderness when necessary to

perserve both the wilderness resource and the visitor's wilderness experience and opportunities. Management and regulation of visitor use will be the minimum necessary to provide for use of the area as wilderness, and to preserve the wilderness character of the area.

Distribution of visitors should be planned to maintain a high-quality wilderness resource and to protect the quality of the wilderness experience. The Wilderness Management Plan will consider all appropriate and compatible methods to distribute the level of use that is within the capacity of the wilderness. Distribution can be influenced by both direct and indirect methods.

(a) *Indirect Methods.* Visitors may be distributed through such indirect management efforts as:

(1) Obliteration of improvements at overcrowded or undesirable sites.

(2) Stock grazing or canoe- and boat-beaching restrictions, both private and commercial, on overused or concentration areas.

(3) Improve access to tributary, lightly used areas.

(4) Information to (1) encourage use of lightly used or relatively unknown areas and to (2) stress the experience and value to be found outside the peak use period.

(5) Minimize the promotion of an outdoor experience in wilderness and emphasize such uses of undeveloped areas outside wilderness.

(6) Manipulation of the fishery resource in cooperation with fish and game agencies.

(7) Design and management of trail-head areas, including access roads and parking areas.

(8) Education of visitors about good wilderness manners and ethics.

(9) Use of built-in frictions or obstacles, such as low-standard access roads.

(10) Removal of trail-head improvements and/or restriction of travel into areas already overused or where capacity use already occurs.

(b) *Direct Methods.* More direct methods to achieve visitor distribution may include:

(1) Regulating the use of saddle horses and/or pack stock.

(2) Zoning of areas strictly for foot or horse use only, zoning to protect sensitive sites and resources, or zoning to provide different experiences within the wilderness.

(3) Requiring permits for specific areas or time periods. A permit or registration system can be an important tool for both the wilderness manager and wilderness visitor. Both systems provide visitor use data necessary to provide information regarding the number and distribution of visitors. In addition, a permit or registration system can give a visitor information on areas of use in preplanning a trip. A permit system can be utilized also to limit or redistribute and disperse visitor use.

(4) Wilderness Rangers informing visitors about less congested areas.

(5) Limiting the number of people in parties or the number permitted to stay overnight at specific locations.

(6) Limiting numbers of users. The Wilderness Management Plan will analyze needed methods and identify necessry measures.

2. *Improvements and Facilities.* Facilities and improvements such as trails, bridges, signs, and compsites, will be provided only where they are the minimum necessary for protection of the wilderness resource. No facilities or improvements will be provided primarily for the convenience of the visitor. The need for proposed facilities, such as latrines, fire circles, and fences will be explained in the Wilderness Management Plan. Improvements and facilities will be constructed of materials which harmonize with the natural environment.

Existing improvements or facilities not specifically provided for in these guidelines—those having no historical value and not necessary for preservation of an area's wilderness character—will be removed.

Construction, maintenance, and removal of facilities and improvements will be by primitive means. Exceptions to this policy, such as using handpowered portable tools and aircraft, may be approved by the State Director if no other alternatives exist, the mechanized or mechanical equipment is the minimum necessary, and they will not degrade or impair the area's wilderness character.

(a) Trail Systems. (1) New trails will be constructed only if they are needed to preserve wilderness values and resources and they will not significantly degrade the degree of naturalness or solitude in the area. Trails are an acceptable improvement provided they are constructed and maintained so they appear to be a part of the country rather than an intrusion upon it. Wilderness management plans will address where trails and related facilities are appropriate.

(2) Existing trails and trail systems will be evaluated for possible expansion, relocation, restoration, or closure. Wilderness Management Plans will address the present situation and evaluate future needs. Trailhead access points will be evaluated at this time. Trailhead locations should be carefully chosen as they have a profound influence over management of visitor use. It may be desirable to locate trailhead access points well outside the wilderness boundary to reduce their impact upon the wilderness area.

(3) Trail routes shall be selected to provide scenic vistas and, where possible, a varied scene. Heavily used areas should generally be served by spur trails and should be bypassed by primary trails. Trails will not be constructed with treads of more than 24 inches in width. Trails should follow natural contours where possible and results in minmum disturbance to soil and ground cover.

(4) Bridges will be designed an constructed so as to harmonize with the environment and will be the minimum size and complexity necessary to allow foot or stock use.

(b) *Signing.* Only a minimum of signs will be provided to aid the visitor, in combination with availability of accurate maps, route descriptions, brochures, etc.

(1) Signs may be erected at trail junctions, showing directions with arrows.

(2) Signs will not be placed within the wilderness for the convenience of the user. Informational or interpretive signs will not be used to mark streams, lakes, mountain peaks, passes, or points of interest.

(3) Regulatory signs will be kept to the minimum necessary, and may be of materials other than wood. When regulatory signs are posted within a wilderness, notice pertaining to these regulations will also be posted at trailheads and published where feasible on brochures or maps or otherwise made available to the user prior to entry into the wilderness.

(c) *Use of Campsites.* (1) Campsites or camping areas may be designated if necessary for the purpose of wilderness resource protection. They will be located sufficiently distant from lakes, streams, trails, or other natural attractions as to allow appropriate use without unacceptable depreciation of the focal point of public interest. Space between sites should be sufficient to ensure a reasonable degree of solitude and quiet.

(2) Shelters or lean-tos will not be constructed, and existing shelters will be removed from within wilderness. Shelters or lean-tos determined to have historical value may remain, and their protection and use will be addressed in the Wilderness Management Plan.

(3) Garbage pits will not be permitted, and existing garbage pits will be closed. A "pack-it-in, pack-it-out" philosophy will be encouraged with visitors. Every

practicable medium will be used to educate and inform the visitor on this point.

(4) Improvised camp structures constructed by vistors will not be permitted. They will be dismantled and obliterated when and where found.

(5) Hitchracks or corrals and other improvements to facilitate stock use may be used as necessary to prevent damage to the wilderness resource. They will be located away from main-traveled trails, streams, lakes, camping areas, and focal points of interest, and will be constructed of materials which harmonize with the government.

(d) *Outfitter Camps.* The Wilderness Management Plan will carefully analyze the role of the outfitter-guide in a particular wilderness. If outfitter-guide services are allowed, they will be planned and administered to meet public needs while maintaining the wilderness resource. Operations will be so administered as to be harmonious with those of wilderness visitors who do not employ such services. Outfitter-guide camps will be located off the primary trails or scenic spur trails and at sufficient distance from attractions to avoid conflicts with other visitors. The BLM will select the location of outfitter-guide campsites as necessary to protect wilderness resources and the wilderness experience of other visitors. Outfitter-guides will operate under special recreation permits. The Wilderness Management Plan will evaluate the need for caches and, if approved, shall designate their locations.

(3) *Fuelwood.* If campfires or cooking fires are permitted, fuelwood cutting should be limited to dead or down material. The use of portable cookstoves will be encouraged whenever possible. The Wilderness Management Plan will define any regulations or restrictions needed for wilderness resource protection.

(4) *Contests.* Contests, such as physical or mental endurance of a person or animal; foot races; canoe or boat races; competitive trail rides; survival contests or exercises (including military); and other activities of this nature shall not be permitted in wilderness areas. These activities do not depend on a wilderness setting, and they cause impacts that derade the wilderness character of the area, thus adversely affecting wilderness-dependent uses.

(5) *Recreational or Hobby Mineral Collecting.* Recreational or hobby collecting of mineral specimens (rockhounding) will be allowed in wilderness. Such use will be limited to hand methods or detection equipment that does not cause surface disturbance, such as a metal detector or Geiger counter. In addition, methods shall not be permitted that in any way adversely affect or degrade the wilderness resource or the experiences of visitors in the area. (This paragraph does not cover mining claims, which are addressed in section I below.)

B. Cultural and Historic Resources

Archeological and historical sites and values are a unique and nonrenewable part of the wilderness resource. They are protected by provisions of the Uniform Rules and Regulations (43 CFR Part 3) to carry out the Antiquities Act of 1906, the Historic Sites Act of 1935, Executive Order 11593, the National Historic Preservation Act of 1966, as amended, and the Archaeological Resources Protection Act of 1979. To the extent not inconsistent with the concept of wilderness preservation and the intent of the Wilderness Act, and objectives for cultural resource management, these resources are available for recreational, scenic, scientific, educational, conservation, and historical uses (including ceremonial or religious use by Native Americans).

Cultural resources, in most instances, will be subject to the forces of nature in the same manner as other wilderness resources. Study or management will not normally include any excavation, stabilization, or interpretation activities. Salvage, rehabilitation, stabilization, reconstruction, and restoration work on archeological and historic sites; excavation; and intensive inventories may be permitted on a case-by-case basis where the project will not degrade the overall wilderness character of the area and such activity is needed to preserve the particular resource. State Director approval is required for all such projects.

The National Historic Preservation Act and Executive Order 11593 require an inventory and evaluation of cultural resources. The evaluation study for National Register of Historic Places eligibility is made using criteria in 36 CFR 1204 and in consultation with the State Historic Preservation Office (SHPO). Those cultural resources found to qualify are nominated to the National Register of Historic Places.

Those sites or structures that do not qualify for the National Register may be removed or obliterated unless they meet the "minimum tool" policy (refer to section II. B. 5.) or are necessary for a use specifically permitted by the Wilderness Act or by the law designating the affected wilderness area.

Management direction for cultural resources that qualify for nomination to the National Register is subject to compliance with Section 106 of the National Historic Preservation Act and 36 CFR 800. A decision to destroy, maintain, or allow historic or prehistoric structures to deteriorate naturally is a Federal undertaking which will affect the resources. In working through the compliance processes, a determination will be made as to what feasible and prudent alternatives exist to satisfactorily mitigate adverse effects of the proposed decision on the cultural resources. The range of alternatives might include recording to established standards (by drawings and photographs), salvage (by removing or dismantling), stablizing, or restoration. Stabilization or restoration and subsequent maintenance may be considered for administrative structures that meet the "minimum tool" policy (refer to section II. B. 5).

If the involved parties (SHPO, Advisory Council, BLM) agree upon data recovery as the appropriate mitigation action, they shall execute a Memorandum of Understanding specifying the steps to be taken to mitigate any adverse effects.

C. Forestry Resources

1. *Cutting of Trees and Shrubs.* Management of the forest cover will be directed toward retaining the primeval character of the environment and allowing natural ecological processes to operate freely. Trees, shrubs, and other vegetative products will not be sold or cut for nonwilderness purposes except under specified conditions set forth in these guidelines for valid mining claims and under emergency conditions such as fire, insect, and disease control.

2. *Cutting of Trees for Administrative Purposes.* Trees may be cut for use in the construction and maintenance of authorized improvements that are located within the wilderness when the necessary material cannot be reasonably obtained or brought in from outside the wilderness. Such cutting within the wilderness shall be done away from trails or campsites, and all evidence of cutting shall be disposed of insofar as possible.

3. *Cutting of Trees for Fuelwood.* (Refer to section III. A. 3., Fuelwood, for specific guidance.)

4. *Reforestation.* Reforestation, in the absence of natural revegetation, will generally be prohibited, but in rare cases may be authorized by the Director to prevent deterioration or loss of the wilderness resource when the cause of the damage or loss is due to human activities and there is no reasonable

expectation of natural reforestation. The natural processes of ecological succession will be the preferred method of site-restoration. When reforestation action is necessary, only native species and only primitive methods, such as hand seeding, will be used.

D. Fish and Wildlife

Management will seek a natural distribution, number, and interaction of indigenous species of fish and wildlife. Natural processes will be allowed to occur in wilderness ecosystems, which include fish and wildlife populations, as far as possible without human influences. Management will protect the conditions that allow natural processes a maximum degree of freedom.

To the extent possible, wildlife species in BLM wilderness should be allowed to maintain a natural balance with their habitat and with each other. Wildlife may be harvested under State regulations; fisheries management will be consistent with preservation of the area's wilderness character; and direct fish and wildlife control measures will be applied only upon a showing of need under standards described below.

The BLM, in cooperation with State and Federal public health and fish and game officials, may make special exceptions, where necessary to control disease epidemics or other health hazards in which wildlife species are involved as carriers.

The basic responsibilities of the BLM and other cooperating State and Federal agencies in the management of fish and wildlife are not altered by the Wilderness Act. However, the constraints of the Act and the intent of the Congress articulated in the Act and in subsequent legislation will guide the management of wildlife in wilderness.

The preservation of rare, threatened, and endangered species dependent on wilderness conditions will be favored.

The killing of native birds and animals which are a natural component of the biotic community, but are not provided protection by State or Federal law, will be discouraged or controlled if necessary through public education and cooperative agreements with State game and fish agencies.

1. *Hunting and Fishing.* Hunting and fishing are permitted in BLM-administered wilderness, subject to applicable State and Federal laws and regulations. Coordination with State game and fish agencies for the management of resident wildlife and fish species will be sought in order to ensure maintenance of the wilderness resource. Specific management criteria may be cited in cooperative agreements.

2. *Wildlife Habitat.* The proper balance of game animals with their habitat may be achieved by managing public hunting. Objectives for the management of wildlife habitat are normally compatible with the objectives for maintaining general wilderness character, or careful planning usually can make them so. Where incompatible, the requirements for maintenance of wilderness values will be overriding.

Vegetative manipulation projects for wildlife purposes may be approved if they do not degrade wilderness character, or if they correct conditions which are a result of man's influence, or the project will promote the perpetuation of a threatened or endangered species.

Habitat manipulation by chemical or mechanical means may only be approved on a project-by-project basis where necessary for threatened or endangered species, or to correct unnatural conditions resulting from human influence. Such activities will be allowed only where manipulation would enhance the wilderness resource and where natural processes have been unsuccessful. Hand or aerial seeding of native vegetation species may be permitted after disturbances, such as wildlife, to restore essential food plants to a wilderness where the natural process of healing is not expected to occur. Actions of this type will be allowed only to enhance wilderness values and not to optimize habitat needs of any single wildlife species at the detriment of wildlife diversity in an untrammeled environment.

Prescribed or controlled burning may be used as a wildlife management tool if carefully designed to maintain or enhance the wilderness resource. Prescribed or controlled burning is to be used only when the project can be accomplished without serious or long-lasting damage to watershed or the area's wilderness character. It may be done only for the following purposes:

a. It is needed to maintain the natural condition of a fire-dependent ecosystem or to re-introduce fire where past strict wildlife control measures had interfered with natural, ecological processes.

b. A primary value of a given wilderness will be sustained as a result of the burning.

c. It will promote the perpetuation of a threatened or endangered species.

Prescribed burning will not be permitted to improve wildlife utilization.

Additional specific guidelines on prescribed burning appear in section E, Fire Management.

The BLM may authorize State and Federal agencies to use temporary enclosures and facilities to trap or transplant wildlife as long as they are the minimum necessary to protect or maintain the wilderness resource.

Although construction of facilities to enhance an area's value for wildlife or fish is not consistent with the free operation of natural processes, there are situations where such measures may be necessary for the continued existence or welfare of wildlife or fish living in wilderness. This is particularly true in the case of species adversely affected through human activities in such areas. Certain permanent installations to maintain conditions for wildlife and fish, upon consideration of their design, placement, duration, and use, may be permitted if the resulting change is compatible with preservation of wilderness character and is consistent with wilderness management objectives for the area, and if the installations are the minimum necessary to accomplish the task. Permissible actions under these criteria may include: installations to protect sources of water on which native wildlife depend, such as exclosures; and water sources such as springs, wells, and guzzlers. Fisheries activities may be permitted as long as their purpose is to protect natural conditions, restore deteriorated habitat, and maintain wilderness values.

3. *Wildlife Manipulation.* In some instances, wildlife species once native to the wilderness have been forced from their original habitat by the encroachment of man and his activities. To the extent that these factors can be altered or managed within the intent of the Wilderness Act, native species no longer established in the wilderness area may be reintroduced and managed as a part of the wilderness resource. Proposals must be in concert with the concept of wilderness and must protect, or perpetuate, the wilderness resource. Care must be exercised to be certain that the species is native. Such programs will be carefully addressed in wilderness management plans.

Management of established exotic species (e.g., chukar partridge, pheasant) not natural to an area may continue where they enhance the wilderness character of a particular wilderness. Introduction of new exotics will not be permitted. Carefully coordination with State and Federal agencies should be established for control of undesirable exotic populations.

4. *Fish Stocking.* Fish-stocking programs needed to meet wilderness management objectives shall be developed in cooperation with the State agencies or the Fish and Wildlife Service and shall be coordinated with overall wilderness management objectives. The probability of increased

visitor use at stocked waters and their full impact and effect on the wilderness resources will be recognized and considered.

Cooperative agreements with State agencies should be developed to establish a stocking policy for each wilderness where stocking is permitted, as a basis for a stocking plan. Basic decisions will be spelled out in the wilderness management plan for each wilderness. Aerial stocking of fish by State agencies or the Fish and Wildlife Service may continue where this was an established practice prior to designation. Authorization will be on a case-by-case basis. Aerial stocking must be done outside of general visitor use seasons. Wilderness management plans should contain all necessary justification, mitigation, and definition of planting programs.

Some general guides for fish stocking in BLM wilderness units are: a. Native species should be favored in waters with a history of supporting such species. Species native to the vicinity or region may be considered as an alternative. Exotic fish will not be considered, except where such practice existed prior to wilderness designation.

b. Waters with established undesirable fish or where overpopulations of fish have occurred should be managed for fish best suited to the water under natural conditions, and to meet wilderness objectives. Barren waters may be stocked only if the wilderness management plan defines the desirability of such an action.

c. Presently nonstocked waters which at one time supported a native fish population, and which would provide suitable habitat for native fish species that would enhance the wilderness experience of visitors, may be considered for stocking on a case-by-case basis.

d. In all fish-stocking activities, threatened or endangered species shall receive primary consideration.

5. *Trapping.* Under State laws and regulations, trapping of furbearers will be allowed when population levels justify a harvest program. Commercial trapping will not be permitted.

6. *Rodents.* Rodents in BLM-administered wilderness areas shall be exempt from control programs, except where overpopulations pose a serious threat to other wilderness values or resources outside the boundaries of the wilderness. Control projects must be approved on a case-by-case basis.

7. *Predators.* Predacious animals and birds are an important part of natural life systems within wilderness. They play an important role in the natural selection and survival processes, helping to maintain critical population balances of wild species. They should be able to survive and compete with other species, free from the unregulated interference of man and his traditional pursuit of sport or bounty. Where control of predators is necessary to protect threatened or endangered wildlife species or on a case-by-case basis to prevent special and serious losses of domestic livestock, it will be accomplished by methods which are directed as eliminating the offending individuals while at the same time presenting the least possible hazard to other animals or to wilderness visitors. Poison baits or cyanide guns are not compatible. Control programs will be carried out by or under the direction of the U.S. Fish and Wildlife Service (FWS) and will be consistent with the Secretary of the Interior's policies on animal damage control and with the Memorandum of Understanding between the BLM and FWS. The State Director will approve predator-control programs on a case-by-case basis, and under such conditions as to ensure minimum disturbance to the wilderness resource and visitors.

Approval must be contingent upon a clear showing that the removal of the offending predators will not diminish the wilderness values of the area, because this kind of wildlife is an integral part of the wilderness, as well as an adjunct to the visitor's experience.

E. Fire, Insect, and Disease Management

1. *Fire Management*—a. *Overriding Fire Guidance.* All fires will be controlled to prevent loss of human life or property within wilderness areas or to prevent the spread of fire to areas outside of the wilderness where life, resources, or property may be threatened.

b. *Natural Fire.* Natural fire (i.e., lightning-caused) is normally a part of the ecology of the wilderness, and man's efforts to ban this agent may have resulted in significant ecological changes in the flora and fauna of some areas. In order to return some wilderness ecosystems to a more natural state, it may be appropriate to allow natural fire to burn. Natural fire will be allowed to burn only in conformance with an approved Fire Management Plan and the overriding fire guidance in section (a) above.

c. *Prescribed Burning.* Prescribed burning may be conducted to reintroduce or maintain the natural condition of a fire-dependent ecosystem or to restore fire where past strict fire control measures had interfered with natural, ecological processes, where a primary value of a given wilderness will be sustained as a result of the burning, or where it will perpetuate a threatened or endangered species. Prescribed fires will be allowed only in conformance with an approved Fire Management Plan.

d. *Removal of Evidence of Fire Control Activities.* Temporary fire camps, helispots, and other sites used for fire suppression or control activities shall be removed upon completion of use and the site rehabilitated to as natural a state as possible.

e. *Fire Detection.* Fire detection methods necessary to meet wilderness objectives will be used. Structures such as lookouts may be maintained or constructed if they are the minimum necessary to achieve wilderness management objectives. Preference will be given to detection methods which have the least permanent impact on wilderness values, such as aircraft overflights and lookouts located outside the wilderness boundary.

f. *Pre-Suppression.* Pre-suppression activities may be allowed where necessary to protect private property, and resources within and outside the wilderness boundary. All pre-suppression programs will be addressed in the Fire Management Plan.

g. *Suppression.* Fire-suppression measures and techniques shall be used which achieve the wilderness management objectives with the minimum adverse impact on the wilderness resource. Preference shall be given to the methods and equipment which least alter the landscape or disturb the land surface. Structures and improvements shall be located outside the wilderness boundary, except those that are the mimimum necessary to achieve wilderness management objectives.

h. *Fire Management Plans.* The following considerations will be covered in each Fire Management Plan: wilderness management objectives for the area, historic fire occurrence, natural role of fire, proposed degree of suppression, expected fire behavior, acceptable suppression techniques, adequate buffer zones, smoke management, and effects on adjacent landowners. The plan will conform to criteria defined by the BLM defining the limits of acceptable fire weather, fire behavior, and fire effects. Each Fire Management Plan will be written to conform to the Wilderness Management Plan (WMP) for the area it addresses and will become an addendum to the WMP upon approval.

2. *Control of Insects and Diseases.* Insect and disease outbreaks will not be

artificially controlled, unless it is necessary to protect timber or other values outside of the wilderness area, or in special instances when loss to resources within a wilderness is undesirable (e.g., absence of control would threaten rare or endangered plants or animals). Such control measures will consist of the effective combination of actions which have the least adverse impact on the wilderness resource.

Special care must be taken when using chemicals or other artificial methods to control insect and disease outbreaks because of their possible adverse effect on the total biological community.

Insect or disease suppression projects in BLM wilderness must be approved by the Director.

F. Water Resources Management

1. *Watershed Restoration.* Watershed restoration may be undertaken where deteriorated soil and hydrologic conditions caused by man or his influences create a serious threat or loss of wilderness values; or where, even though not man-caused, these conditions present a definite hazard to life or property, or where such conditions could cause serious depreciation of important environmental quality outside the wilderness. Where such dangers are not imminent or where natural vegetation may be expected to return in a reasonable time, restoration work will not be done.

Re-establishment of vegetation as a watershed-restoration measure, where there is no reasonable expectation of natural healing, will be accomplished using native or naturalized species. Overland motorized equipment will not be used where more primitive equipment can accomplish the restoration objectives. Exceptions must be fully justified, based upon serious imminent threat to high downstream values. Approval by the Director is required for all watershed restoration proposals.

2. *Water Improvements*—a. *Water-yield Improvements.* Protection of wilderness values and management objectives generally preclude use of water-yield improvement techniques. Water-yield improvement prescriptions, if contemplated, must be clearly compatible with maintenance of the wilderness resource. The Director's approval is required for project approval.

b. *New Water-Development Structures.* The establishment of new water-regulating structures, power installations, and related improvements is subject to approval by the President. (Range and wildlife water-development structures are discussed under separate subheadings and are not subject to Presidential approval.)

The BLM's conclusions and recommedations in connection with proposals for new water-resource developments will be based upon comprehensive, factual information developed by an environmental analysis, and draft and final environmental impact statements, as prescribed by the National Environmental Policy Act. The final environmental impact statement requires the Director's approval. Any recommendation in favor of the proposal must be based upon a clear showing that the public values to be gained exceed the values that would be lost, and that the need cannot be met outside the wilderness. When a proposed structure is thus found to be in the public interest, consideration should also be given to a recommendation to exclude the applicable area from wilderness.

c. *Existing Structures.* Reservoirs, ditches, catchments, and related facilities for the control or use of water may have existed within BLM wilderness under valid permits or other authority prior to the area's designation as wilderness. These may be maintained if they are needed in the public interest, or are a part of a valid existing right.

Routine maintenance and repair of an existing structure which does not change the location, size, type, or increase the original intended storage capacity of a reservoir may be approved by the State Director. The operation, maintenance and repair of such facilities may include occasional motorized access where no other reasonable or practical alternatives exist.

Reconstruction of any structure or restoration of a natural body to its original or historic level must be approved by the Director. Primitive means of transport and hand tools will be used wherever and whenever feasible. Any proposal to increase the storage capacity of a reservoir, or the replacement of a reservoir, which was not under a valid permit at the time the unit was incorporated into the National Wilderness Preservation System, will be considered as a new structure and subject to approval by the President.

The wilderness management plan for the unit should carefully evaluate each improvement to determine if the continuation of the use is needed in the public interest, or is part of a valid existing right. Maintenance needs and methods of accomplishing maintenance must be specifically stated if the improvement is to remain. If not, the improvement should be allowed to deteriorate naturally. When natural processes themselves cannot effectively return the abandoned improvement back to a natural condition, restoration by other means may be used. Only hand labor and tools, and seeding with native or naturalized species may be pemitted. All restoration projects are subject to approval by the State Director.

d. *Snow Measurement.* The measurement of snow within BLM wilderness is permitted under the following conditions: (1) Measurement of snow will be accomplished by primitive means. If use of a helicopter was an established practice in measuring snow within an area prior to wilderness designation, that same use may be permitted, however, ways and means of eliminating the need will be explored.

(2) No new data sites can be established unless they are parts of projects approved by the President under provisions of section 4(d)(4) of the Wilderness Act. Use of existing data sites may continue until adequate correlation can be established with data sites outside the wilderness. Installation of automated equipment (sensing devices, data collection platforms, etc.) may be permitted on a temporary basis at existing data sites to accelerate the development of correlations with data sites outside the wilderness. Access will be by primitive means. However, where the use of a helicopter was an established practice, the practice may be continued.

(3) Only miniaturized and unobtrusive types of equipment may be installed, and must be camouflaged to blend with the terrain as much as possible. Practices such as burying equipment and using antennae which can be removed during nonuse periods, will be used to minimize the visual impacts of the data site.

e. *Water Quality.* Maintaining or enhancing water quality is of high priority in management of the wilderness resource. Water quality monitoring instruments and hydrometeorological devices may be permitted if these are the minimum necessary for protection of the wilderness resources. All instruments and devices must be miniaturized and unobtrusive. No motorized vehicles will be permitted for installation, maintenance, or monitoring and surveillance.

f. *Weather Modification Over Wilderness.* Use of lands within the National Wilderness Preservation System as target areas for weather modification activities will not be

approved unless the following conditions are met:

1. The proponent can provide reasonable, scientifically supportable assurance that his activities will not produce permanent, substantial changes in natural conditions.

2. The proposal does not include any feature that might reasonably be expected to produce conditions incompatible in appearance with the wilderness environment or reduce its value for recreation, scenic, scientific, educational, conservation, or historical use.

The effects of weather modification activities may be permanent or temporary depending upon the type, duration, and degree of change in weather brought about by that activity.

Generally, short-term weather-modification activities, which will produce only occasional, incidental, temporary, or transitory changes in the weather with carryover effects on the ground lasting only a few days beyond the actual seeding period, can be permitted over wilderness because little or no permanent, identifiable ecological or physical impact is likely. Conversely, long-term weather modification programs, which will produce a repeated or prolonged change in the weather during any part of successive years, are likely to have a direct and often substantial impact in terms of ecological and physical effects. Even though the human contribution to these impacts on the ecology and physical conditions on the ground may be obscured by the fact that the activities are carried on outside or above the wilderness, they nevertheless can be recognized to be the result of human activities and therefore cannot be permitted where they will directly affect wilderness areas.

State Directors will gather necessary information relative to items 1 and 2 and make recommendations to the Director on any activity or application. The Director will approve activities or installations relative to weather modification affecting wilderness.

G. Air Quality

Under the Clean Air Act (as amended, 1977), BLM-administered lands were given Class II air quality classification, which allows moderate deterioration associated with moderate, well-controlled industrial and population growth. The BLM will manage designated wilderness areas as Class II unless they are reclassified by the State as a result of the procedures prescribed in the Clean Air Act (as amended, 1977).

According to the Clean Air Act, air quality reclassification is the prerogative of the States. The States must follow a process mandated by the Clean Air Act Amendments of 1977, involving a study of health, environmental, economic, social, and energy effects, a public hearing, and a report to the Environmental Protection Agency.

Administrative actions within wilderness areas will comply with the air quality classification for that specific area.

H. Rangeland Management

1. *Livestock Grazing Operations.* Section 4(d)(4)(2) of the Wilderness Act provides for continued livestock grazing where established prior to designating the area as wilderness. The objective of livestock management in wilderness is:

> Utilize the forage resource in conformity with established wilderness objectives for each area and the BLM grazing regulations (43 CFR 4100), and through practical, reasonable and uniform application of the committee guidelines and policy.

Further insight on the subject is in the Conference Report on S. 2009 (House Report 96–1126), under the heading "Grazing in National Forest Wilderness Areas." These committee guidelines and policy are to be considered in the overall context of the purposes and direction of the Wilderness Act and will be applied nationwide. They are reprinted here verbatim as an excerpt from House Report 96–1126:

Grazing in National Forest Wilderness Areas

Section 4(d)(4)(2) of the Wilderness Act states: "the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture."

The legislative history of this language is very clear in its intent that livestock grazing, and activities and the necessary facilities to support a livestock grazing program, will be permitted to continue in National Forest wilderness areas, when such grazing was established prior to classification of an area as wilderness.

Including those areas established in the Wilderness Act of 1964, Congress has designated some 188 areas, covering lands administered by the Forest Service, Fish and Wildlife Service, National Park Service and Bureau of Land Management as components of the National Wilderness Preservation System. A number of these areas contain active grazing programs, which are conducted pursuant to existing authorities. In all such cases, when enacting legislation classifying an area as wilderness, it has been the intent of the Congress, based on solid evidence developed by testimony at public hearings, that the practical language of the Wilderness Act would apply to grazing within wilderness areas administered by all Federal agencies, not just the Forest Service. In fact, special language appears in all wilderness legislation, the intent of which is to assure that the applicable provisions of the Wilderness Act, including Section 4(d)(4)(2), will apply to all wilderness areas, regardless of agency jurisdiction.

Further, during the 95th Congress, Congressional committees became increasingly disturbed that, despite the language of section 4(d)(4)(2) of the Wilderness Act and despite a history of nearly 15 years in addressing and providing guidance to the wilderness management agencies for development of wilderness management policies, National Forest administrative regulations and policies were acting to discourage grazing in wilderness, or unduly restricting on-the-ground activities necessary for proper grazing management. To address this problem, two House Committee on Interior and Insular Affairs Reports (95–620 and 95–1321) specifically provided guidance as to how section 4(d)(4)(2) of the Wilderness Act should be interpreted. This guidance appeared in these reports as follows:

> Section 4(d)(4)(2) of the Wilderness Act states that grazing in wilderness areas, if established prior to designation of the area as wilderness, "shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture". To clarify any lingering doubts, the committee wishes to stress that this language means that there shall be no curtailment of grazing permits or privileges in an area simply because it is designated as wilderness. As stated in the Forest Service regulations (36 CFR 293.7), grazing in wilderness areas ordinarily will be controlled under the general regulations governing grazing of livestock on National Forests * * *. This includes the establishment of normal range allotments and allotment management plans. Furthermore, wilderness designation should not prevent the maintenance of existing fences or other livestock management improvements, nor the construction and maintenance of new fences or improvements which are consisent with allotment management plans and/or which are necessary for the protection of the range.

Despite the language of these two reports, RARE II hearings and field inspection trips in the 96th Congress have revealed that National Forest administrative policies on grazing in wilderness are subject to varying interpretations in the field, and are

fraught with pronouncements that simply are not in accordance with section 4(d)(4)(2) of the Wilderness Act. This had led to demands on the part of grazing permittees that section 4(d)(4)(2) of the Wilderness Act be amended to clarify the intentions of Congress. However, because of the great diversity of conditions under which grazing uses (including different classes of livestock) are managed on the public lands, the Conferees feel that the original broad language of the Wilderness Act is best left unchanged. Any attempts to draft specific statutory language covering grazing in the entire wilderness system (presently administered by four separate agencies in two different Departments) might prove to be unduly rigid in a specific area, and deprive the land management agencies of flexible opportunities to manage grazing in a creative and realistic site specific fashion.

Therefore, the conferees declined to amend section 4(d)(4)(2) of the Wilderness Act, agreeing instead to reaffirm the existing language and to include the following nationwide guidelines and specific statements of legislative policy. It is the intention of the conferees that the guidelines and policies be considered in the overall context of the purposes and direction of the Wilderness Act of 1964 and this Act, and that they be promptly, fully, and diligently implemented and made available to Forest Service personnel at all levels and to all holders of permits for grazing in National Forest Wilderness areas.

1. There shall be no curtailments of grazing in Wilderness areas simply because an area is, or has been designated as wilderness, nor should wilderness designations be used as an excuse by administrators to slowly "phase out" grazing. Any adjustments in the numbers of livestock permitted to graze in wilderness areas should be made as a result of revisions in the normal grazing and land management planning and policy setting process, giving consideration to legal mandates, range condition, and the protection of the range resource from deterioration.

It is anticipated that the numbers of livestock permitted to graze in wilderness would remain at the approximate levels existing at the time an area enters the wilderness system. If land management plans reveal conclusively that increased livestock numbers or animal unit months (AUMs) could be made available with no adverse impact on wilderness values such as plant communities, primitive recreation, and wildlife populations or habitat, some increases in AUMs may be permissible. This is not to imply, however, that wilderness lends itself to AUM or livestock increases and constuction of substantial new facilities that might be appropriate for intensive grazing management in non-wilderness areas.

2. The maintenance of supporting facilities, existing in an area prior to its classification as wilderness (including fences, line cabins, water wells and lines, stock tanks, etc.), is permissible in wilderness. Where practical alternatives do not exist, maintenance or other activities may be accomplished through the occasional use of motorized equipment. This may include, for example, the use of backhoes to maintain stock ponds, pickup trucks for major fence repairs, or specialized equipment to repair stock watering facilities. Such occasional use of motorized equipment should be expressly authorized in the grazing permits for the area involved. the use of motorized equipment should be based on a rule of practical necessity and reasonableness. For example, motorized equipment need not be allowed for the placement of small quantities of salt or other activities where such activities can reasonably and practically be accomplished on horseback or foot. On the other hand, it may be appropriate to permit the occasional use of motorized equipment to haul large quantities of salt to distribution points. Moreover, under the rule of reasonableness, occasional use of motorized equipment should be permitted where practical alternatives are not available and such use would not have a significant adverse impact on the natural environment. Such motorized equipment uses will normally only be permitted to those portions of a wilderness area where they had occurred prior to the area's designation as wilderness or are established by prior agreement.

3. The replacement or reconstruction of deteriorated facilities or improvements should not be required to be accomplished using "natural materials", unless the material and labor costs of using natural materials are such that their use would not impose unreasonable additional costs on grazing permittees.

4. The construction of new improvements or replacement of deteriorated facilities in wilderness is permissible if in accordance with those guidelines and management plans governing the area involved. However, the construction of new improvements should be primarily for the purpose of resource protection and the more effective management of these resources rather than to accommodate increased numbers of livestock.

5. The use of motorized equipment for emergency purposes such as rescuing sick animals or the placement of feed in emergency situations is also permissible. This privilege is to be exercised only in true emergencies, and should not be abused by permittees.

In summary, subject to the conditions and policies outlined above, the general rule of thumb on grazing management in wilderness should be that activities or facilities established prior to the date of an area's designation as wilderness should be allowed to remain in place and may be replaced when necessary for the permittee to properly administer the grazing programs. Thus, if livestock grazing activities and facilities were established in an area at the time Congress determined that the area was suitable for wilderness and placed the specific area in the wilderness system, they should be allowed to continue. With respect to areas designated as wilderness prior to the date of this Act, these guidelines shall not be considered as a direction to re-establish uses where such uses have been discontinued.

It is also the understanding of the conferees that the authorizing Committees intend to closely monitor the implementation of the guidelines through subsequent oversight hearings to insure that the spirit, as well as the letter, of the guidelines are adhered to by the Forest Service. Of course, the inclusion of these guidelines in this Joint Statement of Managers does not preclude the Congress from dealing with the issue of grazing in wilderness areas statutorily in the future.

This concludes the excerpt from House Report 96–1126.

a. *Management Plans.* The above committee guidelines and policies will be applied in accordance with the environmental analysis process. Management prescriptions will be determined through the BLM resource management planning process and implemented by the allotment management plan.

Planning for livestock grazing operations in designated wilderness will be through the normal BLM resource management planning processes.

(1) Resource management plans establish: (a) Objectives and prescriptions for management of wilderness. These are based on resource inventory data which includes, but is not limited to, ecosystem identification, rangeland conditions, existing uses, and areas of existing or potential conflict.

(b) Use of levels of the rangeland resource and its relationship with other uses.

(2) Allotment mangement plans, within the direction established by the resource management plan, prescribe: (a) The manner and extent to which livestock grazing will be conducted to meet wilderness, rangeland resource needs, desired conditions of ecosystems, and other resource values.

(b) Direction and scheduling for accomplishing goals and objectives on individual allotments including the development of rangeland improvement schedules and grazing system to be followed.

b. *Permits.* Grazing operations within wilderness areas will be authorized by grazing permits. Permits for livestock operations will be issued only in areas where grazing was established at the time the wilderness was designated.

c. *Rangeland Analysis.* (1) Rangeland analysis in wilderness areas will follow the normal BLM standards.

(2) The development of the allotment management plan will determine the need for and standards of rangeland improvements and will prescribe the grazing system to be followed.

Where an approved allotment management plan exists at the time an area is designated as wilderness it will be reviewed in context with the committee guidelines and policy. Necessary modifications will be integrated into the resource management plan and the allotment management plan.

Allotment management plans for allotments partially or entirely within designated wilderness will specifically identify the following:

(a) The use of motor vehicles, motorized equipment or other forms of mechanical equipment including: specific equipment, where it is to be used, when it is to be used, and what it is to be used for.

(b) Rangeland improvement structures and installations to be maintained, constructed, or reconstructed in achieving rangeland management objectives, including maintenance standards.

(c) The means to handle emergencies. In bonafide emergencies or urgent situations, decisions will be based on consideration of all relevant factors and use of good judgment.

d. *Rangeland Improvements.* The following criteria should be considered in determining the use of motor vehicles, motorized equipment or mechanical transport in constructing, maintaining or applying rangeland improvements and practices.

(1) Minimizing threat to or loss of property.

(2) Minimum use of motorized equipment within wilderness.

(3) Develop and manage the rangeland resource in cost-effective manner.

(4) Achieve least amount of impact by non-conforming uses on wilderness values through: (a) Scheduling during periods of low use.

(b) Harmonizing improvements to surrounding landscape.

(c) Locate improvements to achieve maximum screening and fully utilize natural feature opportunities.

(5) Type of practice or construction material.

(6) Timeliness, including frequency and time of year.

(7) Need to deal with emergency or urgent situations that develop through acts of nature, such as drought, heavy snow.

(8) Location of nearest ranch facilities in relation to the project.

(9) Availability of primitive transport, e.g., team and wagon, saddle and pack stock, etc.

(10) Length of time to complete a project by alternative methods.

(11) Availability of temporary camp and feed sites.

(12) Age and health factors of permittee.

Documentation of the environmental analysis which considers the authorization of rangeland improvement construction and/or maintenance, and the use of motor vehicles, motorized equipment, and mechanical transport shall be made in an environmental assessment.

e. *Structural Rangeland Improvements.* Rangeland improvement alternatives will be developed and evaluated through the environmental analysis process, including consultation with grazing permittees and other interested publics. Alternatives which utilize a practical and reasonable approach to meet rangeland and wilderness management objectives will be selected.

Permit modifications for the construction of new rangeland improvements or replacement of existing rangeland improvements will be made in accordance with BLM grazing regulations. Special consideration will be given to construction standards and techniques to achieve the most practical and reasonable approach considering the wilderness resource. Specific consideration will be given to:

—Costs of using natural materials.

—Alternative means of construction which harmonize to the extent possible with the wilderness resource.

—Use of motor vehicles, motorized equipment or mechanical transport needed for construction of improvements.

All rangeland improvements will be listed in the allotment management plan along with maintenance schedules.

(1) *Maintenance.* The maintenance of existing necessary rangeland improvements may be allowed to continue. Those determined unnecessary through an environmental analysis will be phased out and removed on an agreed upon schedule.

The techniques by which maintenance of rangeland improvements and other related grazing activities are performed will require careful study, consideration of options, and a practical and reasonable solution. Existing use and requests for new use of motor vehicles, motorized equipment or other forms of mechanical transport, including emergencies, will be reviewed and congressional grazing guidelines applied. The occasional use of motor vehicles, motorized equipment, or mechanical transport may be permitted where practical alternatives are not available.

The guidelines address occasional use of motor vehicles, motorized equipment, or mechanical transport where practical alternatives do not exist, with application only to those portions of a wilderness where they occurred prior to wilderness designation. It is important to look at all options and their impacts. Good judgments will be necessary in the decisionmaking process.

(2) *New Improvements.* The construction of new rangeland improvements is permissible if determined to be necessary for the purpose of resource protection (rangeland and/or wilderness) and the effective management of these resources rather than to accommodate increased numbers of livestock. The rangeland analysis may indicate that a reduction of use is necessary for rangeland protection, or new rangeland improvemenets are necessary for improved management or protection of wilderness values. New improvements will not be justified solely on the basis that they will aid intensive management resulting in increased grazing.

(3) *Types of materials.* When permitted, new or existing improvements should be of materials which harmonize with the wilderness character of the area to reduce the impact of artificial objects on the natural environment. Natural (native) materials for improvements will be used unless costs are prohibitive or they do not harmonize with the wilderness.

(a) The necessity of the rangeland improvement for livestock grazing operations, resource protection, or enhancement of wilderness values. Some improvements may no longer be needed or should be relocated. Existing rangeland improvements may be necessary for management of the rangeland and wilderness resources. Other alternatives for meeting needs will be explored.

(b) Design, location, and type of materials feasible to serve the purpose and yet be harmonious with natural features of the wilderness will be considered. A steel post and wire fence may be less obtrusive than native pole fence. A redwood water trough may be less noticeable than a steel one. A windmill may better harmonize with wilderness values than an earthen stock pond.

(c) Material and labor costs for natural materials vs. artificial materials. Good judgment, in consultation with permittees, will provide the basis for determining what is reasonable for the permittee's livestock grazing operation and the particular wilderness values involved.

f. *Non-Structural Rangeland Improvements.* Non-structural rangeland improvement practices can be approved where they were part of the management at the time the wilderness was established and where their continuance is necessary to maintain livestock grazing operations. The need for non-structural rangeland improvements and practices will be carefully analyzed using the following criteria: (1) *Seeding.* The need for seeding will be carefully analyzed. Seeding will be approved only for:

(a) Areas where human activities have caused the loss or threaten the existence of indigenous species.

(b) Areas where human activities have denuded or cause loss of soil, providing the actions or activities responsible for the deterioration have been corrected and natural vegetation is insufficient and ineffective.

(c) Maintenance of livestock grazing operations where seeding was practiced prior to the designation of wilderness. Species seeded will be those that are native or naturalized to the area. Seed will be broadcast, except in special situations where other seeding methods are necessary.

(2) *Plant Control.* Plant control will be approved only for: (a) Native plants when needed to maintain livestock grazing operations where practiced prior to the designation of wilderness.

(b) Noxious farm weeds by grubbing or with chemicals when they threaten lands outside wilderness or are spreading within the wilderness, provided the control can be effected without serious adverse impacts on wilderness values.

(3) *Irrigation.* Artifical irrigation or water spreading will be done only to maintain livestock grazing operations where practiced prior to the designation of wilderness.

(4) *Fertilizing.* Fertilization may be used only as an aid to revegetation of disturbed areas approved in item 1 or to maintain livestock grazing operations where practiced prior to the designation of wilderness. Liming will be considered a fertilization practice.

(5) *Prescribed Burning.* Prescribed burning will be approved for rangeland management purposes only where it was practiced prior to the designation of wilderness and is necessary to achieve maintenance of livestock grazing operations; such use must be approved in a fire management plan. (Prescribed burning may be permitted for other purposes, under guidelines in section III. D. 2. and III. E. 1 of this document, such as in cases where reestablishment of natural fire regimes is desired. Rangeland management objectives may be achieved through such prescribed burns and through management of natural fire as prescribed in fire management plans.)

2. *Recreational Livestock.* Commercial recreational livestock, such as that used by packers and outfitters, will be grazed under permit. Noncommercial recreational livestock may also be subject to permit when necessary for the administration or protection of the wilderness. All recreational livestock users, including commercial outfitters, will be required to pack in feed for their domestic animals when it is determined that adequate forage is not available within the area to be visited. The Wilderness Management Plan will analyze the need for regulations or restrictions relating to recreational saddle and pack stock; including, but not limited to hobbling rather than tethering of horses, restrictive zoning, and horse-party size limits.

3. *Wild Horses and Burros.* The Wild Free-Roaming Horse and Burro Act of 1971 declares that wild horses and burros ". . . are to be considered in the area where presently found, as an integral part of the natural system of the public lands."

Viable, healthy populations of wild horses and burros will be maintained in wilderness areas at levels determined appropriate by the BLM planning system. The herd numbers and management techniques will be compatible with preservation of the area's wilderness character.

Herd Management Area Plans (HMAP's) will be developed in wilderness areas with wild horses or burros. The plans will detail the present condition and potential of the herd and herd management area. The plans will describe management actions required to meet the wilderness objectives as well as the herd needs. HMAP's will establish the habitat requirements and any necessary improvements; herd structure (sex and age ratios, etc.); methods of population manipulation and control (including removal, if necessary); migratory habits; and projections of population changes over time. Monitoring studies for the herd and its habitat will be an integral part of the plan. HMAP's will describe the physical improvements necessary for maintenance of healthy, viable herds and their habitat.

Use of motorized vehicles, including aircraft; use and maintenance of equipment such as temporary corrals; and the location, frequency, and timing of such uses will be specified in HMAP's and wilderness management plans. Such uses will be allowed when no other alternatives exist, they are the minimum necessary to accomplish the task, and they are the least degrading of wilderness values temporarily or permanently. Use of these facilities and equipment require State Director approval.

Habitat manipulation and nonstructural improvements will conform to those described under 1.f. above.

Environmental assessments will analyze the impacts of the management prescribed by the HMAP's, and alternatives and mitigating measures to minimize those impacts upon the wilderness resource.

I. Minerals Management

1. *Prospecting and Mining.* The Wilderness Act recognizes the rights of the mining claimant under the mining laws and provides for prospecting and mining in wilderness while still recognizing the wilderness resource.

BLM officials considering operating or prospecting notices of intent or plans of operation are faced with the task of serving two masters which may tend to be mutually exclusive. Nevertheless, the rights of the mining claimant must be met with the least possible impact on the wilderness resource in accordance with the direction in the Wilderness Act.

All BLM officials involved must ensure that provisions approved in operating plans are the minimum necessary to accomplish the rights of the

claimant while creating the least impact on the wilderness resource. Operators must be allowed to carry out operations that are reasonably necessary and incidental to the mining operation, but may not, in any circumstance, cause unnecessary or undue degradation. District Managers will call for the expertise of mining engineers or geologists, soil experts, landscape architects, engineers, watershed specialists, and any other technical expertise necessary to ensure that both the wilderness and the rights of the minerals claimant are adequately and properly served. Appropriate mineral examination will be a part of consideration of any operating plan.

All prospecting and mining activities must comply with the mining laws, BLM and Department regulations and policies, and other applicable Regulations.

a. *Plans of Operations.* (1) An approved plan of operations is required prior to commencing any operation, except casual use, in all BLM-administered wilderness areas. Operations include all functions, work, facilities, and activities in connection with prospecting, development, extraction, and processing of mineral deposits and all other uses related to these activities. Casual use resulting in only negligible disturbance to wilderness resources and not involving the use of mechanized or mortorized equipment, overland mechanical transport, landing of aircraft, or explosives will not require an approved plan of operation.

(2) Contents of a plan of operations and plan approval shall comply with all items listed in the 3809 Regulations at § 3809.1–4(c) and 3809.1–5. The following criteria will also be considered:

(a) *Access*—Access may be proposed in a plan of operations by foot, horseback, road, cross-country vehicles, boat, or aircraft. From the wilderness resource standpoint, foot or horseback is the most preferable and this approach should be considered first. However, this may be impractical from the standpoint of the requirements of the proposed plan. BLM may assist the operator in selecing the most appropriate access route. The final approved method must be that which creates the least lasting impact on the wilderness resource, while still reasonably serving the needs of the operator. In some cases, consideration for the least lasting effect might override another form of access which has more short-term impact.

Those activities otherwise generally prohibited in wilderness, including the use of mechanized transport, motorized equipment, or aircraft, shall be authorized only when proved essential. An approved operating plan will serve as authorization for such otherwise prohibited activities on mining claims within wilderness. All access across wilderness by other than primitive means, whether on or off a mining claim, will be addressed under a plan of operation.

In consideration of the use of motorized equipment and means and type of access, the following criteria shall be satisfied in arriving at a decision:

i. District Managers shall determine that there is reasonable expectation of the presence of a mineral deposit.

ii. There is no reasonable alternative to the use of motorized or mechanical equipment.

iii. When authorized, the use of motorized or mechanical equipment should be timed to have the minimum possible impact on wilderness visitors' enjoyment.

iv. The transportation of prospecting personnel by helicopter or other forms of motorized transport may be approved after a satisfactory showing that the need is reasonably necessary and incidental to the mining operation.

(b) *Motorized Equipment*—The use of motorized equipment may be necessary and incidental to properly perform mining operations. Decisions whether or not to allow the use of such equipment will be based on whether the equipment is necessary to accomplish the task. Where possible, this use will be limited to periods outside the heaviest wilderness use.

(c) *Timber*—Timer determined necessary for removal will be cut in such a manner as to minimize lasting evidence of its removal. Individual trees will be carefully selected so as not to make obvious artificial openings. Stumps will be cut as close to the ground as practical.

(d) *Fire*—The operator will be required to keep spark arresters and fire extinguishers on all internal combustion engines during periods of fire danger. The operator will generally be required to maintain caches of handtools in sufficient quantities to equip those personnel expected to be on the operation. The operator and his personnel will be expected to take initial action on any fire in the vicinity of the operation.

Slash and other flammable debris will generally require complete disposal by burning to reduce fire hazard, prevent insect buildup, and more rapidly reduce evidence of the timber cutting. This will generally consist of careful hand piling away from standing green trees and burning at a time approved by the BLM District Manager. Careful attention during burning operations will be required to prevent damage to standing trees and to ensure a clean burn.

(e) *Site Reclamation*—The reclamation of the site and other disturbed areas will vary with the location, type of soil erosion hazard, type of vegetative cover, and type and extent of disturbance. As a minimum, all sites will be treated in such a manner that they will not cause accelerated erosion, siltation of streams, a hazard to wilderness visitors, or unnecessary or undue degradation of the land. Also, as a minimum, all excavations with vertical cuts in soil will be sloped to their natural angle of repose. Generally, hand-dug pits or shafts with the excavated material still at hand will be refilled. Here, as with timber cutting, the main objective will be to minimize remaining evidence of human activities. It may not be practical to return an area to its original contour, but it will generally be entirely reasonable to return it to a contour which might appear to be natural. An effort will be made to put topsoil equal in quality to that which was removed over disturbed soil surfaces to promote natural revegetation or to aid in seeding. Where native seed is available, disturbed areas will be seeded to native plant species provided the area originally supported such vegetation. Exotic species will not be used.

(f) *Structures and Improvements*—Plans of operations shall identify all structures and improvements planned as an adjunct to the operation. The plan will also show the ultimate disposition of the improvements and when this will occur. The objective will be to ensure the removal of all works or improvements when they are no longer needed for the prospect or future mining.

(g) *Unnecessary or Undue Degradation*—A plan of operations shall include measures to be taken to prevent unncessary or undue degradation of the area resulting from the proposed operation. This may require measures to prevent water pollution through contamination or siltation of streams while the operation is in progress and to leave the site in such a condition that a vegetative cover can be reestablished when the operation is abandoned. Such measures may include trenching of disturbed slopes, placing retaining walls to prevent tailings from entering stream channels, etc. It may also require the scalping and stockpiling of the topsoil or sod from the area to be disturbed so that it might be spread over the surface to aid in reestablishing vegetation. Air and

noise pollution are also critical elements. Plans shall identify mitigating measures to minimize noise and air pollution.

(3) *Performance Bond.* No bond shall be required for operations considered as casual use. A bond may be required for any operator who conducts operations under an approved plan of operations. The primary purpose for a bond is to ensure compliance with the plan of operations. Requirement for posting a bond is at the discretion of the authorized officer.

(4) *Environmental Assessment.* Operating plans for prospecting and mining activities will normally involve surface disturbance of the wilderness resource and will require an environmental assessment which considers the impact of the proposed operation on the lands and all feasible alternatives for complying with the rights of the claimant. Upon completion of the analysis, the District Manager will determine if an environmental impact statement is needed.

b. *Mineral Leasing.* Mineral leasing will be governed by the policy stated in Chapter II, section 3. h. of this document.

c. *Mineral Patents.* The Wilderness Act, section 4(d)(3), states in part:

> Mining locations . . . shall be held and used solely for mining . . . and hereafter, subject to valid existing rights, all patents issued . . . affecting national forest lands designated by this Act as wilderness areas shall convey title to the mineral deposits . . . but each such patent shall reserve to the United States all title in or to the surface. . . .

The same subsection further states that:

> Mining claims located after the effective date of this Act within the boundaries of wilderness areas designated by this Act shall create no rights in excess of those rights which may be patented under the provisions of this subsection.

d. *Common Varieties of Mineral Materials.* Permits to remove such materials will not be issued.

e. *Paleontological Resources.* Paleontological resource inventories, studies, and research involving surface examination or limited subsurface sampling may be permitted. Salvage of paleontological sites, excavation, and collection of artifacts may be allowed if the project will not degrade the wilderness character of the area and such activity is needed to preserve the particular resource, and/or similar studies and research cannot be conducted elsewhere. Use of mechanized equipment and permanent physical protection structures may be permitted if all the above conditions are met and there are not other feasible alternatives. State Director approval is required for all projects.

J. Administrative Structures and Facilities

1. *Administrative Sites.* Existing administrative sites will be limited to the existing structures or their replacement with similar structures of compatible design provided their continued use is necessary to meet minimum requirements for the administration of the area. Tents will usually be used to supplement housing and kitchen demands brought about by special projects and expanding workloads. As maintenance becomes impractical, first consideration will be given to eliminating the site. Replacement of facilities will require the Director's approval. The Wilderness Management Plan will address the need for existing sites. No new sites will be planned unless they are the minimum necessary for management of the area as wilderness.

2. *Fences.* Corrals and fences for the control of administrative pack and saddle stock may be built only at administrative sites where the animals are regularly used for periods of more than a few days' duration. New permanent fences shall be constructed of materials compatible with the particular wilderness. The Wilderness Management Plan will consider the need for, location of, and material to be used in administrative fence construction.

3. *Trails.* Trails for administrative purposes may be constructed when they are the minimum necessary for the preservation of the wilderness resource and have been authorized in the Wilderness Management Plan. (Trails and associated structures for visitor use are discussed as part of the specific guidance under Recreation and Visitor Use, section III. A. of this document.)

4. *Airfields.* New airfields, including emergency airstrips, shall not be located in BLM-administered wilderness. The Wilderness Management Plan shall review existing airstrips and determine whether or not to permit the continued use of existing airfields. Such use will be monitored on a regular bisis to determine if its continuation is appropriate. Use may be restricted when necessary to protect wilderness resources, such as wildlife values during nesting season. If use is approved, maintenance will generally be by primitive, non-motorized equipment only.

6. *Heliports and Helispots*—a. *Heliports.* Heliports may be constructed and maintained at existing administrative sites where they are the minimum necessary for wilderness purposes. Complete justification for continuing heliports or constructing new ones will be required. Unless otherwise approved by the Director, other heliports shall not be located within wildernesses. The Wilderness Management Plan will fully evaluate the need for heliports. Only those heliports considered the minimum necessary for wilderness resource management will be continued.

b. *Helispots.* State Directors may approve construction of individual helispots or systems of helispots when they are the minimum necessary for administration or protection of the area as wilderness. The Wilderness Management Plan will fully evaluate helispot needs. Except for emergencies, helispot construction is prohibited if not specifically identified in the wilderness plan.

7. *Communication Facilities.* Communication facilities will be constructed and maintained only when they are the minimum necessary for administration and protection of the area as wilderness. The Wilderness Management Plan will fully evaluate the need for existing and proposed sites and their maintenance.

8. *Structures and Facilities Constructed, Used, or Proposed by Other Agencies.* Other agencies conducting activities within BLM wilderness shall be equally constrained by provisions of the Wilderness Act that are applicable to the BLM. These guidelines will apply: a. Authorized structures used by other agencies shall be reviewed periodically to determine whether their continued existence is essential for meeting the minimum requirements for administration of the area as wilderness. If it is not, the authorization shall be terminated and the structure removed. The Wilderness Management Plan will assess and determine the disposition of all such structures.

b. When existing improvements deteriorate to the point that normal maintenance will not suffice to keep them usable, the necessity for such buildings shall be critically analyzed. If they are not essential to meet the minimum requirements of administration of the wilderness, or essential to a continuing program that was established on the basis of the structure, they shall not be replaced. Permits for new buildings or replacement of existing structures must be approved by the Director.

c. The maintenance or replacement of existing signs, instruments, and other improvements of a minor nature, used in connection with such projects as snow surveys, water measurement, game and

fish management, and geological studies may be approved by the State Director. New installations may be approved if they are essential to meet the minimum requirements for administration of the wilderness for the purposes of the Wilderness Act.

K. Use of Motorized and Mechanical Equipment

Travel within a BLM-administered wilderness will normally be by nonmotorized, nonmechanical means consistent with the preservation of wilderness character.

The wilderness management plan will specify the instances and places in which administrative use of mechanized equipment, mechanical transport, or aircraft is the minimum necessary to protect and administer the wilderness resource or is necessary as part of a nonconforming, but accepted, use. Where approved, that equipment which is the minimum necessary to accomplish the task with the least lasting and damaging impact on the wilderness resource will be selected. Such motorized and mechanical equipment use will be scheduled at times and locations which will have the least impact on the visitors' wilderness experience.

Conditions under which use may be allowed (unless otherwise stated, all use is subject to the standards spelled out in the preceding paragraph) are: 1. The public use of aircraft or motorboats, where these uses were established prior to the area's designation as wilderness, may be permitted to continue. Wilderness Management Plans will assure periodic review of such use to determine if its continuation is necessary and impacts on the area's wilderness character are minimized.

2. Motorized and mechanical equipment use may be authorized for mining or prospecting purposes if approved in a Plan of Operation or in association with valid existing rights. Refer to specific guidance for Minerals Management.

3. The use of motor vehicles, motorized equipment, and mechanical transport may be approved for certain situations involving established livestock grazing operations. Refer to specific guidance for Rangeland Management.

4. Motorized equipment and mechanical transport use may be allowed when an emergency condition exists which involves the health and saftey of visitors. The Area Manager or District Manager may approve such action.

5. Motorized equipment and mechanical transport may be permitted during a fire suppression emergency. Impacts resulting from overland vehicle travel (either cross-country travel or temporary road construction) and impacts from equipment use will be obliterated and rehabilitated in a manner which permits the wilderness resource an opportunity to heal rapidly. Motorized equipment and mechanical transport uses will be specifically addressed in a wilderness area's Fire Management Plan. The Area Manager or District Manager may approve such action. Refer to specific guidance for Fire Management.

6. The use of aircraft may be allowed in nonemergency situations to deliver supplies or materials to construct or maintain improvements needed for administration of the area as wilderness when use of pack and saddle stock or other non-mechanized means is not feasible. Approval must be authorized by the State Director.

7. Powered hand-portable tools, such as chain saws or rock drills, may be approved by the State Director when they are the minimum necessary for administrative purposes where work cannot be accomplished with nonpowered tools. (In some cases, such tools may be necessary in trail construction and maintenance, due to limitations of time, season, etc.)

8. Mechanized or motorized equipment may be used for wilderness research, other wilderness-enhancing purposes where no other alternatives exist and where such use is the minimum necessary for administration of the area as wilderness and will not degrade the area's wilderness character. Instances could include wildlife transplants or fish stocking by State Divisions of Wildlife. State Director approval is required. (Refer also to specific guidance for Research and Studies.)

9. Mechanized or motorized equipment may be used in gathering information about resources, so long as the use is compatible with preservation of the wilderness environment. Instances could include mineral surveys by the U.S. Geological Survey or water resource investigations. State Director approval is required.

10. Where feasible, control of insects and diseases will be conducted without the use of motorized equipment, otherwise aircraft use is permissible without landing of aircraft. Approval must be authorized by the State Director.

11. Motorized equipment necessary to meet temporary emergencies involving violations of criminal law and/or including the pursuit of fugitives may be approved by the District Manager.

12. There is no specific prohibition of overflight of wilderness by aircraft. Low-flying aircraft cause disturbance of the solitude of an area. Except in bona fide emergencies, such as search and rescue efforts and essential military missions, low flight should be discouraged. Where low overflight is a problem, or expected to become a problem, wilderness management plans will provide for liaison with proper military authorities and the Federal Aviation Administration, and contact with pilots in the general area in an effort to reduce low flight.

L. Research and Studies

Research is a valid and important use of the wilderness resource. Research will be permitted and encouraged as long as all projects are conducted in such a manner as to preserve the area's wilderness character and they further the management, scientific, educational, and conservation purposes of the area.

Research will be conducted or supported to evaluate the effectiveness in achieving objectives of ongoing wilderness management. Research will also be encouraged to identify problems and improve management techniques to increase efforts to futher the purposes of the Wilderness Act.

Research and studies to investigate scientific value may also be conducted in wilderness provided that wilderness is essential to results of such research, and wilderness values would not be jeopardized.

Research and other studies will be conducted without use of motorized equipment or construction of temporary or permanent structures. Exceptions to this policy may be approved by the State Director in projects that are essential to management of the specific wilderness when no other feasible alternatives exist. Such use, when approved, must be the minimum necessary and must not degrade the area's wilderness character.

IV. Implementation of the Wilderness Management Policy

This chapter explains how the BLM will implement the Wilderness Management Policy through the process of developing a plan for each wilderness area under its administration.

The purpose of the Wilderness Management Plan (WMP) is to describe the management strategy that will be used to work toward attainment of the objectives of the Wilderness Management Policy. The plan must clearly show the actions that will be taken to preserve the wilderness resource, and the linkage between these actions and the objectives.

Each WMP will address the management situations present in an individual wilderness area or in two or more closely related areas. Plans should reflect the different kinds of environmental settings, history of use, and management situations found in individual areas within the framework of this policy.

Public involvement must be included in the development of each WMP. A minimum of at least one meeting or workshop must be open to the general public and the public must be given at least 45 days to comment upon the proposed Wilderness Plan. Issues, questions, and problems raised by the public will be considered during the development of the final WMP. WMP's will be updated on a regular basis or as conditions change. The public will be given the opportunity to be involved in plan changes.

The Wilderness Management Plan will include the general policy for all BLM wilderness areas. Additions may be made to tailor the policy to the current management situation for each area. Selected statements from the Wilderness Management Policy may be included to show the connection between actions proposed in the plan and the objective found in the management policy. Other policy statements may be included where appropriate, so long as they do not conflict with the Wilderness Management Policy.

During the time period before a WMP is prepared for a wilderness area, the Wilderness Management Policy will guide the conduct of day-to-day activities. The approval of activities, programs, or projects initiated by the Bureau, other governmental bodies, or private individuals will be contingent upon the completion of an environmental assessment. Proposals determined to be inconsistent with the intent of the Wilderness Management Policy or other elements of the BLM's legislative and regulatory mandate will be modified or disapproved as appropriate.

Upon completion of the WMP for an area, the viability of activities, programs, or projects will be determined through the BLM's environmental assessment process. If the proposed action is part of an approved WMP, the environmental assessment will consider if it is the best way to meet objectives of the plan from an on-the-ground perspective and if the action conforms to other applicable elements of the BLM's legislative and regulatory mandate. If the proposal is not part of the WMP, the environmental assessment will be used also to determine if it is in conformance with the WMP. Proposals found to be inconsistent with the WMP or other applicable Bureau guidance will be modified or disapproved as appropriate.

Specific guidance regarding the procedure for developing Wilderness Management Plans will be issued to BLM field offices after issuance of the final Wilderness Management Policy.

Appendix A—Section 603 of the Federal Land Policy and Management Act of 1976; Pub. L. 94–579

Sec. 603. (a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of the five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, that prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the U.S. Geological Survey and the Bureau of Mines to determine the mineral values if any, that may be present in such areas: Provided further, that the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedures specified in section 3(d) of the Wilderness Act.

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and with a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was conducted on the date of approval of this Act: Provided, that, in managing the public land the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than the preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants.

Appendix B—The Wilderness Act of September 3, 1964; Public Law 88–577; 88th Congress, S. 4

AN ACT

To establish a National Wilderness Preservation System for the permanent good of the whole people and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Short Title

Section 1. This Act may be cited as the "Wilderness Act."

Wilderness System Established—Statement of Policy

Section 2. (a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.

(b) The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

Definition of Wilderness

(c) A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

National Wilderness Preservation System—Extent of System

Section 3. (a) All areas within the national forests classified at least 30 days before the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness," "wild," or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—

(1) Within one year after the effective date of this Act, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in such legal descriptions and maps may be made.

(2) Maintain, available to the public, records pertaining to said wilderness areas, including maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors and forest rangers.

Classification. (b) The Secretary of Agriculture shall, within ten years after the enactment of this Act, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President.

Presidential recommendation to Congress. The President shall advise the United States Senate and House of Representative of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act, not less than two-thirds within seven years after the enactment of this Act, and the remaining areas within ten years after the enactment of this Act.

Congressional approval. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Notwithstanding any other provisions of this Act, the Secretary of Agriculture may complete his review and delete such areas as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

Report to President. (c) Within ten years after the effective date of this Act the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on the effective date of this Act and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

Presidential recommendation to Congress. The President shall adviser the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such advice shall be given with respect to not less than one-third of the areas and islands to be reviewed under this subsection within three years after enactment of this Act, not less than two-thirds within seven years of enactment of this Act, and the remainder within ten years of enactment of this Act.

Congressional approval. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system.

Suitability. (d)(1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness—

Publication in **Federal Register.** (A) Given public notice of the proposed action as they deem appropriate, including publication in the **Federal Register** and in a newspaper having general circulation in the area or areas in the vicinity of the affected land;

Hearings. (B) Hold a public hearing or hearings at a location or locations convenient to the area affected. The hearings shall be announced through such means as the respective Secretaries involved deem appropriate, including notices in the **Federal Register** and in newspapers of general circulation in the area: *Provided,* That if the lands involved are located in more than one State, at least one hearing shall be held in each State in which a portion of the land lies;

(C) At least thirty days before the date of a hearing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by no later than thirty days following the date of the hearing.

(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.

Proposed modification. (e) Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided in subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only in the same manner as provided for in subsections (b) and (c) of this section.

Use of Wilderness Areas

Section 4. (a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

(2) Nothing in this Act shall modify the restrictions and provisions of the Shipstead-Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020), the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607, Eighty-fourth Congress, June 22, 1956; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this Act shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system in accordance with the Act of August 25, 1916, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432 et. seq.); section 3(2)) of the Federal Power Act (16 U.S.C. 796 (2)); and the Act of August 21, 1935 (40 Stat. 666; 16 U.S.C. 461 et seq.).

(b) Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be reasonable for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

Prohibition of Certain Uses

(c) Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of the Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Special Provisions

(d) The following special provisions are hereby made: (1) Within wilderness areas designated by this Act the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

Nothing in this Act shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

Mineral leases, claims, etc. (3) Notwithstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to the effective date of this Act, extend to those national forest lands designated by this Act as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations, lying within the boundaries of said wilderness areas shall be held and use solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and use so much of the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if the timber is not otherwise reasonably available, and if the timber is cut under sound principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United State all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this Act: *Provided*, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this Act shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after the effective date of the Act within the boundaries of wilderness areas designated by this Act shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases permits, and licenses covering lands within national forest wilderness areas designated by this Act shall contain such reasonble stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

Water resources. (4) Within wilderness areas in the national forests designated by this Act, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

(5) Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats.

(6) Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

(7) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(8) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

State and Private Lands Within Wilderness Areas

Section 5. (a) In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this Act as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the

State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture:

Transfer, restriction. Provided, however, That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

(b) In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

Acquisition. (c) Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this Act as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

Gifts, Bequests, and Contributions

Section 6. (a) The Secretary of Agriculture may accept gifts or bequests of land within wilderness areas designated by this Act for preservation as wilderness. The Secretary of Agriculture may also accept gifts or bequests of land adjacent to wilderness areas designated by this Act for preservation as wilderness if he had given sixty days advance notice thereof to the President of the Senate and the Speaker of the House of Representatives. Land accepted by the Secretary of Agriculture under this section shall become part of the wilderness area involved. Regulations with regard to any such land may be in accordance with such agreements, consistent with the policy of this Act, as are made at the time of such gift, or such conditions, consistent with such policy, as may be included in, and accepted with, such bequest.

(b) The Secretary of Agriculture or the Secretary of the Interior is authorized to accept private contributions and gifts to be used to further the purposes of this Act.

Annual Reports

Section 7. At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system, including a list and descriptions of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make.

Appendix C—The Bureau of Land Management Wilderness Review Process

To carry out the wilderness mandate of FLPMA, the Bureau of Land Management has developed a wilderness review process with three phases: Inventory, study, and reporting to Congress.

Inventory: In the wilderness inventory, the BLM examined the public lands, with public participation, and identified those areas that meet the definition of wilderness established by Congress. These areas were identified as wilderness study areas (WSA's). The inventory was completed by November 14, 1980, in the contiguous Western States, resulting in identification of approximately 24 million acres as wilderness study areas and in elimination from further wilderness consideration of approximately 150 million acres.

Study: Each wilderness study area will be studied through the BLM resource management planning system to analyze all values, resources, and uses within the area. The findings of the study, including public participation, determine whether the area will be recommended as suitable or nonsuitable for designation as wilderness. In practice, determining an area's "suitability or nonsuitability . . . for preservation as wilderness," in the words of FLPMA, means determining whether the area is more suitable for wilderness designation or more suitable for other uses.

Reporting: When the study has been completed, a recommendation as to whether the wilderness study area is suitable or nonsuitable for designation as wilderness is submitted through the Secretary of the Interior and the President to Congress. A mineral survey will be conducted by the U.S. Geological Survey and Bureau of Mines for any area recommended as suitable. Reports on all wilderness study areas must reach the President no later than October 21, 1991, and reach Congress by October 21, 1993. Only Congress can designate an area as wilderness.

Appendix D—Definitions

Some of the terms used in this document have specific meanings and are defined as follows:

Domestic Livestock: Aninals kept and managed for their products or for breeding purposes, not visitors' animals or administrative livestock.

FLPMA: The Federal Land Policy and Management Act of 1976 (Public Law 94–579, 90 Stat. 2743, 43 U.S.C. 1701).

Livestock Grazing Operations: Those operations under permit where the primary purpose is the grazing of livestock for the production of food and fiber. Includes pack and saddle stock used in conjunction with such operations.

Mechanized Transport: Includes any wheeled contrivance which constitutes a mechanical advantage to the user and which is powered by a living or nonliving source contained on, within, or attached thereto; such as bicycles, deer carriers, and wagons.

Motorized Equipment: Machines incorporating a motor, engine, or other nonliving power source to accomplish a task. Includes such machines as aircraft, hovercraft, motorboats, automobiles, motor scooters, snowmobiles, bulldozers, duffel carriers, chainsaws, rock drills, and generators. (For administrative guidance, this term is not interpreted to include such things as electric shavers or toothbrushes, portable radios or televisions, Geiger counters, wristwatches, gas stoves, flashlights, and other such small contrivances.)

Motor Vehicle: A device for transporting personnel or material, that incorporates a motor or engine of any type for propulsion, with wheels, tracks, skids, skis, air cushion, or other contrivance, for traveling on, over, through or adjacent to land and/or water.

Multiple Use: ". . . the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some lands for less than all of the resources; a combination of balanced and diverse resource uses that take into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." (From section 103, FLPMA)

Naturalized: Refers to a non-native species of plant or animal which is well established in the area as a part of the wilderness ecosystem and which sustains its population without requiring human assistance (such as stocking or reseeding). Non-native species that are not in equilibrium with the wilderness ecosystem (such as those which are

increasing their population and displacing native species) are not considered naturalized.

Naturalness: Refers to an area which "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." (From section 2(c), Wilderness Act.)

Outstanding: Standing out among others of its kind; conspicious; prominent: Superior to others of its kind; distinguished; excellent.

Permanent Improvement: A manmade structural or nonstructural improvement which will remain at a particular location for more than one field season—as differentiated from temporary structures; includes such items as toilet buildings, trails, cabins, signs, fences, vegetative cover manipulation, shelters, and fire grills.

Primitive and Unconfined Recreation: Nonmotorized and nondeveloped types of outdoor recreational activities.

Rangeland Improvements: Any structural or nonstructural improvement which directly affects or supports the use of the forage resource by domestic livestock, such as fences, line cabins, water wells and lines, and stock tanks.

Recreational Livestock: Horses, mules, or burros used for recreational purposes to transport people and/or their supplies.

Solitude: The state of being alone or remote from habitations; isolation. A lonely, unfrequented, or secluded place.

Temporary Structure: Any structure which can be readily and completely dismantled and removed from the site between periods of actual use. It may or may not be authroized at the same site season to season or year to year.

Unnecessary or Undue Degradation: Surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

Visitor Use: Visitor use of the wilderness resource for inspiration, stimulation, solitude, relaxation, education, pleasure, or satisfaction.

Wilderness: The definition contained in section 2(c) of the Wilderness Act of 1964 (78 Stat. 891). (See Appendix B for its full text).

Wilderness Area: An area formally designated by Act of Congress as part of the National Wilderness Preservation System.

Wilderness Characteristics: The definition contained in section 2(c) of the Wilderness Act of 1964. (78 Stat. 891) (See Appendix B for its full text).

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Part XIII

Department of Energy

Commercial and Apartment Conservation Service Program

DEPARTMENT OF ENERGY

10 CFR Part 458

[Docket No. CAS-RM-80-125]

Commercial and Apartment Conservation Service Program; Proposed Rulemaking and Public Hearing

AGENCY: Department of Energy.

ACTION: Notice of Proposed Rulemaking and Public Hearings.

SUMMARY: The Department of Energy (DOE) proposes to implement the Commercial and Apartment Conservation Service (CACS) Program pursuant to Title VII of the National Energy Conservation Policy Act (NECPA), Pub. L. No. 95-619, as amended by the Energy Security Act (ESA), Pub. L. No. 96-294. The purpose of the CACS Program is to encourage the installation of energy conservation measures and the adoption of energy conserving operation and maintenance procedures in existing small commercial buildings and large (five or more units) multifamily dwellings. Large gas and electric utilities are required, and building heating suppliers may volunteer, to offer and to provide, upon request, energy audits of commercial buildings and multifamily dwellings. The State may submit State Plans to DOE. The State Plans would require large utilities to participate and could include, in the Governor's discretion, nonregulated utilities (e.g., municipalities and cooperatives) and/or building heating suppliers. If a State chooses not to submit a plan, DOE would require covered utilities in the State to carry out a CACS Program for their customers. When a nonregulated utility is not included in a State Plan it is required to submit its own plan for the CACS Program.

The proposed rule sets out the requirements for State Plans and Nonregulated Utility Plans. In addition, it addresses procedures that must be followed in order for a utility to be exempted by the State Regulatory Authority from some requirements of the State Plan. The proposed rule describes the situations and terms under which the Federal Standby Authority would be exercised.

DOE also proposes in this rulemaking amendments to the RCS Program regulations (10 CFR 456) to extend coverage of the RCS Program to include residential units in residential buildings with five or more units which have neither central heating nor central cooling.

DATES: Written comments must be received no later than March 17, 1981, in order to ensure their consideration.

Public hearings will be held in three cities, beginning at 9:00 a.m. local time on the dates and at the locations specified below: February 19, 1981 in Washington, D.C., February 23 and 24, 1981 in San Francisco, California, and February 26, 1981 in Kansas City, Missouri. Requests to speak must be received no later than 4:00 p.m. on February 5, 1981 for Washington, D.C.; February 10, 1981 for San Francisco, CA; February 12, 1981 for Kansas City, Missouri.

ADDRESSES: Public hearings will be held at the following locations: Room 2105, 2000 M Street, N.W., Washington, D.C. 20036; Ramada Inn/Fisherman's Wharf, Crocker-Hopkins Room 509 Bay Street, San Francisco, California 94133; Federal Office Building, 911 Walnut Street, Room 302, Kansas City, Missouri 64106.

All written comments and requests to speak at the Washington, D.C. hearing should be addressed to Carol A. Snipes (Hearing Procedures), U.S. Department of Energy, Office of Conservation and Solar Energy, Office of Hearings and Dockets, Mail Station 6B-025, 1000 Independence Avenue, S.W., Washington, D.C. 20585 (202-252-9319).

Requests to speak at the San Francisco, California hearing should be addressed to Doris Harris, DOE Regional Office, Region IX, 333 Market Street, San Francisco, California 94105 (415-764-7027).

Requests to speak at the Kansas City, Missouri hearing should be addressed to Dottie Doll, DOE Regional Office, Region VII, 324 East 11th Street, Kansas City, Missouri 64106 (816-374-5533).

FOR FURTHER INFORMATION CONTACT:

James R. Tanck, Director, Building Conservation Services Division, Office of Conservation and Solar Energy, Department of Energy, 1000 Independence Avenue SW., Room GH-068, Washington, D.C. 20585, (202) 252-9161

Laura Rockwood, Office of General Counsel, Department of Energy, 1000 Independence Avenue SW., Room 6B-128, Washington, D.C. 20585, (202) 252-9519.

SUPPLEMENTARY INFORMATION:

I. Introduction.

II. Part 456—Amendments to the Residential Conservation Service Program.

III. Part 458, Subpart A—General Provisions and Definitions.

IV. Part 458, Subpart B—Preparation, Submission, and Approval of State Plans.

V. Part 458, Subpart C—Preparation, Submission, and Approval of Nonregulated Utility Plans.

VI. Part 458, Subpart D—Energy Conservation Services for Commercial Buildings.

VII. Part 458, Subpart E—Energy Conservation Services for Multifamily Dwellings.

VIII. Part 458, Subpart F—Federal Standby Planning Authority.

IX. Appendix—Program Measures by Climate and Category of Building.

X. Draft Regulatory Analysis and Urban and Community Impact Statement.

XI. Draft Supplement to the Environmental Impact Statement for the Residential Conservation Service Program.

XII. Consultation with Other Federal Agencies.

XIII. Contractor Contributions to Rulemaking.

XIV. Comment and Hearing Procedures.

I. Introduction

The Department of Energy (DOE) proposes to amend Title 10 CFR, Part 456, the regulations governing the RCS Program. The purpose of the amendment is to extend coverage of the RCS Program to include residential units in multifamily dwellings with 5 units or more which do not have central heating or cooling facilities (units in buildings with central heating or cooling are covered by the CACS Program). Beginning January 1, 1982, a newly eligible customer under the expanded RCS Program would be able to request the audit described in Section 456.307, and receive all the services available under the RCS Program, or request the audit described in Section 458.503(b) of the CACS proposed rule, and not receive the additional RCS Program services. DOE feels that in many cases the audit described in the CACS Program would be more appropriate for large residential buildings than would the audit described in the RCS Program. Furthermore, the additional RCS Program services often may not be necessary for the owners of larger residential buildings.

DOE also proposes to amend Chapter II of Title 10 CFR by adding a new Part 458. The proposed regulation will fulfill the requirements of Title VII of the National Energy Conservation Policy Act (NECPA), Pub. L. No. 95-619, as amended by the Energy Security Act (ESA), Pub. L. No. 96-294. The proposed regulation covers the Commercial and Apartment Conservation Service (CACS) Program. The program is aimed at aiding small businesses and apartment building owners in achieving energy savings that are cost effective. Since information is costly to obtain, and small businesses often lack the time and resources necessary to obtain and analyze such information, the utilities can play a useful role in making this

information available and in providing assistance.

DOE recognizes that the CACS Program as legislated is principally an information program that does not require any specific actions that will conserve energy. It will aid energy conservation only to the extent that the owners and tenants of commercial and residential buildings are stimulated to implement conservation measures and procedures. Thus, the impact of the program depends largely upon the extent to which owners and tenants are made aware of potential energy savings, and of the cost effectiveness of conservation measures and procedures. The utilities have the leading role in disseminating information and encouraging customer audit requests; the success of the program depends largely upon the enthusiasm with which the utility carries out the program in obtaining a high response rate for customers with high potentials for energy savings. DOE feels that the States and utilities are best able to judge how to reach the target groups in an effective manner within the local environment, and has proposed the rules so as to allow considerable latitude for innovation on the part of the State and the utilities.

In view of the above, DOE feels that emphasis should be placed throughout the program on actions that will facilitate the dissemination of information, and encourage a substantial response rate to the audit offer. Obviously, the success of the CACS Program will be measured by the extent to which it achieves the more efficient use of energy in the commercial buildings and multifamily dwellings sectors.

II. Part 456—Amendments to the RCS Program

A. Introduction

Title II of NECPA originally defined a covered residential building as a building with one to four dwelling units which has a heating or cooling system. The ESA amended Title II of NECPA extending coverage, after January 1, 1982, to residential buildings that contain five or more dwelling units unless such building contains a central heating or cooling system. (Those buildings containing a central heating or cooling system would be covered by the CACS Program.) Tenants and owners of such residential buildings may request the audit described in § 456.307, and receive all the services and benefits prescribed under the RCS Program. DOE proposes to allow tenants and owners to request, in the alternative, the audit described in Section 458.503(b), and to forego the additional RCS Program services and benefits. All utilities covered by the RCS Program would be covered by these proposed amendments to the RCS Program.

B. Definition of Residential Building

The proposed amended definition of the term "residential buildings" is based on the definition contained in Section 541 of the Energy Security Act. The definition, as amended, extends coverage of the RCS Program to residential buildings containing five or more dwelling units, unless such building is centrally heated, centrally cooled, or both. Buildings that are centrally heated or cooled are covered by the proposed CACS Program.

Either tenants or owners of residential buildings may request an audit and receive all the RCS Program services and benefits if such tenant or owner receives a fuel bill. DOE recognizes that in most cases tenants will not be able to install measures unless the building owner approves such installations. DOE has considered adding a provision to the proposed amendment requiring that tenants receive written permission from their landlord, indicating that the tenant is allowed to make such installations, before the utility is required to provide arranging services. DOE seeks comment concerning the necessity of such a requirement.

DOE also recognizes that several eligible customers in the same residential building may request audits at different times, thus placing a burden on utilities. DOE seeks comments or how to alleviate this burden while ensuring that eligible customers receive the benefits to which they are entitled.

C. Program Announcement

The proposed amendment would add a new § 456.320 to require utilities and participating home heating suppliers to include a special statement in all Program Announcements distributed to eligible customers in residential buildings containing five or more units. This statement would explain that an eligible customer has a choice between obtaining the RCS Program audit and all the RCS Program services and benefits, or obtaining the CACS Program audit. Nothing is intended to prohibit a utility company that so chooses to offer RCS-type services to customers receiving a CACS audit. The statement must also describe the differences between the two types of audits and services provided within each program. It must be clearly stated that election of one audit and its program services shall preclude the customer from future requests for the other program audit and its services.

Utilities and States could, of course, provide the complete range of RCS services to eligible customers in residential buildings containing five of more units who elect the CACS Program audit. However, this would create additional requirements for both the utility (i.e., arranging) and the State (i.e., listing), and therefore is not required by DOE. Comment is sought on this option.

D. Requirements for Program Audit

The proposed amendment would add a new § 456.321, which would require utilities and participating home heating suppliers to provide to eligible customers in residential buildings containing five or more units, upon request, either an RCS type audit and all the attendant services and benefits, or a CACS type audit.

DOE believes that an RCS audit might be less helpful to an eligible residential customer than would the CACS audit because the RCS audit covers measures applicable principally to single family residences. The CACS audit, on the other hand, is geared to the type of building (5 or more units) owned or occupied by the eligible customer covered by this proposed rule. Consequently, a CACS audit would provide more appropriate information.

Since Title VII of NECPA limits a customer's entitlement under the CACS Program to an energy audit, the additional services and benefits of the RCS Program are not available. As a result, the CACS audit, although more relevant to the large residential buildings, does not carry with it the advantages of extra services (i.e., arranging installation) or benefits (i.e., warranties and standards) provided under RCS.

Consequently, DOE has proposed that the eligible customer in a large residential building have a choice of audit based upon his or her judgment of the relative value of a more relevant audit (CACS audit) versus more services and benefits (RCS audit).

The major alternative would be to provide all RCS services and benefits and a CACS audit. This alternative would be particularly burdensome to States and utilities and would create substantial additional requirements in DOE's regulations. For example: States would be required to develop lists of suppliers, contractors, and lenders for the added measures applicable to the multifamily dwellings covered by the CACS Program, and would be required to provide redress, post-installation inspections, etc.; installers and contractors would have to follow DOE-

developed standards for materials and installations; and utilities would be required to provide the lists, arrange for installation and financing, etc. The additional regulatory burden of these requirements on States, utilities, suppliers, and contractors would be substantial. DOE recognizes this burden and in keeping with the requirement that the amendments contained in the Energy Security Act should not delay or impair implementation of the RCS Program, has decided against this alternative.

DOE is concerned that the eligible customers receive useful information and services, and seeks comment on the proposed approach and other alternatives to that approach.

III. Part 458, Subpart A–General Provisions and Definitions

Section 711 of NECPA states that "this program shall apply to any public utility for which coverage is provided under Section 211." DOE shall publish a list of covered utilities in the **Federal Register** before the beginning of each calendar year, which list shall apply equally to the RCS Program and to the CACS Program. It is made clear in Section 458.102(c) of the proposed rule that a utility which meets the definition of a covered utility is fully subject to the requirements of these rules and the applicable plan whether or not it is included on the list published in accordance with this provision. Inclusion or noninclusion on such list is not determinative of a utility's coverage.

This subpart also contains a provision which reflects the Secretary's authority to enforce the provisions of the CACS Program by petitioning the appropriate U.S. district court to enjoin any person from violating any provision, plan, or order under the CACS Program. Section 741(c) of NECPA. Although the statutory provision for this authority is contained under the section entitled "Federal Standby Authority," both the wording of Section 741(c) and the language of the Conference Report specifically state that the Secretary's authority to request injunctive relief extends to enforcing any provision of the regulations and not just to enforcing the Federal standby authority. The word "person" is not defined in the statute nor explained in the Conference Report. DOE interprets the word "person" to include any utility company, supplier, installer, contractor, financial institution, and State or municipal agency. We believe this is consistent with the statutory purpose of Federal standby authority and the need to ensure appropriate redress of violations of DOE regulations.

Section 710 of NECPA states that the definitions in Section 210 of NECPA are applicable to this program except as otherwise provided in Section 710. Several of the definitions in Section 210 are clearly not applcable to this program and have been deleted (i.e., Class B energy audit, measures warranty, residential building, and useful life). Nine definitions are given in Section 710 of NECPA, the applicable definitions of Section 210 of NECPA, and contains definitions of other terms used in the proposed rule. Many of these other definitions are identical to those contained in the RCS Program final rule (Part 456), and are listed in this proposed rule for convenience. Specific definitions are provided for the various "commercial energy conservation measures" listed in Section 710(b)(5) of NECPA, as well as for the conservation measures added by DOE. The term "energy efficient improvements," as defined in Section 710(b)(4) of NECPA, has been replaced by the term "energy conserving operation and maintenance procedures" to more clearly describe for a building owner the types of actions included. Specific definitions for each of the "energy conserving operation and maintenance procedures" recommended by DOE are provided. These include many of the practices defined in the RCS Program, as well as new procedures applicable to commercial buildings and multifamily dwellings. A number of practices, because of their cost implications in apartment buildings, are included as measures.

No discussion is provided here of the definitions contained in this part that are also contained in the final rule for the RCS Program.

The term "building heating supplier" means any person engaged in the business of providing No. 2, No. 4, or No. 6 heating oil, kerosene, or propane to owners or tenants of commercial buildings, or selling No. 2, No. 4, or No. 6 heating oil, kerosene, or propane to owners of multifamily dwellings.

The term "Commercial Announcement" means the brochure or letter which must be sent to each eligible commercial customer to announce the availability of an audit and provide information on the energy conservation and energy conserving operation and maintenance procedures. The term "Apartment Announcement" means the brochure or letter which must be sent to each eligible multifamily dwelling customer to announce the availability of an audit and provide information on the energy conservation and energy conserving operation and maintenance procedures. The more general term "program information" refers to all the information activities undertaken by a utility or building heating supplier related to the CACS Program. This includes the Commercial and Apartment Announcements and the Tenant's Energy Conservation Information Package.

The definition of "covered utility" is based on Section 211 of NECPA, and is identical to the definition given for this term in the RCS Program final rule. Coverage is limited to large gas and electric utilities.

DOE recognizes that the defintions of the terms "commercial building" and "eligible commercial customer" contained in Section 710(b) of NECPA, are subject to a variety of interpretations. In arriving at the definitions presented in the proposed rule, DOE carefully considered the language of the law, the intent of Congress as reflected in the committee reports, and the problems utilities might have in indentifying eligible customers.

The statutory definition of "commercial building" provides that the building must have been completed by June 30, 1980; the building is primarily used for carrying out a business (including nonprofit business) or for carrying out the activities of a State or local government; the building is not used primarily for the manufacture or production of products, raw material, or agricultural commodities; and it is not a Federal building. Finally, the average monthly usage of energy for 1980 for the building must be less than 4,000 kilowatt hours of electricity or 1,000 therms of natural gas or the Btu equivalent of other fuels. The Btu equivalent of 1,000 therms of natural gas is 100 million Btu.

DOE would define the term commercial building also as a roofed and walled structure. This would include, for example, the separate stores in a building containing several stores such as a shopping center, but would not include separate establishments in an office building. The term building is not defined in Title VII of NECPA. DOE feels it is appropriate to clarify the term building by including in the definition of commercial building, the definition used by the DOE Energy Information Administration.

The definition of "eligible commercial customer" for a public utility identifies the owner or tenant of a commercial building to which that public utility supplies gas or electricity as being potentially eligible for the program. This definition permits tenants in master-metered buildings to be eligible; it is not necessary to pay a utility bill directly to be considered an eligible customer. In this case, the burden is on the utility to obtain names of eligible customers who are not directly metered by the utility.

Similarly, an eligible commercial customer for a building heating supplier is the owner or tenant of a commercial building to which that building heating supplier supplies No. 2, No. 4, or No. 6 heating oil, kerosene, or propane.

The definition given in the proposed rule for the term "eligible multifamily dwelling customer" is identical to the definition contained in Section 710(b) of NECPA. Only the owner of a multifamily dwelling is eligible to request an audit. DOE considered allowing tenants to request audits of their individual dwelling units, but rejected this approach as not being cost effective and not being within the scope of the law.

The definition of the term "multifamily dwelling" is identical to the definition contained in Section 710(b)(3) of NECPA.

The two categories of "energy conservation measures" and "renewable resource measures" have been included in the proposed rule. DOE has attempted to maintain the same format for the proposed rule as for the existing RCS Program. Thus, each of the categories is similar to those in the RCS Program. However, while the renewable resource measures remain the same for the Title VII program, additional energy conservation measures and applicability criteria have been included for the proposed rule. The changes and rationale are discussed in the following paragraphs.

The proposed rule identifies twenty-two "energy conservation measures" for commercial and multifamily buildings. The list includes all of the energy conservation measures specified by the existing RCS program plus the additional measures specified by the Energy Security Act. The additional measures were required because large multifamily buildings and small commercial facilities may have substantially different energy requirements than smaller residential buildings. DOE specifically requests that commenters address the practicality of the applicability criteria with respect to the measures.

The lighting system in a smaller residential structure is considerably less energy intensive and less sophisticated than those commonly found in multifamily and commercial buildings. The potential for saving energy in lighting operations in the larger buildings is commensurately greater and therefore requires more attention. DOE believes that lighting systems will be similar in many building types and climate zones. Therefore, all of the eligible buildings would receive a lighting audit, subject to the building meeting the lighting applicability criteria.

Automatic energy control systems have been defined broadly to include a wide range of devices that regulate lighting, heating, cooling or ventilating systems. These devices reduce energy costs by providing automatic regulation based on time, temperature or humidity. Such equipment has been shown to reduce energy usage by allowing for more precise equipment control than is likely to occur manually. Examples are timers for lighting systems, temperature and humidity sensors for outside air intake, and outside temperature sensors for boiler water temperature control. The definition also includes programmable equipment, such as computerized energy management systems, control of ventilation on the basis of occupancy, electrical demand control equipment, or other types. Such equipment is often valuable in small commercial property, since there is not likely to be an individual assigned to controlling lighting, heating, and ventilating systems carefully. Automatic devices may therefore prove valuable.

Heating systems in multifamily facilities may be quite large as may those serving several small commercial facilities. In larger heating systems, modifications short of complete replacement are available that are more effective for reducing energy costs than with smaller systems. Efficiency of such systems can be increased by increasing heat exchanger surface areas; by adding devices to increase turbulence of hot gases, thereby increasing the residence time of the gases in the boiler; by recycling hot gases to burn remaining hydrocarbons; and by allowing controlled condensation of steam within the heat exchanger, thereby recovering the latent heat of vaporization. Consequently, DOE has broadened this definition for use in the CACS from that used in RCS.

Energy recovery systems are of value where there exists a source of energy which is presently disposed of into the atmosphere or into waste water, and where a building energy requirement exists which can be met by using this waste energy. Such opportunities are more likely to be available in facilities with multiple energy uses, such as refrigeration, ventilation, heating, hot water, and cooking. These activities are most often valuable in larger facilities. Therefore, this measure is included although only applicable to a portion of the covered facilities.

DOE recognizes that cogeneration systems have the potential to significantly reduce both energy consumption and environmental pollutants. For some small commercial facilities and multifamily buildings, there are opportunities to use cogeneration systems. DOE has attempted to leave the definition of a cogeneration system as broad as possible while at the same time prescribing energy demand limitations. DOE believes that this approach gives the auditor the requisite information necessary to determine applicability, while at the same time not excluding products currently available in the market place.

In the proposed rule DOE has retained all of the categories of "renewable resource measures" and all of the applicability criteria from the original RCS Program. DOE believes that the renewable resource measure will have similar applicability in the Title VII program. All of the identified measures have reached commercial acceptance. Retrofit domestic hot water systems, Trombe walls, and other passive applications are increasingly being installed in commercial facilities. Wind systems, combined active solar space heating and domestic hot water systems, and solar swimming pool heaters are also being installed in multifamily and commercial buildings with greater frequency. DOE believes that adoption of renewable resource measures will often result in substantial fossil fuel energy savings while at the same time being reasonably economically feasible.

DOE solicits comments on both the inclusion of renewable resource measures as a general category and on each specific measure.

The use of the term "energy conserving operation and maintenance procedures" is similar to the term energy conserving practices in Title II of NECPA, except for two additions. DOE believes that a building energy use monitoring list will be a useful item for a building manager and that the auditor is capable of providing the manager with such a list. DOE also believes that every building should receive a visual inspection of its steam distribution lines to check for obvious abnormalities, including steam trap failures and poorly functioning condensate lines. The terminology was changed from "practices" to "operation and maintenance procedures" to more clearly describe for a building owner the types of actions included.

DOE has attempted, buy use of the term "estimates based on typical practice," to define the minimum effort required of the auditor. Audit results which estimate energy savings and installation costs based on typical practice are perhaps the cheapest and quickest audit tool which retains a

degree of end-use accuracy. DOE believes that this approach is the minimum level of effort which will lead to adoption of energy conservation measures or renewable level of effort which will lead to adoption of energy conservation measures or renewable resource measures on the part of the building owner. The utility is encouraged to provide greater analysis if the utility believes it is necessary.

The definition of "participating building heating supplier" reflects the voluntary participation of building heating suppliers and the Governor's choice whether to include building heating suppliers in the State Plan.

The term "program measures" means those energy conservation or renewable resource measures which have been deemed appropriate by climatic region and building category, and which are found in the Appendix to this part. This listing is similar to the list used for the RCS Program. In addition, it includes new measures that are required under the CACS Program.

The term "State measures" means an energy conservation measure that has been approved by the Secretary in the State Plan pursuant to §§ 458.404 and 458.504 of the proposed rule.

The term "Tenant's Energy Conservation Information Package" means the information package required to be provided by a covered utility or participating building heating supplier to each owner of a multifamily dwelling once an audit has been requested by the owner of such dwelling. Prior to receiving the audit the owner must agree to distribute an Information Package to each tenant in the building.

IV. Part 458, Subpart B—Preparation, Submission and Approval of State Plans

A. Scope

This subpart identifies the responsibilities of the States and the Tennessee Valley Authority (TVA) in the preparation and submission of State Plans, and the procedures for approval of the State Plan by the Secretary. The authority for this subpart is derived from Section 721(a) of NECPA. Every attempt has been made to ensure that this Subpart of the proposed rule is consistent with the corresponding Subpart B of the final rule for the RCS Program.

B. Initial Submission, Lead Agency and Coverage of State Plan.

Section 458.202 of the proposed rule requires that, if a State intends to submit a State Plan, then the Governor or State agency specifically authorized by State law to submit a State Plan must inform the Secretary within 30 days of the promulgation of the final rules of the name and address of the Agency which will have principal responsibility for the development of the State Plan. This provision would enable the Secretary to provide technical assistance to the appropriate persons in the State, and inform the Secretary of the State's intentions. DOE has not proposed to require that the Lead Agency for this program be the same as the Lead Agency for the RCS Program. We invite comments on this decision, particularly as it will affect coordination between the two programs.

The Governor would be required to notify the Secretary, within 30 days of promulgation of the final rules, of which nonregulated covered utilities, if any, will be subject to the State Plan. Within 90 days of promulgation of the final rules, the Governor would be required to notify the Secretary whether or not any building heating suppliers will be included in the State Plan. These requirements parallel those in the RCS Program.

C. Coordination Requirements

Section 458.203 proposes three requirements for coordination in the development of the State Plan. Section 458.203(a) would require the Lead Agency to coordinate the Plan with neighboring States which have jurisdiction over any covered utility or participating building heating supplier subject to the Plan. Section 458.203(b) would require the Lead Agency, if such agency is not the State Regulatory Authority, to provide a copy of the Plan to such Authority 30 days prior to the public hearing required by § 458.204. In every State, regardless of who is the Lead Agency, the State Regulatory Authority will have a significant role to play in the implementation of utility programs. The purpose of § 458.203(b) is to emphasize DOE's interest in cooperation between State agencies in the development of the Plan. Section 458.203(c) would require States to coordinate their CACS Program with their RCS Program and with the State Plans developed under Section 367(b)(1) of the Energy Policy and Conservation Act (10 CFR Part 420, State Energy Conservation Plans). Such coordination must not have the effect of delaying implementation of the RCS Program. This provision is based on § 712(c) of NECPA, which instructs DOE to assure that the Title VII rules are coordinated with these other programs and requires that nothing in the Title VII rules will have the effect of delaying implementation of the RCS Program.

D. Notice, Comment, and Public Hearing

Section 458.204 reflects the provisions of Section 722(4) of NECPA, which requires that no State Plan shall be approved by the Secretary unless such plan is adopted after notice and public hearing. DOE expects that States will consult very early with utilities, building heating suppliers, consumers, Public Utility Commissions and others in the development of the Plan. Because NECPA allows only 180 days for the development of the State Plan, we decided not to include in the proposed Rule any prescription of the specific groups to be consulted or the schedule for their consultation.

E. Procedures for Submission and Approval of State Plans

Section 458.205 contains the proposed schedule for development, submission, and approval or disapproval of the State Plan. This section repeats the requirements of Section 721(a) of NECPA, and parallels the requirements contained in the RCS Program final rule. Ten copies of the proposed State Plan would be required to be submitted to the Secretary within 180 days of the promulgation of the final rule. If the plan were to meet the necessary requirements, it would be approved within 90 days of submittal. Within 30 days of approval of the State Plan, the Lead Agency would be required by Section 458.205(c) to notify the covered utilities and participating building heating suppliers of the approval of the State Plan by the Secretary, to direct their compliance with it and to certify their compliance to the Secretary within 13 months.

If the State Plan were not to meet the criteria of Subpart B, it would be disapproved within 90 days of submission, and the reasons for disapproval would be specified in writing. The Governor or Lead Agency would be allowed to submit another proposed State Plan within 60 days.

Section 458.205(e) provides for States to submit amendments to the State Plan to the Secretary. Such amendments shall be considered according to the same procedures and schedule as the original Plan, except that the Secretary may waive any of the submission requirements for amendments that would not have a substantial impact on large numbers of individuals or businesses.

F. Building Heating Suppliers

Section 721(c) of NECPA gives a Governor discretion to submit a plan applicable to building heating suppliers. Section 458.202(c), as proposed, requires

the Governor, within 90 days of promulgation of the final rules, to inform the Secretary whether building heating suppliers will be included in the State Plan. To give affect to the Congressional intent to encourage a unified State effort, Section 458.206 would require that, if the Governor elects to submit a plan for building heating suppliers, the plan must be part of the State Plan and be submitted according to the same procedures for submission of the State Plan. The mechanism for coordinating this plan with other elements of the State Plan would be left to the discretion of the Governor.

G. Special Provisions for TVA

NECPA gives the same authority to the TVA, with respect to those utilities over which TVA has ratemaking authority, as it does to both a Governor and a State Regulatory Authority. This creates an overlap of jurisdictions in those States where the TVA-regulated utilities are located. Section 458.207 contains provisions necessary to clarify the role of the TVA. In particular, DOE expects, the TVA to coordinate the development of its Plan closely with the States in which its utilities are located. In addition, the TVA Plan is not to cover building heating suppliers. We seek comment on additional provisions which may be required to reduce the potential for conflict or duplication of such Plans.

H. Special Procedures for Exemptions

Section 458.208 proposes provisions for exemption from the CACS Program. The statutory basis for these exemption provisions is given in Section 722 of NECPA. The major issues entailed in these exemption provisions stem from the act that Section 722 of NECPA leaves several questions unanswered. (Related issues result from the fact that other sections of NECPA give very specific treatment to concepts involved in the meaning of Section 722.)

Section 722 states, in essence, that no energy conservation plan (State Plan or Nonregulated Utility Plan) shall be approved by the Secretary unless it requires each regulated utility to implement a CACS Program, except that no such program "may be required to apply to all" of the eligible buildings in its service area if, within six months of the date of these rules, the State Regulatory Authority or other regulatory body having ratemaking authority "determines that the inclusion of such additional buildings or dwellings would significantly impair such utility's ability to carry out the RCS Program under Title II of NECPA or to provide utility service to its customers."

The major issues inherent in this section are:

(1) Is this intended to allow a partial or a total exemption from program requirements?

(2) Is this intended to be a permanent or a temporary exemption from program requirements?

(3) What is the definition of a "significant impairment" of a utility's ability to carry out the RCS program or to provide utility service?

(4) What is DOE's role in this exemption process? Does exemption authority belong solely to the State Regulatory Authority?

As a starting point, it is convenient to discuss the first two issues together. The language in Section 722 of NECPA does not make it clear whether the exemption is intended to be partial or temporary. The discussion of this section contained in the Conference Committee Report leaves these issues equally unclear. DOE believes, however, that the exemption is intended as an interim measure to allow more gradual program implementation in places where full and immediate implementation might be disruptive.

The interpretation reflected in the proposed rule is that DOE should have a role in defining significant impairment of the RCS Program but should not be involved in defining significant impairment of a utility's ability to provide utility service.

DOE has the clear authority to specify State Plan requirements (Section 712(a) of NECPA) and any other rules necessary to carry out Title VII provisions (Section 712(d) of NECPA). However, the State Regulatory Authority alone has the authority to determine the existence of "significant impairments." In the proposed rule DOE requires a record of the basis for State Regulatory Authority exemption decisions as a part of the State Plan submittal but DOE does not have authority to reverse these decisions. DOE's authority to determine the content of State Plans allows DOE to require that exemptions be only an interim measure and that full implementation is to ultimately follow. The proposed rule requires that State Plans contain "conditional programs" for those utilities that are granted an exemption. These are partial programs that must be implemented until the "conditions" causing significant impairments may be eliminated. State Plans containing conditional programs must also propose actions to be taken to remove these "conditions."

In the proposed rule, § 458.208(a) repeats the exemption provision of Section 722 of NECPA. Section 458.208(a) of the rule also outlines the exemption process whereby the criteria for significant impairment specified in § 458.208(b) are to be used by the State Regulatory Authority in making a determination of significant impairment via the procedure specified in § 458.208(c). A determination of significant impairment must be submitted in a State Plan containing a conditional program which meets the requirements given in § 458.208(d).

In defining "significant impairment of the RCS Program" in § 458.208(b) of the proposed rule, DOE proposes that nothing in these rules shall have the effect of delaying the submission, approval, or implementation of Residential Conservation Service Programs developed under Title II. This requirement is contained in Section 712(c) of NECPA. DOE believes that this provision of the law precludes any other possible definition of significant impairment of the RCS Program because any form of impairment may be thought of as a delay in program implementation. Consequently, this language from the law was adopted as the definition used in the proposed rule.

Section 458.208(b) of the proposed rule permits the State Regulatory Authority to establish its own definition of significant impairment of a utility's ability to provide utility service.

Section 458.208(c) of the proposed rule describes two procedures by which the State Regulatory Authority could make the determination of the existence of conditions of significant impairment. The first procedure reflects the provision of Section 722 of NECPA, which requires that the State Regulatory Authority make the significant impairment determination within six months of the final rules. The second procedure is intended to provide the State Regulatory Authority with the option to take more time to review cases. Under this approach, the State Regulatory Authority may, within six months of the effective date of these rules, make a preliminary determination that significant impairment is probable. The State Regulatory Authority would then be permitted to take up to one year from the effective date of the CACS rules to either confirm or reverse this determination. In the meanwhile, the State Plan would be required to propose full program implementation. If the State Regulatory Authority were to confirm its determination, however, then an amendment to the State Plan containing a proposal for a conditional program would be required. DOE invites comments on this alternative.

Section 458.208(d) defines conditional programs and specifies State Plan

requirements for conditional programs. A conditional program is defined as a program which temporarily provides only partial coverage of commercial buildings and multifamily dwellings. However, conditional programs would not be permitted to change the audit content requirements specified in NECPA. The proposed rule provides some permissible types of conditional programs. Comments proposing other alternatives will be carefully considered. A conditional program is further defined by § 458.208(d) to be conditioned on the existence of significant impairments and must be accompanied by a plan to remove such impairments.

The special State Plan requirements for conditional programs would include a technical analysis to support the significant impairment determination, the rationale for the conditional program, and specification of the steps to be taken to alleviate significant impairments and State enforcement measures to assure these steps are taken.

V. Part 458, Subpart C—Preparation, Submission, and Approval of Nonregulated Utility Plans

A. Scope

This subpart identifies the responsibilities of covered nonregulated utilities, not subject to a State Plan, for the preparation and submission of Nonregulated Utility Plans, the procedures for approval of Nonregulated Utility Plans by the Secretary, and the minimum requirements for the content of Nonregulated Utility Plans. Every effort has been made to coordinate this subpart of the proposed rule with the corresponding section, Subpart D, of the final rules for the RCS Program.

B. Coverage

Subpart C applies to all nonregulated utilities which are not covered by a State Plan.

C. Initial Submission

Section 458.303 would require each nonregulated utility not covered by a State Plan to notify the Secretary within 60 days of these rules of the person responsible for the preparation of its Nonregulated Utility Plans.

D. Coordination Requirements

Section 458.304 require each nonregulated utility subject to this subpart to coordinate the preparation of its Nonregulated Utility Plan with the preparation of the applicable State Plan for the purpose of minimizing inconsistent provisions between the two plans.

E. Notice, Comment, and Public Hearing

Section 458.305 sets forth the proposed requirements for public notice and the opportunity for public comment and public hearing on Nonregulated Utility Plans. These provisions are the same as those required of States and the same as those in the RCS Program.

F. Procedures for Submission and Approval of Nonregulated Utility Plans

Section 458.306 presents procedures for the submission, approval, disapproval, and amendment of Nonregulated Utility Plans. These procedures are the same as those for States and are the same as the RCS Program. Section 458.306 also provides special qualifications on the plan content requirements for nonregulated utilities.

G. Special Procedures for Exemptions

Section 723(a) of NECPA provides certain conditions under which nonregulated utilities may be exempted from some plan requirements. Section 723(a) accomplishes this by referring to Section 722 which provides exemption procedures for State Plans. In the case of nonregulated utilities all of the requirements are the same except that the Governor of the State is designated to perform the role of the State Regulatory Authority. Likewise, § 458.208 of these rules would refer to § 458.208 of these rules and change the designation from the State Regulatory Authority to the Governor. All of the issues discussed above in reference to § 458.208 also apply to § 452.307. Procedures and actions by the Governor in granting exemptions would be required in the Plan. If the State were not to submit a plan, the procedures and actions would be required to be submitted to DOE nonetheless.

VI. Part 458, Subpart D. Energy Conservation Services for Commercial Buildings

A. Scope and Coverage

The Commercial and Apartment Conservation Service Program is divided into two Subparts for purposes for clarity. Subpart D describes the proposed minimum requirements for the content of State Plans covering commercial building. The State would be allowed, and is encouraged, to include additional information and provide additional requirements in the State Plan pertaining to the commercial building in the CACS Program if such information and requirements are not specifically prohibited.

All utilities covered by the RCS Program are covered by the CACS Program. Title VII of NECPA contains no provisions for temporary programs. However, utilities may be exempted by the State Regulatory Authority from providing services to some commercial buildings. The State Plan is required to identify which utilities have received such exemptions and to which commercial buildings the exemptions applies.

B. Eligibility for Audit

To receive an audit from a public utility or participating building heating supplier, the requesting party must be an eligible commercial customer of that utility or building hearing supplier by being the owner or tenant of a commercial building as these terms are defined in Section 458.103.

Certain factors related to program coverage presented the most difficult problem DOE encountered in structuring the CACS Program. The proposed rule is a compromise of several desirable, but conflicting, objectives. The following discussion provides additional detail on the issues and alternatives considered for adoption. DOE solicits comments on the proposed rule and the alternatives discussed below, and welcomes suggestions of other approaches. Three key factors are involved in the commercial coverage problem the concept of "building" customer status relative to the utility or building heating supplier, and the level of energy usage. These factors will be discussed separately below and are followed by alternative approaches to coverage.

Commercial Building

The Energy Security Act refers to owners or tenants of "commercial buildings" in establishing the eligibility for energy audits. Since the intent of Congress was to assist small commercial enterprises in achieving energy conservation, DOE has interpretated the term "commercial building" to include any small commercial establishment with walls and a roof, whether or not the establishment is a part of a larger structure. This has the effect of extending commercial coverage to more small commercial enterprises than would the concept of a "commercial building" as only the outer structure and would include, for example, any establishments located in large shopping centers. Such shopping centers may not quality for an audit under the energy usage criteria, but the individual establishments might.

It is felt that such individual establishments should be included because they can engage in energy conservation apart from action directed toward the entire shopping center. Such tenant establishments may or may not be separately metered for energy usage. Those which are separately metered, or submetered have a direct incentive to invest in energy conservation. Those which are not separately metered or submetered have an incentive to cooperate with the landlord/owner to conserve energy since many commercial leases have energy cost pass-through provisions and because rents are affected by energy cost in any event.

DOE recognizes that buildings that are not at least submetered may present problems in terms of determining eligibility and identification (see also the discussion in the preamble on Section 458.403(a)). However, these problems can reasonably be addressed at the local level where the particular characteristics of the service population are available for structuring a program to reach the small end of the commercial sector.

DOE considered extending coverage of "commercial building" to all commercial establishents that met the energy usage requirments and that did not have their own direct roof (or their own walls). This alternative would include, for example, establishments in large office buildings. DOE rejected this alternative because it felt that it was not Congress' intent cover such establishemts and because the incentives for such establishments to invest in energy conservation are minimal. DOE invites comments on this determination.

As provided by Section 731(a) of NECPA, new customers are eligible for an audit unless the occupied space had previously been audited. In the letter event, the new customer could request a copy of the audit. The marginal benefits which could be expected to result from an additional audit may not justify the expense. DOE solicits comments on this determination.

Eligible Customer

The statue provides that an eligible commercial customer is an owner or tenant of a commercial building to whom a public utility, building heating supplier, covered by the program sells natural gas or electricity.

One interpretation of the statute is that the utility/building heating supplier is expected to offer the program only to direct customer (that is, those which are separately metered) of that concern. However, this interpretation would exclude from coverage many of the smaller businesses that were the major concern of Congress. DOE feels that the program should include all similar small commercial enterprises, regardless of particular metering arrangements in any particular case. For this reason, we have interpreted "eligible customer" to include any small commercial enterprise which is *supplied with* utility service by a participating utility/building heating supplier. The result is that similar establishment in two different buildings, one master-metered and one individually-metered, would be treated the same in terms of program eligibility. Again, DOE recognizes that this approach presents problems in terms of identifying and qualifying eligible customers but feels that at the local level reasonable solutions to these problems are possible.

Energy Usage

Congress specified the program as applying to building with monthly energy use less than 4000 kWh of electricity of 1000 therms of gas or the equivalent amount of certain other fuels in Btu. (Note that 4000 kWh=136 therms=13.6 million Btu, 1000 therms=100 million Btu.

The intent of Congress was the usage criteria would identify buildings of the same size, compatible with the small business focus of the program. After an extended period of discussion during which virtually all combinations of the usage criteria were considered, DOE has chosen 100 million Btu as the maximum limit for limit for average monthly energy usage of any fuel. This is equivalent in energy to 1000 therms of natural gas. The kWh criterion remains. The result is that a building would qualify, from a usage standpoint, if (a) it uses less than 4000 kWh of electricity, or (b) it uses less the 100 million Btu of natural gas or any other covered fuel.

One possible interpretation of the energy usage criterion contained in the Title VII definition of commercial building is that a building using more than 4000 kWh of electricity but using no natural gas would qualify, since zero Btu of natural gas is less that 100 million Btu. This case would result in making eligible for a CACS Program audit 20 percent of the total national commercial floor space. This "zero" case could result in covering some rather large buildings. However, it would ensure that small business occupying all electric buildings would receive CACS services. The "zero" case would be particularly important in climate zones where cooling is a significant energy use category in a building. (The "zero" natural gas case is more likely to arise than the "zero" electricity case since almost all buildings use some electricity. However, the "zero" natural gas case approach would also apply in cases of "zero"electricity.)

Another alternative regarding energy usage which DOE considered was assigning a specific minimum level—other than zero—of electricity and natural gas (or other fuel) consumption for CACS eligibility. However, the available data on building size versus energy usage was conflicting and not helpful. Consequently, DOE could establish no useful and rationally based minimum level of other fuel consumption. Moreover, to require a minimum would somewhat arbitrarily eliminate some small business from CACS coverage.

A third possile approach, which would avoid coverage of larger all-electric buildings, would be to require that such buildings use at least some natural gas or some fuel other than electricity in order to be covered (i.e., less than 4000 kWh of electricity, or, of another covered fuel is used in the eligible building, less the 100 million Btu of that fuel). DOE believes it is possible to imply from the statutory language the assumption that a building must consume some of a praticular fuel in order to include that fuel in the computation of eligibility. Under this approach, coverage of the CACS would drop to approximately 10 percent of the commercial floor space.

DOE invites comment and submission of documented data on this issue and on the three alternatives presented (the "zero usage" case, the "specific minimum usage" case, and the "any munimum usage" case). Commenters may also want to include comments on the alternatives discussed below which would require legislative change to accomplish.

Alternate Approaches

Serious consideration was given to three other approaches to determining program coverage or eligibility. One was to base eligibility on building size, instead of energy usage, that is, square feet of floor space. A size of 10,000 square feet was considered to be representative of the desired program coverage. A major disadvantage of this approach is that such data are not easily availabe to utilities or building heating suppliers. Additional problems arise when one cosiders how to define "square feet." Should it include only usable floor space or gross building size? Perhaps it should only cover space that is either heated or cooled. These issues further complicate the problems

associated with acquiring the descriptive data needed to define eligibility. Use of this definition would require a legislative change.

A second alternative approach to eligibility that was considered was to use the Small Business Administration's definition of small business and to make all small businesses eligible. This approach also had problems in that such data are not readily available to utilities or building heating suppliers. Present SBA definition rely mainly on the dollar amounts of gross business volume and are related to Standard Industrial Classification (SIC) codes. SBA has recently proposed a new small business definition based on number of employees that is also SIC code specific. Use of this definition would also require a legislative change.

The third alternative considered was to interpret the 4000 kWh limit as applying to uses other than space conditioning, and the 1000 therms limit as applying to space conditioning. Under this interpretation, for example, an all electric building would be covered if it used less than 4000 kWh for lighting and less than 29,400 kWh (the Btu equivalent of 1000 therms) for space conditioning. DOE rejected this interpretation as being inconsistent with Congressional intent.

Again, DOE solicits comments and suggestions on the proposed approach to eligibility and on each of the above alternatives. The DOE wishes to point out that a variety of comprises were necessary regarding the proposed design of program coverage. Most of the difficulties are associated with restricting the program to the smaller commercial establishments mandated by Congress. In view of the gains, from the utility's or supplier's viewpoint, it may be very cost effective for the utility or supplier to extend the coverage of the program beyond the minimum required by the Energy Security Act and this proposed rule.

C. Commercial Announcement

Section 731(a)(1) of NECPA requires that each public utility offer to each eligible commercial customer an audit of the eligibile customer's commercial building. The offer of the audit must be made within 12 months of approval of the applicable State Plan, and every 24 months thereafter until 1990. The proposed rule requires the Commercial Announcement to be distributed to every eligible commercial customer, but the rule does not specify how this distribution is to be accomplished. DOE recognizes that utilities and participating building heating suppliers may have difficulties in identifying commercial tenants that are not individually metered. DOE invites comments on how these commercial tenants may be identified and on what requires concerning identification of such tenants may need to be included in the rules.

DOE has considered requiring utilities to send Commercial Announcements to all commercial customers and requesting such customers to distribute the announcements to all their commercial tenants. However, this would require the distribution of announcements to many customers that are not eligibile for the audit. This may lead to confusion on the part of customers which could result in great inconvenience to the utilities. Furthermore, there would be no assurance that owners would distribute the Commercial Announcement to their tenants. DOE has also considered, in addition to requiring utilities to send the announcement to all easily identifiable customers, requiring that utilities advertise the program through the mass media. The advertising would briefly describe the program, include a statement of eligibility, and give a contact point for additional information. The amount of advertising necessary to reach all eligible customers and the cost of such advertising have not been estimated. Further, advertising has the disadvantage of not insuring that all eligible customers have been reached. DOE invites comments on these alternative methods of distributing the Commercial Announcement.

The proposed rule would require that the Commercial Announcement include a list of program measures and energy conserving operation and maintenance procedures, an offer to perform an audit, a description of the audit, a brief explanation of applicable Federal, State, and local energy tax credits, and not include any advertising. Although Title VII of NECPA does not specify these requirements, they are similar, though not as extensive, as the requirements contained in the RCS Program final rule.

The Commercial Announcement would have to contain a list of the program measures and of any State measures included in the State Plan. Unlike the RCS Program, the proposed rule for the CACS Program would not require that measures be listed by building type. Listing measures by building type would place an extra burden on utilities which DOE wishes to avoid.

The proposed rule requires that Commercial Announcements list the energy conserving operation and maintenance procedures and state that they are low-cost or no-cost. Although Section 712(b) of NECPA indicates that DOE may specify energy conserving procedures by climatic region or building type, we have not done this in the proposed rule. Most of the operation and maintenance procedures are effective in all climatic regions and building types. The individual audit will provide specific information on the effectiveness of each procedure for the particular building.

Unlike the RCS Program, the proposed rule would not require that the Commercial Announcement include estimates of savings likely to result from installation of the measures or adoption of the energy conserving operation and maintenance procedures. It is felt that such estimates would create an additional burden for the utilities and complicate the announcement. The wide range of energy usages, business types, and other factors would make it very difficult for utilities to predict savings for all types of commercial buildings. The auditor is required to provide costs and savings information. DOE invites comment on this decision.

In the Commercial Announcement the utility must offer to perform an audit, explain how the audit may be requested, and state the cost, if any, of the audit. The aduits must be available when the Commercial Announcements are distributed, and must be performed within a reasonable period of time following the request for an audit. The Commercial Announcement may be distributed throughout the 12 month period, or at one time. It may be desirable to allow audits to be scheduled by neighborhood, type of building, or some other nondiscriminatory criterion. In order to mitigate impairment of the RCS Program, utilities will be allowed some flexibility in scheduling audits. However, as in the RCS Program, an unconditional offer of an audit must be made within 2 years of approval of the State Plan. DOE invites comment on this approach.

The proposed rule requires that the Commercial Announcement include an explanation of the benefits of the Federal energy tax credits, and any State or local energy tax credits. This explanation would also be required to include a list of eligible measures and the amounts of the credits.

The proposed rule contains a ban on advertising in the Commercial Announcement. However, it has been suggested that allowing advertising, especially by lenders, may improve the effectiveness of the program. Comments on the proposed ban are invited.

The proposed rule does not describe the form that the Commercial

Announcement must take. It was originally thought that it would resemble the Program Announcement for the RCS Program. However, the information required for this program is not as extensive as that required for the RCS Program. Also, it is recognized that a different group of people will be targeted by the Commercial Buildings Program. Therefore, it is possible that the offer of an audit might be made in a letter signed by the president of the utility of participating building heating supplier and addressed to the eligible commercial customer. It is felt that a Commercial Announcement of this type could be a convenient and effective vehicle for presenting the benefits of the commercial buildings audit program. DOE invites comments on what form the Commercial Announcement should take.

Section 458.403(a)(2) would define a new customer and require that a utility send a Commercial Announcement to such a customer. A new customer would be eligible for an audit unless the occupied space had previously been audited. In that case, the new customer could request a copy of the audit results.

D. Energy Audits for Commercial Buildings

DOE has attempted to retain, wherever practicable, both the audit requirements and the audit format from the existing RCS Program. DOE believes the similarities between the two programs will allow for coordination of the Title II and Title VII Programs. However, it has not been possible to retain all of the existing RCS audit program. The proposed regulations must take into account the differences in the building population and the customer population of this program as compared with Title II. Among the differences affecting the audit content are the following:

(1) Commercial buildings vary substantially in size, structure and energy use. The diversity is much greater than that of the Title II buildings.

(2) The owners are predominantly business persons, including the owners of the eligible multifamily buildings, which may affect the type and quantity of information and the need for services.

(3) The energy conservation measures available are diverse, and the equipment types in each category of building have a wide range of differences.

As a result of these differences, the level of regulation of audit content, measures and calculation procedures in the RCS Program is not always appropriate for the CACS Program. Consequently, the proposed CACS regulations would allow substantially greater flexibility, fewer services, and greater use of estimates than in the RCS Program.

What can be provided effectively to an eligible customer by this program is information on the energy use of its facilities; estimates of the likely financial value of applicable measures; and guidance to further analysis, engineering, and implementation. Many of the estimates may be based on typical values achieved in similar facilities which, if properly applied to a customer's facility, produce results that demonstrate the likely value of measure implementation. However, full analysis, with sized equipment and carefully calculated costs and energy savings, is required for only a small number of measures. The full analyses are intended to serve as an example of an engineered solution for a recommended measure. It is anticipated that this approach would raise the credibility of the audit, the auditor, and the value of further services if necessary.

Building specific analyses are required for five measures: lighting systems, caulking and weather stripping, building insulation, storm windows and doors, and hot-water pipe insulation. These measures were selected on the basis of the limited expense and effort required to perform such analyses, their widespread applicability, and their high potential impact on energy use and costs. The audit of lighting systems meets these criteria for small commercial buildings, and these facilities use over 50 percent of their electricity for lighting. Through use of a light meter, a count of lamps and fixtures, and some straight forward calculations, the auditor can evaluate the cost and savings of a range of lighting energy measures. The remaining selected measures which reduce heat loss, can also be evaluated in a straight forward manner requiring only tape measurements for input data.

While these additional efforts may add thirty minutes to one hour to the audit and increase auditor training requirements, substantial benefits from these analyses are anticipated. First, the detailed analyses are more likely to promote early implementation of the selected measures, as all of the information needed by the building owner for implementation is provided. Second, the detailed analyses provide an example of more complete technical assistance. It is anticipated that these analyses will improve the credibility of the auditor and the audit. It is also possible that such examples of technical assistance will increase the owner's likelihood of seeking further technical services.

DOE considered two alternatives to the use of building specific analyses for a minority of measures. One alternative was to perform building specific analyses for all measures. This was rejected, as the expense of such an audit would be several times greater than as proposed. DOE also considered allowing all analyses to be performed on the basis of typical practice estimates. DOE believes that the benefits of improved audit credibility and higher retrofit rates justify the increased cost per audit. DOE requests specific comment on the cost and benefits of the proposed approach and the alternatives.

The audit can be designed to be completed in one day or less for all facilities through the use of estimation techniques and the adoption of systematized approaches, including computer applications. This would allow the utility to control costs while at the same time providing guidance to small businesses without supplanting the role of private engineering and technical energy services.

The regulations are considered sufficiently flexible to allow a utility to adapt its existing RCS program for larger residential buildings, or in some cases, commercial buildings. The regulations are designed to describe the minimum audit content. A State or utility has the option of requiring more of the auditor. The proposed minimum content is: the provision of information that describes how energy is used, a list of the measures that are the most attractive investments, cost and savings estimates for a few measures, notice of available government funds to reduce the costs of installation or financing, and guidance for the evaluation of competing products and services.

1. Requirements for Program Audit. DOE proposes to retain the single audit approach that is required in the existing RCS Program. DOE believes that audit cost will be minimized if the building receives only one audit. DOE estimates that a small commercial facility can be audited in approximately 3½ to 4 hours and that an auditor or audit team can average two buildings per day. From the evidence available to DOE, it is unlikely that any audit will require more than a full day. DOE invites comment on whether the minimum audit content may require more than one day, especially in respect to existing utility programs.

The provisions of the proposed rule do not mean that one person necessarily must perform the entire audit or that the audit must be carried out in one visit. DOE believes that it is possible for one person to be trained to address all measures in a particular building. This can be facilitated by the utility acquiring

certain information, such as type of furnace from the customer before the audit. However, a utility would be allowed to subcontract for all or part of its audit services. Whatever the contracting arrangement of the utility or the number of visits, the customer who requests an audit would be entitled to receive an analysis of all applicable program measures.

The following paragraphs provide a discussion of the requirements for the CACS Program audit. Those sections of the proposed rule which are not discussed are straightforward and do not appear to require further elaboration.

Section 458.403(b)(1)(i): DOE believes that changes in building operation and maintenance will generally involve little or no capital cost and will result in substantial energy savings. The changes can often be implemented rapidly by the building owner with no outside assistance. Therefore, DOE considers that such changes should be separately identified by the auditor and recommended to the building owner prior to any recommendations concerning applicable program measures.

Section 458.403(b)(1)(ii): DOE has attempted to make the proposed audit procedure similar to the audit procedures for the RCS Program to assure effective coordination between programs and to mitigate confusion over a new format. DOE would retain all of the program measures and applicability criteria from the existing RCS Program because small commercial buildings and multifamily dwellings will often require the same audit considerations as residential buildings. However, DOE realizes that there are measures which are unique to commerical buildings, for example, lighting systems, which require new applicability criteria. The proposed new applicability criteria are discussed below.

DOE has attempted to define useful applicability criteria which will allow an auditor to eliminate a measure from consideration by simple observation. However, because there is so much variety among the building types, it is probable that the applicability criteria will be insufficient for some buildings. It is DOE's intention to rely upon the discretion of the auditor in cases where the applicability criteria fail to give a reasonable initial indication as to the appropriateness of a measure.

DOE considered eliminating applicability criteria from the proposed rule. DOE believes, however, that the applicability criteria will be useful in establishing the minimum audit content. DOE invites comment on the concept of applicability criteria and on each criterion identified in the proposed rule.

Replacement or modification of lighting system: DOE recognizes that lighting systems will be similar in many building types and most climate zones. Studies have shown that lighting requires a substantial portion of typical commercial energy consumption and the potential for reducing waste is very high. Therefore, DOE intends that all commercial buildings should receive audits of the lighting systems. DOE has proposed stringent applicability criteria for the lighting systems to assure that buildings receive this audit. It is expected that the applicability criteria would cover most buildings and that buildings not falling within the applicability criteria already would have an efficient lighting system.

Ceiling and wall insulation: DOE has proposed the use of the same applicability criteria for commercial buildings insulation levels as it did for residential buildings in the Title II Program. The rationale for this approach is that small commercial facilities will exhibit building characteristics similar to residential buildings as regards building insulation. DOE also believes that the economics of retrofitting the commercial buildings to the levels identified in the Appendix will be similar to residential buildings. DOE recognizes that there may be instances where the applicability criteria are inadequate. It may be physically impossible to retrofit some building types without an inordinate effort and in other instances the auditor may not be able to determine the existing building insulation levels due to structural characteristics. DOE proposes to rely upon the discretion of the auditor to determine the applicability of retrofit insulation in buildings where DOE criteria are inadequate.

Stream/condensate pipe insulation: DOE believes that steam and condensate pipes should be insulated to at least the level of the thermal equivalent of one inch of fiberglass.

Automatic energy control systems, equipment associated with automatic energy control systems: The applicability criteria for this measure would describe the circumstances where automatic energy control systems could effectively reduce energy costs. Generally, where energy savings can be achieved by limiting equipment operation as a function of time, temperature, and humidity, automatic control should be considered.

Energy recovery systems: Energy recovery systems should only be considered once building energy wastes have been minimized. However, should such wastes remain where a requirement exists in the building for such energy, then energy recovery should be considered. Options include heat wheels, heat pipes, heat exchangers, and preheaters.

Cogeneration systems: DOE believes that cogeneration is a desirable method of reducing energy consumption but that cogeneration may not be appropriate for many small commercial facilities. Installing a cogeneration system requires that several technical, economic, environmental and regulatory criteria be met. Generally, it is difficult to achieve these criteria in a new facility and it is probable that it is more difficult to do so in a retrofit situation. Accordingly, DOE has attempted to define stringent applicability criteria which would allow the auditor to make a rapid judgement for most buildings. However, the applicability criteria attempt to define a situation in which a cogeneration system may meet technical and economic acceptance. In no instance does DOE anticipate that the auditor would be required to provide more than an estimate of the type of cogeneration system appropriate to a particular building or an estimate of the energy savings which could be achieved.

Renewable resource measures: It is the intent of DOE to foster the adoption of renewable resource measures whenever feasible. Small commercial facilities will generally exhibit similar characteristics as residential buildings in regard to the conditions appropriate for renewable resource measures. Accordingly, DOE has proposed to retain all of the applicability criteria from the existing RCS Program for renewable resource measures.

Section 458.403(b)(1)(iii): DOE intends to assure that an on-site visit include such items as measurement and inspection. It is expected that measurements will include such items as determining the area of building devoted to window space or counting the number of lamp fixtures. While DOE realizes that these actions would increase the length of the audit and therefore the cost, an audit without these actions could not make meaningful estimates of installation costs or energy savings.

Section 458.403(b))(1)(iv): DOE believes that installation costs and energy savings should be based on costs which the eligible customer is likely to encounter when attempting to implement a recommended program measure. This section is similar to the existing RCS requirements except that in the proposed program the auditor is to include an estimate of the real energy cost escalation rates which the eligible customer may experience. DOE believes

that energy cost savings estimates without this provision would be inadequate in that they would not accurately depict the financial conditions that the eligible customer is likely to experience. By using energy cost escalation rates in the calculation procedure, the potential for conservation can be more realistically conveyed to the building owner. DOE intends to allow any reasonable real price escalation on rates to be identified by the State or utility.

Section 458.403(b)(1)(v),(vi),(vii): The requirements for (v) (estimates for solar systems), (vi) (procedures to assure the validity of audits), and (vii) (cost and saving estimates of furnace efficiency modifications) are the same as in the RCS Program audit.

Section 458.403(b)(1)(viii): Calculation procedures. DOE has determined that several program measures are common to many building types in all climate zones, generally have rapid payback periods and do not involve complicated calculation procedures. Further, DOE believes that the audit will have enhanced value if audit calculations are performed that are unique to the building being audited. DOE therefore proposes that several program measures receive a level of attention greater than other program measures. It is anticipated that the State will require that the detailed analysis be consistent with accepted engineering practice. DOE expects that auditors will employ computerized or other forms of systematized approaches for the detailed analysis effort.

DOE considered allowing workbook format approaches for all program measures. This approach was rejected because no existing workbook was identified which covered all of the measures and all of the building types. Workbooks do exist for approximately 75 percent of the building types but the workbooks often have out-of-date energy costs and installation costs. The workbooks also generally are not comprehensive with respect to the eligible program measures for the proposed program. DOE believes that it will be less expensive to require that only a few program measures receive a detailed analysis as opposed to developing new workbooks to cover all building types and program measures. DOE has not proposed to restrict the use of workbooks that a State or utility believes meet the program criteria. DOE solicits comments on this approach.

Section 458.403(b)(1)(ix): DOE anticipates that the program measures will cover most of the energy consuming functions of the building. Because small commercial buildings are diverse and may include unique process applications, it is conceivable that a large energy consuming function may not receive an audit. DOE believes that if the audit did not address a major energy consuming function because of regulatory oversight, then the credibility of the audit process would be weakened. DOE therefore proposes that an energy consuming activity which accounts for more than ten percent of total energy use should receive particular attention during the audit.

DOE recognizes that some unique activities may be quite difficult to audit. It is DOE's intention that the auditor use discretion when addressing a unique function but in no case should the auditor be required to provide detailed costs and savings estimates for a unique function. DOE seeks comment on this approach. Further, in order to assist States and utilities in providing audits, DOE would develop and provide technical assistance.

2. Results of Program Audit The purpose of this section is to discuss the program audit end product: the delivery of results to the customers.

The requirements in the proposed section are intended to guide the developers of the State Plan as to the quantity and detail of information that would be provided by the audit. DOE has chosen not to propose specifics of format, computation, and delivery of results in the regulation in order to allow for flexibility on the part of a State or utility in the development of its audit program.

DOE considered requiring in-person delivery of audit results. Such delivery might be feasible if the auditor were to prepare the results at the site, or if the resources expended on the audit where substantial. However, DOE proposes not to require in-person delivery in order to permit flexibility in program design and in recognition of the limited time availability of many small businessowners who may not desire in-person presentation. However, DOE proposes to require that the customer have the opportunity to fully discuss the audit if he or she requests it.

Section 458.403(b)(2)(i): As proposed, the auditor must determine the type of fuels consumed by the building, and the quantities consumed annually, in order to provide a basis for evaluation of measures. Where data is lacking, estimates from part-year data or estimates from similar buildings can be used.

Section 458.403(b)(2)(ii): This section would require a determination of how much energy is consumed by the building, and where energy is consumed by quantity and end use. This proposed section describes the data required for evaluation of energy savings, and for selection of measures for analysis. The data is also believed to be useful to the building owner by providing an understanding of where his purchased energy is being consumed. In addition, the energy use per square foot calculation would allow for comparison with other buildings of similar type and climate. DOE considered requiring that such a comparison be performed by the auditor, but believes the expense of preparing normalized data is not justifiable.

DOE recognizes that an accurate end-use analysis for many businesses can be expensive and time-consuming to compute. Therefore, estimates of Btu consumption by end use would be allowable, and might be based on typical end use breakdowns for that building type and location. DOE recognizes that this might limit the ability of building owners and operators to compare energy performance, and seeks comment on this provision.

Section 458.403(b)(2)(iii): This section would require the audit to provide notice of any government incentives for energy conservation that may be available. DOE believes that a valuable service is provided to the customer by these notices, as the increasing number of such programs at the Federal, State, and local level have rarely been presented comprehensively to building owners. DOE considered proposing the inclusion of the benefits of these programs in the economic analyses of program measures where the availability of the benefits were certain, for example, tax credits. DOE believes that such a requirement may be overly burdensome. DOE requests comments on this decision.

Section 458.403(b)(2)(iv): This section proposes that at least limited guidance be provided to the customer to assist him in implementing applicable measures. DOE envisions that such guidance would include generic information on the types of equipment and/or kinds of businesses that are appropriate for proper implementation. DOE would not require the arrangement of services as is required for the RCS Program, presuming that the customers eligible under the CACS Program are more accustomed to arranging their own services. DOE, however, would not preclude the arranging of services should a State desire to include such a requirement.

Sections 458.403(b)(2)(vi),(vii): For limited number of measures, DOE proposes to require that costs and savings be specifically computed. DOE intends these analyses to describe the

type and amount of equipment recommended to be purchased, and to base costs and savings estimates on these measured quantities. DOE feels that such analyses, which are typical of privately-offered technical assistance audits, should be provided to the building owner as an example of the content of a technical assistance audit. DOE believes that sample full analyses would improve the credibility of the audit findings for all measures provided to the building owner.

Sections 458.403(b)(2)(viii),(ix): DOE has found that the program measures available to the building types have generalizable implementation costs, energy savings, and investment payback when properly qualified by building size, function, and operating characteristics. DOE is also interested in restricting the necessary cost of the program audit. As a result, DOE proposes to allow most measures to be analyzed based on typical practice, as defined in § 458.103.

Typical savings estimates could be based on examples from similar facilities. However, these estimates would have to be specific to the end-use analysis, most commonly as a likely percentage saved to the particular end-use category. The auditor would then determine the likely value of savings. Implementation costs would also be based on typical practice estimates specific to the building size, function, and operating characteristics. DOE solicits comment on this approach to audit analysis.

Section 458.403(b)(2)(x): Only simple payback, which is the ratio of implementation costs to first-year savings, is proposed to be required as part of the audit. DOE believes that other computations, including ten-year cash flow, internal rate of return, projected actual payback, and lifecycle cost computations are useful, but not for all owners or for all measures and that, therefore, the expense of such computations may be unjustified. States may, however, find such additional computation useful and would be allowed to include them in State Plans. DOE also seeks comment on whether additional computations should be required by rule.

Section 458.403(b)(2)(xi): Disclosure of the basis of cost and savings estimates are proposed to ensure that the findings are presented without unreasonable expectations for accuracy.

Section 458.403(b)(2)(xii): DOE feels that maintenance costs, where applicable, should be estimated to fully characterize the economic impact of implementing program measures.

Sections 458.403(b)(2)(xiii),(xiv),(xv): The proposed requirements for reporting on renewable energy resources are essentially the same as for the RCS Program.

Section 458.403(b)(2)(xvi): The measures recommended for detailed analysis were selected based on the level of applicability, the ease of evaluation, the quantity of energy savings, and the quickness of payback. Measures meeting these criteria can be fully analyzed without excessive costs in a wide range of buildings. DOE requests comments on the selected measures.

Section 458.403(b)(2)(xvii): The remaining proposed measures may be analyzed based on typical practice, as described above.

E. Reporting and Record Keeping Requirements

Section 458.403(c) sets forth proposed reporting the recordkeeping requirements. It would require each State to provide as a part of their State Plan an annual report to the Secretary apprising the Secretary of program features such as the identities of participating utilities, the estimated number of eligible customers, the number of people employed in the program, the number of audits requested, the program costs, the nature of complaints, and manpower shortages. The recordkeeping requirements would entail maintenance of audit data and related information for specified retention periods. The proposed rule in § 458.403(c) is taken to the maximum extent directly from the RCS regulations. Items pertaining to installation and financing requirements of Title II of NECPA were deleted, since Title VII contains no such prohibitions, and some other minor changes have been made.

F. Complaints Processing Procedures

Section 458.403(d) of the proposed rule, would require that the State Plan contain complaints processing procedures and that these be the same as those used in the RCS Program to the maximum extent possible. This is intended to simplify matters and provide some economy of costs. It is presumed that the new program woud not have significantly different compliant processing needs. Complaints would be limited to those incident to the Title VII Program. Consequently, complaints would involve those against utilities and, potentially, owners of multifamily buildings who fail to share audit results with tenants. DOE believes that some mechanism is necessary for handling complaints in order to ensure adequate implementation of the CACS Program, and believes the proposed approach will be both cost-effective and a reasonable method of providing for complaint resolution. Comments are invited on this proposed approach.

G. Addition of Measures by States

In the RCS program many States expressed the desire to have the flexibility to add measures which they believed to be particularly important. DOE subsequently developed a procedure which encouraged States to tailor additional program measures to best fit the needs of the State. In the Title VII Program DOE proposes to retain the same approach for State measures. Each State would be allowed to add either energy conservation measures or renewable resource measures if the State could demonstrate that the measures would save energy, not increase the consumption of oil, and not adversely affect the RCS Program.

DOE solicits comments on this proposed approach. DOE specifically requests that States address the issues of in-house technical expertise available to the Lead Agency and the State's ability to consider additional measures.

H. Auditor Qualification Requirements

Sections 458.405 and 458.505 outline the proposed requirements for auditor qualification through training. DOE proposes the same requirements as in the RCS Program to define areas in which the auditor must be knowledgeable, and has added to those requirements items concerning measures applicable to Title VII audits. It is DOE's intention that there need not be two classes of auditors, but rather that a pool of qualified personnel could be created which would be capable of performing audits under either Program. DOE proposes not to make the requirements for the CACS Program more rigorous than those for the RCS Program, in part because of the desire to keep the audit under both Programs simple, and in part to assure that costs would be minimized.

DOE would require that States develop a training curriculum which would assure that auditors completing the training would be able to analyze energy use and determine the advisability of implementing the applicable measures. Auditors would have to have an understanding of the various energy saving measures and will be able to discuss energy conserving operation and maintenance procedures with the customers. Under a model curriculum, which DOE intends to develop, auditors would also be required to be knowledgeable of the

advantages and disadvantages of State and program measures.

DOE considered requiring engineering training but rejected this approach because the intent of the program is not to compete with existing auditing companies but rather to give eligible customers a first step approach to energy savings at a reasonable cost. The amount of information that the audits would contain and the number and types of measures covered also dictate an uncomplicated approach. A full audit, including specifications and computed energy savings particular to the unit, would result in costs that would be prohibitive, or, at best, unjustified in relation to the amount of savings that would result. For example, DOE proposes that covered multifamily dwellings and commercial buildings be examined for the potential savings that could result from cogeneration. The result of such an investigation should be the indication of whether the customer should further pursue the option; a detailed analysis would be costly, and for a building where cogeneration is not justified irrelevant to potential energy measures. Therefore, DOE is not proposing to require specalized training such as requiring a college degree in engineering. DOE solicits comments on this approach, and specifically invites comments on the potential quality difference in this approach versus one requiring engineering or related field experience.

DOE has attempted through the proposed fourteen subsections in Section 458.405(a) to indicate specifically the areas in which States would be required to assure course training. DOE would not require that the training include field work, but would leave that option to the States. DOE has also not proposed the specific content of the curriculum. DOE is aware that curriculum development is expensive and that some States may prefer to have a model to use as with the RCS model curriculum. DOE solicits comments on the extent to which an additional curriculum is necessary for those sections not already covered in the RCS model.

(a) DOE has allowed States to determine whether RCS auditors must be qualified in the three phases of auditing—conservation, renewables, and furnace efficiency. The same flexibility is proposed for CACS auditors.

(b) DOE does not propose that States become the trainers, but rather is flexible in determining how auditors could be taught. This flexibility would allow a utility to be responsible for training its own personnel if a State so desired, for example. In return for this flexibility, however, DOE would require that the State Plan address how this utility training would be monitored to assure quality.

I. Procedures for Investigating and Enforcing Compliance With the State Plan

Section 458.406 of the proposed rule contains the same investigation and compliance provisions as the corresponding § 456.303 of the RCS Program.

J. Coordination

Section 458.407 contains the same provisions requiring coordination between energy conservation programs, energy suppliers, and regulatory agencies as those of the corresponding § 456.316 of the RCS regulations. One additional provision has been added to account for the requirement of Section 731(a)(4) of NECPA which requires that no utility may be required to audit a building which has been audited previously under Title VII of NECPA or under the Schools and Hospitals Program.

K. Accounting and Payment Requirements

The accounting and payment requirements proposed in § 458.408 rules are similar to the corresponding § 456.310 of the RCS regulations. The State Regulatory Authority would be given the responsibility of determining the customer charge, if any, and how utilities would recover the costs of providing commercial audits. Portions pertaining to installation and financing have been deleted, but the sections are otherwise identical. Not appearing in the proposed rule are provisions that are contained in § 456.311 of the RCS regulations concerning customer billing requirements and limitations on termination of service. These sections are not present because they were never included in Title VII of NECPA. We invite comments on whether such requirements should be included in this program.

VII. Part 458, Subpart E—Energy Conservation Services for Multifamily Dwellings

A. Scope and Coverage

Subpart E describes the proposed requirements for the content of State Plans pertaining to multifamily dwellings. All utilities covered by the RCS Program are covered by the Multifamily Dwellings Program. However, utilities may be exempted by the State Regulatory Authority from providing services to some multifamily dwellings. The State Plan would be required to identify which utilities have received exemptions and to which multifamily dwellings the exemption applies.

B. Eligibility for Audit

DOE considers the outreach portion of the program to be quite important to penetration efforts. Therefore, DOE proposes to review State descriptions of how program recipients learn of and participate in the program. While DOE proposes to leave implementation of this section to the States, DOE would reject a State Plan which contained procedures so cumbersome as to limit participation. DOE seeks comment on this proposal.

Section 458.502(b)(3) contains the proposed requirement that an owner of a multifamily dwelling agree to give his or her tenants information pertinent to the tenants' units as a precondition to receiving audit services. DOE has not, however, detailed procedures for gaining the customer's assurance to provide tenants with the information, but proposes to leave this area to the States. DOE solicits comment on whether specific regulatory language would be helpful. DOE has not required that tenants receive audit information about common areas or equipment, such as hallways or furnaces. Comments on the appropriateness of such a requirement are invited.

Section 458.502(b)(4) contains the proposed requirement that an owner of a multifamily dwelling agree to distribute to each tenant of such dwelling a Tenant's Energy Conservation Information Package as a precondition to receiving an audit. The Information Package would be supplied to the owner by the utility or the building heating supplier which would perform the audit. DOE considered proposed that the utility or building heating supplier distribute the Information Package directly to the tenants once an audit had been requested. This alternative was not proposed because DOE felt that it would place an unnecessary burden on utilities and participating building heating suppliers and not necessarily result in the tenant receiving the audit results to which the tenant is entitled. Comments on the proposed approach and the alternative are requested.

C. Apartment Announcement

Section 731(a)(1) of NECPA requires that each public utility offer to each eligible multifamily dwelling customer an audit of the eligible customer's multifamily dwelling. The offer of the audit must be made within 12 months of approval of the applicable State Plan, and every 24 months thereafter until 1990. Although the proposed rule would

require the Apartment Announcement to be distributed to every eligible multifamily dwelling customer, the rule does not specify how this distribution is to be accomplished. DOE believes that utilities and building heating suppliers will not find it difficult to identify eligible multifamily dwelling customers. Utilities and building heating suppliers may find it convenient to include the Apartment Announcement with the monthly bill. DOE seeks comments on methods of distributing the Apartment Announcement.

DOE considered requiring that Apartment Announcements be sent to all tenants of multifamily dwellings. It was thought that such a requirement might encourage tenants to request building owners to request an audit and might encourage tenants to conserve energy on their own regardless of the actions of the building owner. However, this requirement was not proposed because of the added expense to utilities, and because NECPA does not require a utility to offer services to multifamily dwelling tenants. DOE has proposed, however, that utilities and participating building heating suppliers distribute the Tenant's Energy Conservation Information Package to all owners of buildings for which a request for an audit is made. The owner would be required to distribute the Information Package to the tenants along with the audit results. This Information Package is discussed in detail in Section D below.

The proposed rule would require that the Apartment Announcement distributed to multifamily dwellings include a list of program measures and energy conserving operation and maintenance improvements; an offer to perform an audit and a description of the audit; an explanation of applicable energy tax credits; and explanations of the Weatherization Assistance Program for Low Income Persons; no advertising; information on loans and grants available through the Solar Energy and Energy Conservation Bank; information on loans or grants available at the State or local level; and a notice that, in order to receive an audit, the owner must agree to make the results available to the tenants.

The proposed rule requires that Apartment Announcements list the program measures and any State measures included in the State Plan. It would not require that measures be listed by building category, such as building size or type of fuel used. Most of the measures are applicable to all multifamily buildings, and the audit, as proposed, would evaluate which measures are most appropriate for the specific building. The proposed Apartment Announcement would list the energy conserving operation and maintenance procedures and state which are low-cost and which are no-cost. It would not be required that these procedures be listed by building category, since most are applicable to any type of building. Because the RCS Program required that measures and energy efficient practices be listed by building category, DOE invites comments concerning the decision not to require such a listing for the Multifamily Dwellings Program.

The proposed rule does not require that the Apartment Announcement include estimates of savings likely to result from installation of the measures or adoption of the energy conserving operation and maintenance procedures. It is felt that such estimates may be misleading, and would create an additional burden for the utilities. The wide range of energy use habits, configuration of buildings, and other factors would make it very difficult to predict savings in a large multifamily dwelling. Comments are sought on this decision.

The proposed Apartment Announcement would offer to perform an audit, explain how the eligible customer may request the audit, and list the direct cost if any, of receiving the audit. The proposed rule also permits that offers of audits be conditional. This provision is similar to one contained in the original RCS Program. DOE considered eliminating conditional offers. However, in order to mitigate the chance that the expanded program would significantly impair a utility's ability to fulfill the requirements of the RCS Program or provide utility service to its customers, some flexibility in scheduling audits would be provided. DOE seeks comments on this provision.

DOE proposes to require in the Apartment Announcement an explanation of the Federal energy tax credits and a description of who is eligible for them. Although renters, not owners, are eligible for the residential tax credit, it is felt that there is a benefit in having this information included in the Apartment Announcement. Landlords may want to make this information available to their tenants, especially those that are submetered. In addition, cooperative housing corporations and associations of condominimum owners are eligible for the tax credit, and may request an audit directly. Information explaining the Weatherization Assistance Program for Low Income Persons should be included in the Apartment Announcement because the cooperation of the owner of the building is necessary in order for the tenant to take advantage of the Weatherization Program. It should be noted that under the Weatherization Assistance Program, no apartment can be weatherized without first having written permission of the owner, and rents cannot be raised because of the increased value of the unit due to the weatherization work. DOE seeks comments on the requirements concerning tax credit and weatherization information.

Apartment Announcements would not be allowed to include any advertising. The ban on advertising is proposed in this program for the same reason it was included in the RCS Program. Allowing advertising would give the utilities an unfair advantage over other suppliers, installers, and leaders. Because of the relative scarcity of energy conservation financing programs, utilities would be allowed to state that they finance the sale and installation of measures. DOE invites comment on this ban.

The Apartment Announcement should include a notice stating that, in order to receive the audit, the owner must agree to make the audit results available to the tenants. Title VII of NECPA requires that, in order to receive the audit, the owner must first agree to make the results available to tenants. There is some concern that, by stating this requirement in the Apartment Announcement, the response rate may suffer. The alternative is to make no such statement in the Announcement, but to notify the owner of the requirement when the request for an audit is made. DOE seeks comments on which approach would be more desirable.

DOE proposes to require that utilities and participating building heating suppliers distribute a supplement to the Apartment Announcement to eligible multifamily dwelling customers that have requested an audit. This supplement would contain information designed to show how landlords and tenants may share in the benefits of energy conservation, and would include sample landlord/tenant agreements demonstrating how such benefits may be shared. DOE invites comments regarding this proposed supplement.

D. Tenant's Energy Conservation Information Package

Section 458.403(a)(3) of the proposed rule would require utilities and participating building heating suppliers to distribute to all owners of multifamily buildings for which an audit has been provided a Tenant's Energy

Conservation Information Package, which would be distributed by the owner to each tenant. Although it is not specificially required by Title VII of NECPA, it is felt that distribution of such an Information Package would greatly enhance the success of the Title VII Program. Section 731(a)(2) of NECPA provides the Secretary the authority to require such a package.

The Title VII Program is an information program. The service specifically required is the conducting of an audit, upon request, of multifamily dwellings and small commercial buildings. The audit is intended to provide information on actions the building owner may take to conserve energy. In the case of multifamily dwellings, many of these actions would require the understanding and the cooperation of the tenants in order to be effective. This is especially true of the energy conserving operation and maintenance procedures, which, because of their low-cost/no-cost aspect, may be particularly attractive to the building owner. The audit would provide information to the building owner, but unless the tenants also are furnished with certain energy conservation information, they cannot be expected to cooperate with the owner.

On the other hand, many of the energy conservation measures require a substantial investment on the part of the owner. Understandably, may owners will be reluctant to make such investments. This reluctance may be tempered by tenants who have been informed about the benefits of energy conservation, and who urge such investments. Furthermore, if tenants have been notified of the audit program, and have been convinced of the beneifts of energy conservation, they may be able to persuade their landlord to take action on an audit when he or she might not otherwise do so.

DOE believes that the Tenant's Energy Conservation Information Package should also include suggestions of how the tenant may conserve energy in his or her apartment, regardless of the actions taken by the landlord. It is important, though, to encourage landlord/tenant cooperation in an effort to conserve energy.

The Information Package would be required to contain an explanation of how the installation of each program measure or the adoption of each energy conserving operation and maintenance procedure would affect the level of services the tenant receives. The effect on the level of services, such as lighting, in the common areas of the building as well as in individual units should be explained. DOE believes that this information should be designed to help the tenant understand that the goal of such actions is the conservation of energy, not the reduction of services. In many cases, energy can be conserved without any change in the comfort level the tenant experiences. In such cases there may be a reduction in costs which may eventually be passed on to the tenant. It might be pointed out that it is in the tenant's interest not only to conserve energy but to encourage his or her landlord to take energy conservation actions.

DOE considered, but did not propose, requiring an explanation of the Resident Utility Billing System (RUBS). RUBS is a pro-rata billing system that passes through energy costs to residents. DOE studies indicate that the adoption of RUBS can result in energy savings of 5 to 10 percent. Pamphlets explaining RUBS for tenants have been developed by DOE and are available through the University of Colorado (The RUBS Project, Campus Box 468, University of Colorado, Boulder, Colorado 80309, 303/492–6746). States may include a requirement in their State Plan that RUBS be described in the Information Package.

The proposed rule requires that the Information Package contain low-cost/no-cost energy conservation information. It is felt that such information would lead to substantial conservation regardless of the actions of the building owner. DOE seeks comments on this requirement.

The Information Package would be required to describe the residential energy tax credit and the Weatherization Assistance Program for Low Income Persons. In addition, State and local programs should be described. Such information would encourage tenants to install conservation measures.

DOE invites comments on the distribution and content of the proposed Tenant's Energy Conservation Information Package. Specific suggestions concerning additions and/or deletions would be appreciated.

E. Alternative for Disseminating Information

A State would be allowed to provide in its State Plan an alternative requirement for disseminating the program information contained in the Information Package to tenants. No such alternative is proposed for disseminating the Apartment Announcement.

F. New Customers

In addition to requiring the sending of announcements to current customers, the proposed rule in § 458.503(a)(5) requires that new eligible customers be sent Apartment Announcements. In addition, new tenants may request a copy of the results of an audit performed on the new tenant's multifamily dwelling that are applicable to that new tenant's individual dwelling unit.

G. Energy Audits for Multifamily Dwellings

DOE believes that the audit requirements for multifamily dwellings should be nearly identical to the audit procedure for commercial buildings. The buildings will, in general, exhibit similar characteristics in the building shell, HVAC system, hot water generation and air-conditioning systems. DOE believes that it is expedient to develop similar audit formats to allow close coordination between audits of these buildings types. DOE realizes that in most cases, the applicability of measures can be evaluated through an examination of only a sampling of dwelling units in a multifamily dwelling. For example, the cost and savings of storm windows can be evaluated for the entire building by examining a few typical units. DOE proposes to allow multifamily dwelling audits to be performed on such a basis. It is DOE's intention to rely upon the auditor to make the discretionary judgement in cases where program measures clearly do apply to the multifamily dwelling. A discussion of these proposed audit requirements can be found in the section of the preamble dealing with audits of commercial buildings.

H. Reporting and Recordkeeping Requirements

Section 458.503(c) proposes requirements for multifamily dwellings identical to those of § 458.403(c) for commercial buildings.

I. Complaints Processing Procedures

Section 458.503(d) proposes requirements for Subpart E identical to those of § 458.403(d) for Subpart D.

J. Addition of Measures by States

Section 458.504 proposes requirements for Subpart E identical to those of § 458.404 for Subpart D.

K. Auditor Qualification Requirements

Section 458.505 proposes requirements for Subpart E identical to those of § 450.405 for Subpart D.

L. Procedures for Investigating and Enforcing Compliance With the State Plan

Section 458.506 proposes requirements for Subpart E identical to those of § 458.406 for Subpart D.

M. Coordination

Section 458.507 proposes requirements for multifamily dwellings identical to those of § 458.407 for commercial buildings. Discussions on recordkeeping, complaints processing, investigation and enforcement, and coordination can be found in Part VI of the preamble.

N. Accounting and Payment Requirements

Section 458.508 proposes requirements for multifamily dwellings identical to those of § 458.408 for commercial buildings, except that § 458.508 contains a limit on audit charges to the multifamily dwelling customer of § 15.00 per dwelling unit or actual audit costs, whichever is less. This limit is specifically prescribed in Title VII of NECPA. Treatment of audit costs beyond those charged directly to the customer receiving the audit is in the discretion of the State Regulatory Authority.

VIII. Part 458, Subpart F—Federal Standby Authority and Enforcement Provisions

This subpart proposes the procedures to be followed to ensure that eligible customers receive the services of the program when a State or nonregulated utility does not submit an acceptable plan within the necessary time or fails to implement adequately an approved plan. This Federal Standby Authority is provided for in Section 741 of NECPA. The provisions of Section 741 are very similar to the provision of Title II. Likewise, the proposed rule corresponds to Subpart F of the RCS regulations. The proposed rule has been slightly restructured to make it easier to distinguish provisions pertaining to States from those pertaining to nonregulated utilities.

IX. Appendix—Program Measures by Climate and Category of Building

DOE proposes to include the majority of program measures and applicability criteria from Appendix I contained in the existing RCS Program in the CACS Program. The rationale for using this approach to the audit requirements is that the major building components exhibit similar characteristics between all building types covered by this proposed rule, regardless of general building category. DOE believes that the levels of insulation identified in Appendix I of the existing RCS Program are reasonable insulation levels for small commercial and multifamily buildings. DOE realizes that these insulation levels will not be appropriate for all of the diverse building types, but rather believes that the Appendix will serve as a general guide for the building auditor. DOE intends to rely upon the auditor to a greater degree in the CACS Program than in the existing RCS Program. In this regard, DOE has proposed several provisions for the auditor to use discretion when considering the applicability of program measures.

X. Draft Regulatory Analysis and Urban Community Impact Analysis

Executive Order 12044 directs agencies of the Executive Branch to conduct a Regulatory Analysis of regulations that are likely to have a major economic impact. The objective of the Regulatory Analysis is to examine alternative regulatory provisions which might permit achievement of the regulatory goals at a lower cost. The Department of Energy, in an Interim Management Directive dated April 25, 1978, expanded the scope of Regulatory Analyses conducted for regulations within its jurisdiction. DOE is requiring, in addition to economic impact estimates, projections of the impact of regulatory alternatives on the goals of the National Energy Plan and on institutional issues created by the proposed regulations. In keeping with these objectives, DOE has prepared a Draft Regulatory Analysis of the proposed rules published herein.

This Summary of the Draft Regulatory Analysis is published concurrently with the publication of the proposed rules for the RCS Program. A copy of the complete Regulatory Analysis may be obtained by contacting: Mr. James Tanck, Director, Building Conservation Services Division, Office of Assistant Secretary for Conservation and Solar Energy, U.S. Department of Energy, Room GH–068, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, (202) 252–9161.

A. Legislative Background and Authority

On November 9, 1978, Public Law 95–619, the National Energy Conservation Policy Act (NECPA) was enacted into law. Under part 1 of Title II, Congress established a Residential Conservation Services (RCS) Program which requires that large public utilities and home heating oil suppliers provide energy audits and certain other conservation services to customers who reside in single-family homes or multi-family dwellings with up to four units per building.

On June 30, 1980, the Energy Security Act (ESA) was signed into law providing, inter alia for the expansion of Title II of NECPA to include, as of January 1, 1982, multi-family dwellings with five or more units which are neither centrally heated nor cooled. ESA also established a new Title VII of NECPA which provided for a similar program for small commercial buildings and multi-family dwellings with five or more units per buildings which are centrally heated, centrally cooled or both.

The ESA requires that DOE promulgate rules to implement the new provisions of Title II and Title VII of NECPA. The Draft Regulatory Analysis for the Commercial and Apartment Conservation Service (CACS) forms a part of DOE's rulemaking process for Title VII and supports the Proposed Rule as published herein. A broad spectrum of general options was considered to determine the relative effectiveness of the Proposed Rule in meeting national energy conservation objectives.

B. Scope of Regulations

The residential and commercial sectors which are the targets of the RCS and CACS Programs consume about 36 percent of the total U.S. energy use. In the residential sector, 90 percent of the energy is consumed in single-family homes and multi-family dwellings with fewer than five units. This subsector is covered under the RCS rules adopted by DOE in November, 1979. The remaining 10 percent of the energy use in the residential sector (representing 15 percent of the living units) is consumed in multi-family dwellings with five or more units and is a subject of this rulemaking.

C. Need for Regulations

The energy use in the sectors covered under this rulemaking, while smaller than that of single-family homes, is nonetheless very significant as evidenced by the fact that it represents 30 percent of the energy equivalent of U.S. oil imports. Numerous studies by DOE and others have demonstrated that a major fraction of this energy use could be eliminated by cost effective investments in retrofit of existing buildings. In June, 1980, Congress acted to extend DOE's regulatory authority, already in effect for single-family homes, to multi-family and small commercial buildings.

Because Congress specifically requires in Section 712 of NECPA that DOE promulgate regulations in this area, a discussion herein of the need for such regulations is not necessary.

D. General Provisions of the Proposed Rule

The Proposed Rule is set forth in detail elsewhere in the Federal Register. This section briefly summarizes the rule and indicates the general approach and applicability. Specific legal interpretations of the rule should not be derived from this material, which is merely an abstract of the rule.

The rule is modeled to the maximum extent possible after rules previously promulgated under Title II of NECPA. The new rule provides that:

1. Covered public utilities (gas and electric) and participating building heating suppliers are required to provide upon request to eligible customers an on-site energy audit. The offer is to be made in periodic announcements mailed directly to the eligible customers.

2. Covered utilities and participating heating suppliers must also provide certain other services such as information on availability of governmental financial assistance.

3. Each State may develop a State Plan and assume responsibility for administration of the program within the State. The State may also choose to provide certain services otherwise provided by the utilities or DOE.

4. Non-regulated utilities must either develop individual plans or be included under the State Plan.

5. DOE must develop and invoke its own plan in each State which has no approved State plan, or is inadequately implementing an approved State plan. DOE is also required to order a nonregulated utility to promulgate a plan if it is not covered by an approved plan or inadequately implementing an approved plan.

The coverage of the program is specified through the definition of eligible customers. Under the CACS Program, eligible customers include owners of certain centrally heated or cooled apartment buildings and tenants and owners of small commercial buildings. Small commercial buildings are those which used less than 1000 therms per month of fuel or 4000 KWH per month of electricity for 1980.

The proposed rule would require certain minimum information be provided in Program Announcements to assure that eligible customers are apprised of the audit program. The rule also establishes specific requirements to assure that all energy conservation and renewable resource measures are adequately considered in the audit.

E. Findings of the Regulatory Analysis

The findings of the Regulatory Analysis are that the Proposed Rule will:

1. result in a significant reduction in energy consumption in the multi-family dwelling and commercial sectors;

2. achieve energy savings at a cost well below the cost of oil imports;

3. lead to small but positive effects on employment; and

4. lead to small but positive effects on urban areas.

The Department finds that institutional impacts will be small and mostly positive on affected institutions.

Having evaluated a number of feasible alternatives to the Proposed Rule, the Department offers its rule for public comment as representing its best judgement at this time as to the appropriate rule pursuant to legislative authority. As is pointed out in the preamble to the rule, there are several issues in this rulemaking about which the Department is particularly desirous of obtaining public opinion.

The costs and benefits of the program as proposed are summarized below.

Summary of Cost/Benefit Analysis

	Multifamily	Commercial	Total
Energy savings, million BOE[1]			
Per year (1990)	9.8	5.30	14.38
Total to year 2000	136.2	79.5	215.7
Employment (jobs created, 1990)	11023	6599	17622
Cost (total to 1990, $ millions)	1026	677	1703
Federal Government	16	15	31
State governments	53	50	103
Utilities	252	210	462
Building owners and tenants	705	402	1107
Dollars per BOE			
Undiscounted	7.54	8.51	7.90
Discounted	11.50	12.99	12.05

[1] BOE = barrel of oil equivalent, 6.8 million BTU.

The summary table provides projected energy savings per year; total energy savings; jobs created; costs for Federal Government, State Governments, utilities, and building owners and tenants; and cost per unit of energy saved. The energy savings per year are given for 1990 after the completion of the retrofit program. Total savings, of course, continue to accumulate for the life of the retrofit measures. For the purpose of this analysis, savings are accumulated to the year 2000.

The employment impact includes actual employment by agencies responsible for the program (Federal, State, and utility jobs) as well as jobs created by retrofit activities, jobs eliminated in energy supply industries, and jobs created by increased funds available to customers after payback of retrofit investment.

Costs are totaled through the end of the program on an undiscounted basis and are given in 1980 dollars. Annual costs average about one-ninth of the total for the nine year program. The cost for an average State of 4 million population would be an aggregate 2 million dollars or about $220,000 per year. An average utility with 300,000 customers is estimated to have net program costs (after accounting for revenues from audit charges) of about 1.5 million dollars or $165,000 per year.

The cost/benefit measure used for the progam is the cost of displacing the energy equivalent of a barrel of oil. If this figure is below the cost of imported oil (about 30 dollars per barrel), the program provides net benefits over oil imports.

The program is highly cost effective as compared to imports of foreign oil at greater than 30 dollars per barrel. The Proposed Rule was found to be the most cost effective of the alternatives available to DOE in meeting national energy objectives within the authority granted by NECPA.

F. Analysis of Alternatives

DOE has evaluated four basic strategies which could be employed in a CACS Program: a non-action case which relies on existing programs and fuel price responses to achieve energy conservation; a limited rule which would provide only non-mandatory guidelines for the program; a case which represents the regulatory strategy embodied in the Proposed Rule; and an enhanced regulatory strategy which includes some provisions beyond DOE's existing authority under NECPA and would require additional legislation.

1. *No-Action Case.* Beginning with the 1973/74 oil embargo, significant moves have been made to reduce energy consumption in buildings in response to both economic incentives resulting from higher fuel prices and national policy objectives. Total energy use in the residential and commercial sectors has increased at a rate of only one percent per year, about the same rate of increase as the population.

One of the most important Federal actions initiated since the embargo was the Energy Tax Act of 1978 which provided a residential energy tax credit for investments in energy conservation in a taxpayer's principal residence. The tax credit serves not only as an incentive for conservation but also as a very broad based source of statistical information on baseline conservation actions in the residential sector.

According to the Internal Revenue Service (IRS) report on 1978 tax returns, over 5.9 million taxpayers claimed the credit for expenditures of 4.2 billion dollars. The predominant actions were insulation and storm windows/doors representing together over 84 percent of the investment. A substantial number of the returns claimed credit to several different measures.

The 1978 return includes a credit for not only 1978 but also for 1977 after April 20 of that year. Thus the returns represent actions taken over a period of 1.7 years. Overall this indicates that some conservation actions were being taken at a rate of about 6 percent of residences per year. However, most of the claims indicate only partial weatherization with only about one percent per year investing in full weatherization. Two-thirds of the claims indicated less than half the investment required for full weatherization. Preliminary data from IRS indicates claims have fallen about fifteen percent (on an annual basis) for 1979. The IRS statistics predominantly reflect retrofit of single-family homes. For the multi-family and small commercial sectors covered under this rulemaking, the Department's research indicates that significantly lower rates of retrofit than observed in the single-family sector may be expected.

2. *Limited Rule Case.* In the process leading to the drafting of the Proposed Rule, the Department considered as an alternative a much more limited rule than that proposed herein. The general approach of such a rule would be to provide general guidelines to States and utilities for establishing an effective multi-family and commercial audit program with essentially no mandatory requirements.

The Limited rule would have the following basic features:

- Participation by public utilities would be voluntary.
- Procedures for offering audits including the content and distribution of Program Announcements would not be specified.
- No requirements would be established for State Plans.
- No set time would be specified for initiating a program.
- The content of the audit would be entirely at the discretion of the utility. No particular energy conservation or renewable resource measures would be required to be included in the audit.

A Limited rule would be expected to have some favorable impact on energy conservation; however, a major part of the potential energy savings achievable under the program would not be realized.

3. *Proposed Rule Case.* This case represents the expected results from the promulgation of a Proposed Rule which is closely modelled after the RCS program for single-to-four unit family homes.

For the purpose of the Regulatory Analysis, DOE has identified certain existing utility programs which were established prior to the Federal program. The Department has closely examined these programs and found that a number of them are sufficiently similar to the program established by these rules to allow quantitative data obtained on participation rates of customers, conservation investments, and energy savings to be applied to projects for the Proposed Rule Case.

4. *Enhanced Regulation Case.* As previously discussed, the Proposed Rule is fundamentally permissive with respect to all sectors except large public utilities. This Proposed Rule is to some extent a guideline in that States, manufacturers, suppliers, installers, financial institutions, tenants, and building owners are not compelled to participate in the program. Even the public utility sector, the only sector facing obligatory requirements, is given extreme flexibility in carrying out the audit program. For example, no mandatory goals are established for the numbers of audits to be performed or for energy savings. Nonetheless, the Department's research has indicated that similar (non-Federal) utility programs have achieved the significant participation and energy savings projected for the Proposed Rule Case without mandatory goals.

This performance is due in large part to underlying economic incentives that, once clarified, documented, and elucidated, are extremely compelling to the public utilities as well as the other program participants. It also results from the clear signal inherent in Federal legislation and regulations that energy conservation is a primary national policy objective.

There are, however, further steps that could be taken by the Government to speed and insure energy conservation. In several areas other than retrofit of buildings, Congress has previously adopted such approaches as mandatory standards and requirements, for example, in setting mandatory requirements for gasoline mileage in new automobiles at lowest cost per unit of energy displaced of the cases studied. However, this regulatory strategy is beyond DOE's legislative authority.

Table 1 summarizes the cost/benefit analysis for multifamily. Table 2 covers commercial buildings.

G. Urban and Community Impact Analysis (UCIA)

The purpose of the UCIA is to assess the impacts of the proposed CACS program covering large centrally heated or colled multi-family dwellings and small commercial buildings. For the purposes of the UCIA, unit-heated and centrally heated apartments are treated as one group.

1. *Absolute Impacts.* Because of the geographic distribution of the majority of larger apartment buildings, the CACS program will have its greatest effect on urban areas. Other communities containing sizeable clusters of these buildings will also experience substantial program impacts. The small commercial building sector is more ubiquitously distributed on the landscape and will not likely result in any significant impacts occurring in any one particular area relative to any other.

2. *Relative Impacts.* A sizeable portion of the units in the covered buildings are occupied by low-income tenants. Buildings housing such tenants may be eligible for special grants and other weatherization assistance aimed specifically at this income group. If these financial programs are tapped in conjunction with CACS, this income group may receive a large proportion of the program impact. Other fiscal incentives exist for the overall apartment dwelling population (i.e., loans, tax credits, grants) which may serve to minimize the possible difference in program participation between income groups.

An enhanced regulatory approach could be directed to either State governments, utilities, tenants, building owners, or a combination of these sectors. The mandatory requirements could establish targets for energy audits or energy efficiency or for both.

5. *Program Coverage of Commercial Sector.* The Department's primary concern in the commercial sector relates to the degree of coverage of the sector. Congress has clearly stated in both the wording of the law itself and the adopted Conference Committee report that the program is meant to apply only to a part of the commercial sector, that part where modest amounts of energy are used by each customer.

This intent has been translated in the law into specific numerical limits on energy consumption per commercial customer (4000 KWH/month of electricity or 1000 therms/month of fuel). DOE has considered three options for qualification of eligible customers.

• Option 1—The customer must completely occupy a building. This limits coverage to buildings as well as customers which use less than the energy consumption limits.

• Option 2—The customer can occupy all or part of a building. This incorporates some larger buildings if each customer occupying the building is in itself a small direct energy user.

• Option 3—This option extends the definition of utility customer to include *indirect* customers; that is, firms which are not separately metered but which, in effect, pay for a portion of a building's energy use (incorporated in rent) which on a pro rata basis is less than the specified energy consumption limits.

In addition the Department considered three alternate interpretations as to application of the consumption limits on electricity and fuel. These were as follows:

• Alternative A—The limits on electricity and fuel consumption are applied on an *exclusive* basis. That is, a customer who exceeds either the electric limit or the fuel limit is excluded from the program.

• Alternative B—The limits are applied on an *inclusive* basis. That is, a customer qualifies for the program if he consumes less than either limit.

• Alternative C—This alternative is the same as alternative B except that special treatment is given to electrically heated buildings. Since 1000 therms of fuel has an energy content that is equivalent to 29,300 KWH of electricity, customers using electric heat would allowed to use up to 29,300 KWH for space conditioning in addition to the 4000 KWH specified for other uses.

Alternates A, B, and C were considered for option 1. Only alternate C was evaluated for options 2 and 3.

The analysis resulted in the following percentage coverage of commercial floorspace on a national basis.

Option				
1A	1B	1C	2	3
2.9	8.9	9.85	14.5	39.3

Percent of Floorspace Covered:

6. *Results of Cost/Benefit Analysis.* The quantitative results of the analysis are summarized below and presented in detail in the Draft Regulatory Analysis.

The No-Action Case requires no additional Federal expenditures but would realize little in energy savings. The limited rule achieve significant energy savings but at a relatively high cost per unit of energy saved. The proposed rule provides increased energy savings and considerably improved cost effectiveness. Enhanced regulations are estimated to result in the highest energy savings.

Table 1.—*Cost/Benefit Analysis for Multifamily*

	No-action case	Limited rule case	Proposed rules case	Enhanced rule case
Energy savings (million barrels of oil equivalent):				
Per year (1990)	0.76	3.03	9.08	21.18
Total to year 2000	11.35	45.38	136.15	317.69
Employment: Jobs created, 1990	599	4,233	11,023	25,078
COST (total to 1990, million dollars)	$61.3	$532.2	$1,026.1	$2,048.9
Federal Government	$0.0	$15.8	$16.0	$16.4
State governments	$0.0	$51.2	$52.5	$55.2
Utilities	$24.4	$235.3	$251.7	$284.6
Building owners and tenants	$36.9	$229.8	$705.9	$1,690.8
Dollars per barrel of oil equivalent saved:				
Undiscounted	$5.40	$11.73	$7.54	$6.44
Discounted	$8.24	$17.90	$11.50	$9.63

Table 2.—*Cost/Benefit Analysis for Small Commercial*

	No-action case	Limited rule case	Proposed rules case	Enhanced rule case
Energy savings (million barrels of oil equivalent):				
Per year (1990)	0.66	1.99	5.30	11.60
Total to year 2000	9.94	29.83	79.55	174.0
Employment: Jobs created, 1990	674	3,111	6,599	13,384
COST (total to 1990, million dollars)	$61.3	$426	$677	$1,166
Federal Government	$0	$15	$15	$16
State governments	$0	$50	$50	$51
Utilities	$20.9	$208	$210	$216
Building owners and tenants	$42.2	$153	$402	$883
Dollars per barrel of oil equivalent saved:				
Undiscounted	$6.35	$14.28	$8.51	$6.70
Discounted	$9.60	$21.79	$12.99	$10.23

The CACS program is expected to result in creation of about 17,000 jobs nationwide. While a portion of this employment will be in Federal and State Government and in administrative positions at utilities, a significant number of jobs will be available to the low-income urban sector.

3. *Conclusion.* The CACS program is seen as a particularly effective mechanism for improving the energy efficiency of large apartment dwellings and small commercial buildings. These needed improvements in apartment buildings should aid in upgrading the overall quality of life for the urban dweller.

XI. Environmental Impact Analysis

An environmental impact statement (EIS) was issued for the Residential Conservation Service program in November, 1979 (DOE–EIS–0050) in compliance with the National Environmental Policy Act (NEPA). The Department of Energy has determined that the extension of the Residential Conversation Service program to commercial and multi-family buildings involves "substantial changes" in the program "that are relevant to environmental concerns" (40 CFR 1502.9(c)(1)(i)). Therefore, a supplement to the existing environmental impact statement is required. A Notice of Intent regarding the preparation and scope of the supplement was published in the **Federal Register** on December 9, 1980. If you wish to receive a copy of the draft supplement when it is completed, please contact: Mr. James Tanck, Director, Building Conservation Services Division, M.S. GH–068, Forrestal Building, 1000 Independence Avenue SW., Washington, D.C. 20585, (202–252–9161)

The NEPA regulations issued by the Council on Environmental Quality state that publication of a draft rule shall "normally" be accompanied by issuance of a draft environmental impact statement (or draft supplement). In the present case this is not possible, if the statutory deadline for issuance of the proposed rule is to be met. DOE therefore plans to issue a draft supplement to the EIS for the Residential Conservation Service program after publication of this proposed rule. However, the supplement will be available to the public for review for a reasonable period of time prior to the public hearings on the proposed rule.

as specified in the Department's NEPA guidelines.

Key Environmental Issues

Under the existing Residential Conservation Service program, concerned utilities are required to make available a number of services to residential customers, including energy audits, and installation financing, and inspection of certain conservation measures. The existing environmental impact statement for the Residential Conservation Service program identifies a number of potential adverse health and safety impacts from measures covered in these programs. These impacts are related to four measures (urea-formaldehyde foam wall insulation, vent dampers, electric and mechanical ignition systems, and small wind energy conversion systems) which, in the event of improper performance, may have significant impacts. There is also a general concern about the increased concentration of certain indoor air pollutants due to reduction of the air exchange rate resulting from installation of certain energy conservation measures. The principal mitigating measures for these potential impacts are the installation standards and follow-up inspections mandated under the Residential Conservation Service program.

The legislation establishing the proposed Commercial and Apartment Conservation Service (CACS) program provides only for energy audits. Thus, the program does not include the mitigating measures noted above. The proposed program also includes several additional measures whose potential environmental impacts were not assessed in the existing environmental impact statement.

The environmental impacts related to single family and multifamily residence programs differ in the type of mitigating measures incorporated in the two programs and the types of conservation measures which may be installed. In the case of the single family and individually heated and cooled multifamily residences under the RCS program, several mitigating measures are available to reduce health and safety impacts. These include product standards and warranties, installation standards and inspections. Such measures, intended to reduce impacts related to indoor air quality and accidents, would not be available under the CACS program to centrally-heated and cooled multifamily residences. In addition, different measures or different participation rates may apply to multifamily residences. Air handling equipment may be present in multifamily dwellings which may increase air infiltration and reduce indoor air quality impacts. However, certain measures, such as changes in heating equipment, might increase the risk of indoor air quality degradation or accidents in the installation and use of the conservation measure. Similar considerations would apply to the application of the program to small commercial buildings.

The following issues will be analyzed during the preparation of the Supplement. This list is not intended to be all inclusive, nor is it intended to be a predetermination of impacts.

1. Effect on indoor air quality of decreased air infiltration due to conservation measures.
2. Effect on indoor air quality of increased emission sources from conservation measures.
3. Decrease in emissions due to decreased energy use.
4. Increased emissions due to production of conservation measures.
5. Regional distribution of impacts and benefits.
6. Health and safety impacts related to installation or utilization of the measures.
7. Land use and aesthetic impacts.
8. Socioeconomic impacts related to changes in employment and increase demand for conservation measures.

XII. Consultation With Other Federal Agencies

In preparing the proposed rule, DOE consulted with representatives of the Secretary of Housing and Urban Development (HUD), particularly to achieve continuity as HUD developed the proposed rule for Title V, Subtitle A, Solar Energy and Energy Conservation Bank.

XIII. Contractor Contributions to Rulemaking

The following entities made contributions to the development of the proposed rule for the Commercial and Apartment Conservation Service Program.

1. Jack Faucett Associates and its subcontractor, Xenergy, provided analytical and technical support for the proposed rule.

2. Oak Ridge National Laboratory (ORNL) and its subcontractor, TRW, assisted in the preparation of the Draft Regulatory Analysis and Urban and Community Impact Statement. ORNL and its subcontractor, Battelle-Columbus Laboratories assisted in the preparation of the Draft Supplement to the Environmental Impact Statement for the Residential Conservation Service Program.

XIV. Comment and Hearing Procedures

A. Written Comments

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to the proposed procedures, requirements, and criteria. Comments should be submitted to the address indicated in the addresses section of this preamble and should be identified on the envelope and on the documents submitted to DOE with the designation "Commercial and Apartment Conservation Service Program" (Docket No. CAS–RM–80–125). Fifteen copies should be submitted. All written comments must be received by (60 days after publication), to insure consideration.

All written comments received after publication of these proposed rules, whether or not submitted in accordance with these procedures, will be available for public inspection in the DOE Reading Room, Room 1E–190 Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. Any information or data considered by the person furnishing it to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information or data and treat it according to its determination.

B. Hearing Procedures

The time and place of the public hearings are indicated in the dates and addresses section of this preamble. DOE invites any person who has an interest in the proposed rulemaking, or who is a representative of a group or class of persons that has an interest in the proposed rulemaking, to make a written request for an opportunity to make an oral presentation. Such a request should be direct to the address indicated in the addresses section of this preamble and must be received before 4:30 p.m. on January 21, 1981 for Kansas City, January 23, 1981 for Washington, D.C. and January 27 for San Francisco.

Such a request may be hand delivered to Room 1F–085, 1000 Independence Avenue, S.W., between the hours 9:00 a.m. and 4:30 p.m., Monday through Friday. A request should be labeled both on the document and on the envelope "Commercial and Apartment Conservation Service Program.", CAS–RM–80–125.

The person making the request should briefly describe the interest concerned; if appropriate, state why she or he is a proper representative of a group or class of persons that has an interest; give a

concise summary of the proposed oral-presentation; and provide a telephone number where he or she may be contacted through the day of the hearing.

Each person who, in DOE's judgment, proposes to present relevant material and information shall be selected to be heard and shall be notified by DOE of his or her participation before 4:30 p.m. on: February 12 for Washington, D.C.; February 17 for San Francisco, California; and February 19 for Kansas City, Missouri.

Each person selected to appear at the hearing must bring 15 copies of her or his statement to the hearing at the address given to the addresses section of this preamble.

The hearings will be held beginning at 9:00 a.m., local time.

C. Conduct of Hearings

DOE reserves the right to arrange the schedule of representatives to be heard and to establish the procedures governing the conduct of the hearing. The length of each presentation may be asked only by those conducting the hearing, and there will be no cross-examination of persons presenting statements.

Any participant who wishes to ask a question at the hearing may submit the question, in writing, to the presiding officer. The presiding officer will determine whether the question is relevant and material, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made and the entire record of the hearing, including the transcript, will be retained by DOE and made available for inspection at the DOE Freedom of Information Reading Room, Room GA-152, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

In consideration of the foregoing, the Department of Energy hereby proposes to amend Chapter II of Title 10 of the Code of Federal Regulations, by establishing Part 458 and amending Part 456 as set forth below.

(Part 1 of Title II of the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 et seq., as amended by Title V, Subtitles B and D of the Energy Security Act, Pub. L. 96-294, 94 Stat. 611 et seq.; Department of Energy Organization Act, Pub. L. 95-91 Stat. 565 et seq., 42 U.S.C. 7101 et seq.)

Issued in Washington, D.C., January 7, 1981.

T. E. Stelson,

Assistant Secretary, Conservation and Solar Energy.

PART 456—RESIDENTIAL ENERGY CONSERVATION PROGRAM

1. The Table of Contents to Title 10, Part 456 of the Code of Federal Regulations is amended by revising the heading for § 456.306 ("Program Announcement.") to read "Program Announcement for residential buildings containing fewer than five dwelling units.", and by revising the heading for § 456.307 ("Requirements for program audits.") to read "Requirements for program audits for residential buildings containing fewer than five dwelling units."

2. The Table of Contents to Title 10, Part 456 of the Code of Federal Regulations is amended by adding two new headings to read as follows:

Sec.

456.320 Program Announcement for residential buildings containing five or more dwelling units.

456.321 Requirements for program audits for residental buildings containing five or more dwelling units.

3. Section 456.105(w) The definition of "Residential Building", is revised to read as follows:

§ 456.105 Definitions.

* * * * *

(w) Residential Building. The term "residential building" means any building used for residential occupancy which—

(1) Is not a new building to which final standards under Section 304(a) and 305 of the Energy Conservation and Production Act apply;

(2) Has a system for heating or cooling, or both heating and cooling, living spaces; and

(3) Contains at least one but not more than four dwelling units (townhouses and rowhouses in rows of more than four separate houses are included in this definition, but garden apartment complexes which contain clusters of four or fewer apartment units are not) except that after January 1, 1982, such term shall also include any building which contains more than four dwelling units (including garden apartment complexes) unless such building contains a heating or cooling system, or both, which is a central system.

4. Section 456.306 is amended by revising the section heading to read:

§ 456.306 Program announcement for residential buildings containing fewer than five dwelling units.

* * * * *

5. Section 456.307 is amended by revising the section heading to read:

§ 456.307 Requirements for program audits for residential buildings containing fewer than five dwelling units.

* * * * *

6. Part 456 is amended by adding a new § 456.320 to read as follows:

§ 456.320 Program announcement for residential buildings containing five or more dwelling units.

The State Plan shall require that beginning on January 1, 1982, each covered utility and each participating home heating supplier shall include a statement in all Program Announcements sent to eligible customers in residential buildings containing five or more dwelling units which are neither centrally heated nor centrally cooled that such persons may choose to either obtain an audit and be eligible for the services under the RCS Program as described in the Program Announcement or obtain an audit under the CACS Program (10 CFR 458). Such statement shall adequately describe the difference between the two types of audits and services provided within each program and shall clearly state, if appropriate, that an election of one audit and its program services shall preclude the customer from receiving in the future the other program audit and its services.

7. Part 456 is amended by adding a new § 456.321 to read as follows:

§ 456.321 Requirements for program audits for residential buildings containing five or more dwelling units.

The State Plan shall require that beginning on January 1, 1982, if an eligible customer in a residential building containing five or more dwelling units which is neither centrally heated nor centrally cooled requests an energy audit under the RCS Program, the covered utility or participating home heating supplier shall provide an energy audit which meets the requirements of § 456.307 of these regulations, and shall allow the customer to take advantage of the other services and benefits available under the RCS Program. If, however, such a customer requests a CACS Program audit, the State Plan shall require the covered utility or participating home heating supplier to provide an energy audit which meets the requirements of 10 CFR 458.503(b).

Chapter II, Title 10 of the Code of Federal Regulations is amended by

adding a new Part 458 to read as follows:

PART 458—COMMERCIAL AND APARTMENT CONSERVATION SERVICE PROGRAM

Subpart A—General Provisions and Definitions

Sec.
458.101 Purpose and scope.
458.102 List of covered utilities.
458.103 Definitions.
458.104 Enforcement.
458.105 Request for confidential treatment.

Subpart B—Preparation, Submission, and Approval of State Plans

458.201 Scope.
458.202 Initial submission.
458.203 Coordination requirements.
458.204 Notice, comment, and public hearing.
458.205 Procedures for submission and approval of state plans.
458.206 Building heating suppliers.
458.207 Special provisions for the Tennessee Valley Authority (TVA).
458.208 Special procedures for exemptions.

Subpart C—Preparation, Submission, and Approval of Nonregulated Utility Plans

458.301 Scope.
458.302 Coverage.
458.303 Initial submission.
458.304 Coordination requirements.
458.305 Notice, comment, and public hearing.
458.306 Procedures for submission and approval of nonregulated utility plans.
458.307 Special procedure for exemptions.

Subpart D—Energy Conservation Services for Commercial Buildings

458.401 Scope and coverage.
458.402 Eligibility for audit.
458.403 Services provided by utilities and participating building heating suppliers.
458.404 Addition of measures by states.
458.405 Auditor qualification requirements.
458.406 Procedures for investigating and enforcing compliance with the State Plan.
458.407 Coordination.
458.408 Accounting and payment of costs.
458.409 Plans for participating building heating suppliers.

Subpart E—Energy Conservation Services for Multifamily Dwellings

458.501 Scope and coverage.
458.502 Eligibility for audit.
458.503 Services provided by utilities and participating building heating suppliers.
458.504 Addition of measures by states.
458.505 Auditor qualification requirements.
458.506 Procedures for investigating and enforcing compliance with the State Plan.
458.507 Coordination.
458.508 Accounting and payment of costs.
458.509 Plans for participating building heating suppliers.

Subpart F—Federal Standby Authority and Enforcement Provisions

458.601 Scope.
458.602 Conditions under which Federal standby authority shall be invoked.
458.603 Procedures for Federal standby planning process.
458.604 Failure to comply with orders.
458.605 Enforcement provisions.
Appendix—Program Measures by Climate and Category of Building.

Authority: Part 1 of Title II and Title VII of the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206, et. seq. (42 U.S.C. 8211 et seq.), as amended by Title V, Subtitles B and D, of the Energy Security Act, Pub. L. 96-294, 94 Stat. 611 et. seq.; Department of Energy Organization Act, Pub. L. 95-91 Stat. 565 et. seq., (42 U.S.C. 7101 et seq.).

Subpart A—General Provisions and Definitions

§ 458.101 Purpose and scope.

This part contains the regulations to implement Title VII of the National Energy Conservation Policy Act, 42 U.S.C. 8211 *et seq.*, as amended by the Energy Security Act, Pub. L. 96-294 (references to NECPA hereinafter refer to Title VII of the Act unless otherwise stated). NECPA requires the establishment of utility programs to provide energy audits of commercial and multifamily buildings, to encourage and facilitate the use of energy conserving operation and maintenance procedures and the installation of energy conservation measures and renewable resource measures.

§ 458.102 List of covered utilities.

(a) Before the beginning of each calendar year, the Department of Energy shall publish in the **Federal Register** a list of all covered utilities for that calendar year.

(b) After publication of the list, each State Regulatory Authority shall notify DOE in writing of those utilities on the list which are under the jurisdiction of that Regulatory Authority.

(c) The publication of the list is for informational purposes, and the failure to include a covered utility on the list or the failure of a State Regulatory Authority to designate a utility subject to its jurisdiction in no way affects the duties of or requirements upon such covered utility under these rules or any plan promulgated pursuant to these rules.

§ 458.103 Definitions.

For purposes of this Part:

(a) *Apartment Announcement.* The term "Apartment Announcement" means the CACS Programs information and offer of services required by § 458.503(a)(1)to be sent by a coverd utility or participating building heating supplier to each eligible multifamily dwelling customer.

(b) *Building Heating Supplier.* The term "building heating supplier" means a person who sells or supplies heating fuel (including No. 2, No. 4, and No. 6 heating oil, kerosene, butane, and propane) to an eligible customer for consumption in a commercial or multifamily building.

(c) *Commercial and Apartment Conservation Service (CACS) Program.* The term "Commercial and Apartment Conservation Service (CACS) Program" means the program required by Title VII of NECPA to be implemented by public utilities pursuant to an approved State Plan, and approved Nonregulated Utility Plan, or a Federal Standby Plan.

(d) *Commercial Announcement.* The term "Commerial Announcement" means the CACS Program information and offer of services required by § 458.403(a) to be sent by a coverd utility or participating building heating supplier to each eligible commercial customer.

(e) *Commercial Building.* The term "commercial building" means a building—

(1) Which was completed on or before the date of enactment of this Title,

(2) Which is a roofed and walled structure designed to shelter persons, animals, or things,

(3) Which is used primarily for carrying out a business (including a nonprofit business) of for carrying out the activities or administration of a State or local government,

(4) Which is not used primarily for the manufacture or production of products, raw materials, or agricultural commodities,

(5) For which the average monthly use of energy for the calendar year 1980 was

(i) Less than 4,000 kilowatt hours of electricity, or

(ii) Less the 100 million BTU of natural gas, No. 2, No. 4, or No. 6 heating oil, kerosene, or propane, except that such term does not include a Federal building as defined in § 458.103(1). The energy consumption of any energy using devices not inside the building, such as parking lot lights, in the area associated with a given building is attributed to the building for purposes of this definition.

(f) *Covered Utility.* The term "covered utility" means in any calendar year a public utility which during the second preceding calendar year had either:

(1) Sales of naturl gas for purposes other than resale which exceeded 10 billion cubic feet, or

(2) Sales of electric energy for purposes other than resale which exceed 750 million kilowatt-hours.

(g) *Eligible Commercial Customer.* The term "eligible commercial customer" means—

(1) With respect to a public utility, the owner or tenant of a commercial building to which that public utility

provides natural gas or electricity for use in such building.

(2) With respect to a building heating supplier, the owner or tenant of a commercial building to which that building heating supplier provides No. 2, No. 4, or No. 6 heating oil, kerosene, or propane for use in such building.

(h) *Eligible Multifamily Dwelling Customer.* The term "eligible multifamily dwelling customer" means—

(1) With respect to a public utility, the owner of a multifamily dwelling to whom that public utility sells naturl gas or electricity for use in such dwelling, or

(2) With respect to a building heating supplier, the owner of a multifamily dwelling to whom that building heating supplier sells No. 2, No. 4, or No. 6 heating oil, kerosene, or propane for use in such dwelling.

(i) *Energy Conservation Measures.* The term "energy conservation measures" means the following measures:

(1) *Caulking.* The term "caulking" means pliable materials used to reduce the passage of air and moisture by filling small gaps including a fixed joints on a building, uderneath baseboards inside a building, in exterior walls at electric outlets, around pipes and wires entering a building, and around dryer vents and exhaust fans in exterior walls. Caulking includes, but is not limited to, materials commonly known as "sealants," "putty," and "glazing compounds."

(2) *Weatherstripping.* The term "weatherstripping" means narrow strips of material placed over or in movable joints of windows and doors to reduce the passage of air and moisture.

(3) *Furnace Efficiency Modifications.* The term "furnace efficiency modifications" means:

(i) *Replacement Furnaces or Boilers.* The term "replacement furnaces or boilers" means a furnace or boiler, including a heat pump, which replaces an exising furnance or boiler of the same fuel type and which reduces the amount of fuel consumed due to an increase in combustion efficiency, improved heat generation or reduced heat losses.

(ii) *Furnace Replacement Burner (Oil).* The term "furnace replacement burner (oil)" means a device which atomizes the fuel oil, mixes it with air, and ignites the fuel-air mixture, and is an integral part of an oil-fired furnance or boiler including the combustion chamber, and which because of its design, achieves a reduction in the oil used from that used by the device which it replaces.

(iii) *Flue Opening Modifiction (Vent Damper).* The term "flue opening modification (vent damper)" means an automatically operated damper installed in a gas-fired furnance which:

(A) Is installed dowstream from the drafthood; and

(B) Conserves energy by substantially reducing the flow of heated air through the chimney when the furnace is not in operation.

(iv) *Automatic Intermittent Pilot Ignition Device (IID).* The term "automatic intermittent pilot ignition device (IID)" means a device which, when installed in a gas-fired furnace or boiler, automatically ignites the gas burner and replaces a gas pilot light.

(4) *Replacement Central Air Conditioner.* The term "replacement central air conditioner" means a central air conditioner which replaces an existing central air conditioner of the same fuel type and which reduces the amount of fuel consumed due to an increase in efficiency.

(5) *Ceiling Insulation.* The term "ceiling insulation" means a material primarily designed to resist heat flow which is installed between the conditioned area of a building and an unconditioned attic. Where the conditioned area of a building extends to the roof, the term "ceiling insulation" also applies to such material used between the underside and upperside of the roof. The term "ceiling insulation" also includes such material installed on the exterior of the roof.

(6) *Wall Insulation.* The term "wall insulation" means a material primarily designed to resist heat flow which is installed within or on the walls between conditioned areas of a building and unconditioned areas of a building or the ouside.

(7) *Floor Insulation.* The term "floor insulation" means a material primarily designed to resist heat flow which is installed between the first level conditioned area of a building and an unconditioned basement, a crawl space, or the outside beneath it. Where the first level conditioned area of a building is on a ground level concrete slab, the term "floor insulation" also means such material installed around the perimeter of or on the slab. In the case of mobile homes, the term "floor insulation" also means skirting to enclose the space between the building and the ground.

(8) *Duct Insulation.* The term "duct insulation" means a material primarily designed to resist heat flow which is installed on a heating or cooling duct in an unconditioned area of a building.

(9) *Pile Insulation.* The term "pipe insulation" means a material primarily designed to resist heat flow which is installed on a heating or cooling pipe in an unconditioned area of a building.

(10) *Water Heater Insulation.* The term "water heater insulation" means a material primarily designed to resist heat flow which is suitable for wrapping around the exterior surface of the water heater casing.

(11) *Storm Window.* The term "storm window" means a window or glazing material placed outside or inside an ordinary or prime window, creating an air space, to provide greater resistance to heat flow than the prime windows alone.

(12) *Thermal Window.* The term "thermal window" means a window unit with improved thermal performance through the use of two or more sheets of glazing materials affixed to a window frame to create one of more insualted air spaces. It may also have an insulating frame and sash.

(13) *Storm or Thermal Door.* The term "storm or thermal door" means:

(i) A second door, installed outside or inside a prime door, creating an insulating air space,

(ii) A door with enhanced resistance to heat flow through the glass area by affixing two or more sheets of glazing material, or

(iii) A prime exterior door with a R-value of at least 2.

(14) *Heat Reflective and Heat Absorbing Window or Door Material.* The term "heat reflective and heat absorbing window or door material" means a window or door glazing material with exceptional heat-absorbing or heat-reflecting properties; or reflective or absorptive films and coatings applied to an existing window or door which thereby result in exceptional heat-absorbing or heat-reflecting properties.

(15) *Devices Associated with Electric Load Management Techniques.* The term "devices associated with electric load management techniques" means customer-owned or leased devices that reduce the maximum kilowatt demand on an electric utility and which are either:

(i) Part of a radio, ripple or other utility controlled load switching system on the customer's premises;

(ii) Clock-controlled load switching devices;

(iii) Interlocks, and other load-actuated, load-limiting devices; or

(iv) Energy storage devices with control systems.

(16) *Clock Thermostat.* The term "clock thermostat" means a device which is designed to reduce energy consumption by regulating the demand on the heating or cooling system in which it is installed, and uses:

(i) A temperature control device for interior spaces incorporating more than one temperature control level, and

(ii) a clock or other automatic mechanism for switching from one control level to another.

(17) *Automatic Energy Control System.* The term "automatic energy control system" means devices which regulate the operation of lighting, heating, cooling, or ventilating equipment automatically based on time, inside and/or outside temperature or humidity, or space utilization. Such equipment can include, but is not limited to:

(i) Temperature or humidity control devices or any type which are not replacing an existing device;

(ii) Temperature or humidity control devices which, due to their automatic control capabilities, can be expected to reduce the overall energy consumption of the facility compared to those presently in place.

(18) *Equipment Associated with Automatic Energy Control Systems.* The term "equipment associated with automatic energy control systems" means devices including but not limited to, automatic dampers on ventilating equipment and boiler stacks, wiring, relays, valves and other equipment which, when regulated by automatic energy control systems, produces a reduction in energy consumption.

(19) *Replacement of Modification of Lighting Systems.* The term "replacement or modification of lighting systems" means devices and actions which reduce overall lighting energy consumption while maintaining satisfactory lighting levels. These devices and actions include:

(i) Reducing light levels to levels cited in applicable codes and standards in each area of the building. This action may include installation of task lighting and reduction of general area lighting;

(ii) Controlling lamp operating time to limit lighting operation to periods of area use. Installation of local switching, time control devices and sensing devices are included;

(iii) Replacement of lamps with more efficient sources. These devices and actions may include, but are not limited to, replacement of incandescent and fluorescent lighting with low energy equivalent lamps, or replacement of any fixture type with one of greater lumens per watt efficiency such that total lighting demand can be reduced.

(20) *Furnace, or Utility Plant and Distribution System Modifications.* The term "furnace, or utility plant and distribution system modifications" means:

(i) With respect to replacement burners, furnaces, boilers, or any combination thereof, equipment which substantially increases the combustion of the fuel undergoing combustion as a result of:

(A) Greater heat exchange surface and/or turbulence;

(B) Recombustion of gases; or

(C) Recovery of latent heat of vaporization.

(21) *Energy Recovery Systems.* The term "energy recovery systems" means any of the following equipment:

(i) Recuperator,

(ii) Heat wheel,

(iii) Regenerator,

(iv) Heat exchanger, or

(v) Economizer.

(22) *Cogeneration System.* The term "cogeneration system" means any system which can be used to simultaneously produce electricity, as well as steam or other forms of thermal or mechanical energy.

(j) *Energy Conserving Operation and Maintenance Procedures.* The term "energy conserving operation and maintenance procedures" means:

(1) Furnace Efficiency Maintenance and Adjustments, which means cleaning and combustion efficiency adjustment of gas or oil furnaces, periodic cleaning or replacement of air filters on forced-air heating or cooling systems, lowering the bonnet or plenum thermostats to 80°F on a gas or oil forced-air furnace, and turning off the pilot light on a gas furnace during the summer;

(2) Nightime Temperature Setback, which means manually lowering the thermostat control setting for the furnace during the heating season to a maximum of 55°F during sleeping hours or hours when building is unoccupied;

(3) Reducing Thermostat Settings in Winter, which means limiting the maximum thermostat control setting for the furnace to 68°F during the heating season;

(4) Raising Thermostat Setting in Summer, which means setting the thermostat control for an air conditioner to 78°F or higher during the cooling season;

(5) Water Flow Reduction in Showers and Faucets, which means placing a device in a shower head or faucet to limit the maximum flow to three gallons per minute or less, or replacing existing showerheads or faucets with those having built-in provisions for limiting the maximum flow to three gallons per minute or less;

(6) Reducing Hot Water Temperatures, which means manually setting back the water heater thermostat setting to 120°F, and reducing the use of heated water for clothes washing and other purposes when high temperatures are not needed;

(7) Reducing Energy Use When a Building is Unoccupied, which means reducing the thermostat setting to 55°F when a building is empty for four hours or longer in the heating season, turning an air conditioner off in the cooling season when no one is present and turning a water heater off when a building is vacant for two days or longer;

(8) Plugging Leaks in Ceiling Space and Basements, which means (i) installing scrap insulation or other pilable materials in gaps around pipes, ducts, fans, or other items which enter the ceiling space or basement from a heated space, (ii) adding insulation to a ceiling or basement door;

(9) Sealing Leaks in Pipes and Ducts, which means installing caulking in any leak in a heating or cooling duct, tightening or plugging any leaking joints in hot water or steam pipes, and replacement of washers in leaking water valves;

(10) Efficient Use of Shading, which means using shades or drapes (i) to block sunlight from entering a building in the cooling season, (ii) to allow sunlight to enter during the heating season, and (iii) to cover windows tightly at night during the heating season;

(11) Building Energy Use Monitoring List, which means a worksheet which allows a building owner to monitor energy cost and energy use on a monthly basis for at least a two year period;

(12) Steam Distribution System Maintenance Procedures, which means the visual inspection of the steam distribution system for the purpose of detecting steam leaks, ensuring that steam is not entering the condensate system and operation of condensate return lines to return all condensate to the boiler;

(13) Such other low or no cost practices designated by the Governor and approved by the Secretary in a State Plan which (i) save energy; (ii) do not require the installation of energy conservation or renewable resource measures; and (iii) do not adversely impact the CACS Program.

(k) *Estimates Based on Typical Practice.* The term "estimates based on typical practice" means a determination of energy savings, implementation costs, or energy end-usage based upon the experience of facilities of the same function and climate for which full analyses have been performed. In order to perform estimates based on typical practice, the utility must document and update the results of full analysis audits that provide the basis for the estimate. The data may include, but is not limited to, the State commercial and multifamily audit data base, government or trade association studies or guidebooks, or

other compiled results from the implementation of program audits.

(l) *Federal Building.* The term "Federal building" means any building or other structure owned in whole or part by the United States or any Federal agency, including any such structure occupied by a Federal agency under a lease-acquisition agreement under which the United States or a Federal agency will receive fee simple title under the terms of such agreement without further negotiation.

(m) *Governor.* The term "Governor" means the Governor or chief executive officer of a State or his designee.

(n) *Multifamily Dwelling.* The term "multifamily dwelling" means a building which is used for residential occupancy, was completed on or before June 19, 1980, and contains five or more dwelling units and a central heating or central cooling system, or both.

(o) *Nonregulated Utility.* The term "nonregulated utility" means a public utility which is not a regulated utility.

(p) *Nonregulated Utility Plan.* The term "nonregulated utility plan" means a plan developed pursuant to Subpart C of this Part.

(q) *Participating Building Heating Supplier.* The term "participating building heating supplier" means a building heating supplier that has elected to participate in a State CACS Program which includes building heating suppliers.

(r) *Program Audit.* The term "program audit" means an energy audit in which the estimates of costs and savings are based on an on-site inspection of the building of an eligible customer by an auditor qualified according to a State or Nonregulated Utility Plan.

(s) *Program Information.* The term "program information" means the CACS Announcement and any information dissemination activities related to a Commercial and Apartment Conservation Service Program.

(t) *Program Measures.* The term "program measures" means those energy conservation or renewable resource measures which the Secretary has by rule determined to be appropriate by climatic region and building category and which are found in the Appendix to this Part.

(u) *Public Utility.* The term "public utility" means any person, State agency, or Federal Agency which is engaged in the business of selling natural gas or electric energy, or both, to commercial or multifamily dwelling customers for use in a commercial building or multifamily dwelling.

(v) *Rate.* The term "rate" means any price, rate, charge, or classification made, demanded, observed, or received with respect to sales of electric energy or natural gas, any rule, regulation, or practice respecting any such rate, charge or classification, and any contract pertaining to the sales of electric energy or natural gas.

(w) *Ratemaking Authority.* The term "ratemaking authority" means authority to fix, modify, approve, or disapprove rates.

(x) *Regulated Utility.* The term "regulated utility" means a public utility with respect to whose rates a State regulatory authority has ratemaking authority.

(y) *Renewable Resource Measure.* The term "renewable resource measure" means the following measures in or with respect to a commercial building or multifamily dwelling:

(1) *Solar Domestic Hot Water Systems.* The term "solar domestic hot water systems" means equipment designed to absorb the sun's energy and to use this energy to heat water for use in a commercial building or multifamily dwelling other than for space heating, including thermosiphon hot water heaters.

(2) *Active Solar Space Heating Systems.* The term "active solar space heating systems" means equipment designed to absorb the sun's energy and to use this energy to heat space by use of mechanically forced energy transfer, such as fans or pumps.

(3) *Combined Active Solar Space Heating and Solar Domestic Hot Water System.* The term "combined active solar space heating and solar domestic hot water system" means equipment designed to perform both of the functions described in paragraphs (1) and (2) above.

(4) *Passive Solar Space Heating and Cooling Systems.* The term "passive solar space heating and cooling systems" means systems that make most efficient use of, or enhance the use of, natural forces—including solar isolation, winds, night time coolness and opportunity to lose heat by radiation to the night sky—to heat or cool space by the use of conductive, convective or radiant energy transfer. Passive solar systems include only:

(i) *Direct Gain Glazing Systems.* The term "direct gain glazing systems" means the use of south-facing (+ or −45° or True South) panels of insulated glass, fiberglass, or other similar transparent substances that admit the sun's rays into the space where the heat is retained. Glazing is either double-paned, or single-paned equipped with moveable insulation.

(ii) *Indirect Gain Systems.* The term "indirect gain systems" means the use of panels of insulated glass, fiberglass or other transparent substances that direct the sun's rays into specially constructed thermal walls, ceilings, rockbeds, or containers of water or other fluids where heat is stored and radiated.

(iii) *Solaria/Sunspace Systems.* The term "solaria/sunspace systems" means a structure of glass, fiberglass or similar transparent material which is attached to the South-facing (+ or −45° of True South) wall of a structure which allows for air circulation to bring heat into the building, and which is able to be closed off from the structure during periods of low solar insulation.

(iv) *Window Heat Gain and/or Loss Retardants.* The term "window heat gain and/or loss retardants" means those mechanisms which significantly reduce summer heat gain or wintertime heat loss through windows by use of devices such as awnings, insulated rollup shades (external or internal), metal or plastic solar screens, or moveable rigid insulation.

(5) *Wind Energy Devices.* The term "wind energy devices" means equipment that uses wind energy to produce energy in any form for personal purposes.

(6) *Replacement Solar Swimming Pool Heaters.* The term "replacement solar swimming pool heaters" means devices which are used solely for the purpose of using the sun's energy to heat swimming pool water and which replace a swimming pool heater using electricity, gas or other fossil fuel.

(z) *Secretary.* The term "Secretary" means the Secretary of Energy.

(aa) *Standard Industrial Classification Code.* The term "Standard Industrial Classification Code" means the numerical codes used by the Department of Commerce to classify industries.

(bb) *State.* The term "State" means a State, the District of Columbia, and Puerto Rico.

(cc) *State Agency.* The term "State agency" means a State, a political subdivision thereof, or any agency or instrumentality of either.

(dd) *State Measure.* The term "State measure" means an energy-saving measure which has been approved by the Secretary in the State Plan pursuant to § 458.404 and § 458.504.

(ee) *State Plan.* The term "State Plan" means a plan developed pursuant to Subpart B of this Part.

(ff) *State Regulatory Authority.* The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sales of electric energy or natural gas by any public utility (other than by such State agency); except that in the case of a public utility with respect to which the

Tennessee Valley Authority has ratemaking authority, such term means the Tennessee Valley Authority.

(gg) *Tenant's Energy Conservation Information Package.* The term "Tenant's Energy Conservation Information Package" means the Information Package required to be provided, by § 458.503(a)(2), by a covered utility or participating building heating supplier to each owner for distribution to each tenant in a multifamily dwelling for which an audit has been performed.

§ 458.104 Enforcement.

If the Secretary determines that any person, including an individual, corporation, association, public or private organization, or State or municipal agency, has violated any provisions of these regulations, any plan approved or promulgated under these regulations, or any order issued pursuant thereto, the Secretary may file a petition in the appropriate United States district court to enjoin such person from violating such provision, plan, or order.

§ 458.105 Request for confidential treatment.

(a) *Request.* If you wish to file a document with DOE claiming some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, or is otherwise exempt by law from public disclosure, and if you wish to request that DOE not disclose information, you must comply with the DOE FOIA regulations set forth in 10 CFR 1004 (44 FR 1908, January 8, 1979).

(b) *Disposition of Request.* DOE retains the right to make its own determination with regard to any claim of confidentiality. Notice of the decision by DOE to deny such claim, in whole or in part, and an opportunity to respond thereto, will be given to the person claiming confidentiality of the information no less than seven days prior to the public disclosure of such information.

(c) *Document by Document Identification.* Each request for confidential treatment must be made with respect to each separately identified document and must be made at the time that document is first submitted to DOE.

Subpart B—Preparation, Submission, and Approval of State Plans

458.201 Scope.

This Section identifies the responsibilities of the States and the Tennessee Valley Authority (TVA) in the preparation and submission of a State Plan, hereinafter referred to as "State Plan," if a State or the TVA chooses to submit a State Plan; and the procedures for approval of the State Plan by the Secretary.

458.202 Initial submission.

If a State intends to submit a State Plan, the Governor or State Agency specifically authorized by State law to submit a State Plan shall submit the following information to the Secretary:

(a) *Lead Agency.* Within 30 days of the effective date of this rule, the name and address of the State Agency, hereinafter referred to as "Lead Agency," which has principal responsibility for the development of the State Plan. The Lead Agency shall be either:

(1) An Agency designated by the Governor to develop and submit a State Plan; or

(2) A State Agency specifically authorized by law to develop and submit a State Plan.

(b) *Nonregulated Utilities.* Within 30 days of the effective date of this rule, a list of which nonregulated covered utilities, if any, operating in the State will be subject to the State Plan; and

(c) *Building Heating Suppliers.* Within 90 days of the effective date of this rule, whether or not building heating suppliers will be included in the State Plan.

458.203 Coordination requirements.

(a) *Among States.* The Lead Agency shall, to the extent feasible, coordinate the preparation of the State Plan with any other State which has jurisdiction over any covered utility or participating building heating supplier subject to the State Plan for the purpose of minimizing any inconsistent provisions governing such covered utility or participating building heating supplier.

(b) *Between the Lead Agency and the State Regulatory Authority.* If the Lead Agency is not the State Regulatory Authority, then the Lead Agency shall provide such Authority a copy of the proposed State Plan 30 days prior to the public hearing required by § 458.204.

(c) *Between State Plans.* The Lead Agency shall coordinate the State Plan for the Commercial and Apartment Conservation Service (CACS) Program with any existing or proposed State Energy Conservation Plan developed under Section 367(b)(1) of the Energy Policy and Conservation Act and with any State Plan for the Residential Conservation Service (RCS) Program established under Title II of the National Energy Conservation Policy Act (NECPA). Such coordination shall not have the effect of delaying the submission, approval, or implementation of the RCS State Plans developed under Title II of NECPA.

458.204 Notice, comment, and public hearing.

Prior to submission of the State Plan to the Secretary for approval, the Governor or Lead Agency shall:

(a) *Notice and Comment.* Provide meaningful public notice of the intention of the State to submit a State Plan. To be meaningful, this notice shall, at a minimum—

(1) Appear in newspapers of general circulation published in the State;

(2) Indicate where a copy of and information pertaining to the proposed State Plan can be obtained;

(3) Indicate the date, time, and location of each public hearing to be held pursuant to § 458.204(b) at least 30 days prior to such hearing; and

(4) Invite public comments on the content of the proposed State Plan, with at least 30 days notice.

(b) *Hearing.* Hold at least one public hearing in the State for the purpose of hearing testimony and receiving comments on the content of the proposed State Plan.

458.205 Procedures for submission and approval of State Plans.

(a) *Who Shall Submit.* Ten (10) copies of the proposed State Plan shall be submitted to the Secretary by either:

(1) The Governor of the State;

(2) The Lead Agency; or

(3) the TVA with respect to all covered utilities over which the TVA has exclusive ratemaking authority and, in the discretion of TVA, with respect to any covered utility over which the TVA and another State Regulatory Authority have ratemaking authority.

(b) *Time for Submission.* The proposed State Plan shall be submitted within 180 days of the effective date of this rule. The time for submission may be extended by the Secretary if:

(1) The Governor or Lead Agency requests an extension at least 10 days prior to the formal deadline; and

(2) Good cause is shown for allowing an extension.

(c) *Approval.*

(1) If a proposed State Plan meets the criteria of Subparts B, D, and E of this Part, the Secretary shall approve it

within 90 days of the date the proposed State Plan was submitted.

(2) Within 13 months after the date of approval of a State Plan, the Lead Agency shall provide to the Secretary a statement certifying whether or not all covered utilities and building heating suppliers subject to the State Plan are in compliance with the State Plan.

(3) The Lead Agency shall, within 30 days of approval of the State Plan:

(i) Inform covered utilities subject to the State Plan and participating building heating suppliers of the contents of the State Plan;

(ii) Direct such covered utilities and participating building heating suppliers to comply with the State Plan; and

(iii) Inform such covered utilities and participating building heating suppliers of the State procedures for investigating and enforcing compliance with the State Plan.

(d) *Disapproval.*

(1) If a proposed State Plan does not meet the criteria of Subparts B, D, and E of this Part, the Secretary shall, within 90 days of the date the proposed State Plan was submitted, disapprove the proposed State Plan in writing and shall specify in writing the grounds for disapproval.

(2) Within 60 days of the date of disapproval of a proposed State Plan, or such longer period as the Secretary may determine pursuant to the criteria of § 458.205(b), the Governor or Lead Agency may submit another proposed State Plan. Except for the time in which a proposed State Plan must be submitted and the requirment for notice, comment, and public hearing, all procedures of this Subpart for submission of the original proposed State Plan shall be applicable to the submission of any proposed State Plan submitted after initial disapproval. The Secretary may, in disapproving a State Plan, require that the notice, comment, and public hearing requirements be complied with prior to resubmission.

(e) *Amendments.*

(1) The Governor or Lead Agency may submit proposed amendments to an approved State Plan at any time.

(2) Except for the time in which a proposed State Plan must be submitted, all procedures of this Subpart for submission of the original State Plan shall be applicable to the submission of proposed amendments to any approved State Plan. Exception: The Secretary may waive any of the submission requirements for proposed amendments if the Secretary finds that the amendment is unlikely to have a substantial impact on large numbers of individuals or businesses.

§ 458.206 Building heating suppliers.

If the Governor or Lead Agency submits a plan applicable to building heating suppliers in the State, it shall be a part of the State Plan and shall be submitted in accordance with the procedures of this Subpart applicable to the submission of the State Plan.

§ 458.207 Special provisions for the Tennessee Valley Authority (TVA).

In this Part, except as otherwise specified, references to the Lead Agency shall be deemed to refer also to the TVA and references to the State Plan shall be deemed to refer also to the TVA Plan. References in this Part to a State as a geographic area shall, with respect to the TVA Plan, be references to the service areas of the covered utilities subject to the TVA Plan. Reference in this Part to a State as a governmental entity (other than references to State laws or regulations) or to any State Agency or officer shall be deemed to refer also to the TVA. If the TVA chooses to submit a Plan, it shall be subject to the following exceptions and additional requirements:

(a) *Exclusion from Initial Submission.* The TVA need not submit the Initial Submission as required in § 458.202. However, within 30 days after the effective date of this rule, the TVA shall notify the Secretary of the person(s) in charge of its Plan and shall submit to the Secretary a list of which covered utilities will be subject to its Plan.

(b) *Coordination Requirement.* The TVA shall coordinate its Plan with each State Plan developed by a State in which the utilities covered by the TVA Plan are located.

(c) *Exclusion of Building Heating Suppliers.* The TVA Plan shall not cover building heating suppliers.

§ 458.208 Special procedures for exemptions.

(a) *Exemption Procedure.* If the State Regulatory Authority having ratemaking authority over a utility determines, according to the criteria of § 458.208(c) and the procedures of § 458.208(d), that the full implementation by that utility of a CASC Program meeting the requirements of this part would produce a significant impairment of such utility's ability to fulfill the requirements of the RCS program, 10 CFR Part 456, or to provide utility service to its customers, then a State Plan may be submitted which instead proposes a conditional program, meeting the requirements of § 458.208(d), for such utility.

(b) *Criteria for Significant Impairment.*

(1) The criteria for determining the existence of a significant impairment of a utility's ability to provide utility service to its customers shall be established by the State Regulatory Authority which exercises ratemaking authority over the utility subject to the following restriction specified by NECPA.

(2) A significant impairment of the RCS Program is defined as anything which has the effect of delaying the submission, approval, or implementation of residential energy conservation plans under 10 CFR Part 456. The criteria for significant impairment, as determined by the State Regulatory Authority, shall be included in the State Plan. If there is no State Plan submitted, such criteria shall be included in a separate submission.

(c) *Determination of Significant Impairment.* A determination of the existence of a significant impairment must be made by the State Regulatory Authority having ratemaking authority over the utility through either of the following two procedures:

(1) Within 6 months of the date of these rules, the State Regulatory Authority may establish its criteria for significant impairment (consistent with § 458.208(b)), review exemption requests with regard to these criteria, and produce findings of significant impairment. In such cases, the State Plan may be submitted containing conditional programs which meet the requirements of § 458.208(d) for the exempted utilities; or

(2) Alternatively, within six months of the date of these rules, the State Regulatory Authority may make a preliminary determination of significant impairment. In this case, the State Plan submitted shall provide for full implementation of the CACS Program by utilities applying for exemption under this procedure. The State Plan submission should include, as an appendix, a description of the basis for the preliminary determination specified by the State Regulatory Authority. If, within one year of the effective date of this rule, the State Regulatory Authority confirms its finding of significant impairment, then an amended State Plan may be submitted containing conditional programs which meet the requirements of § 458.208(d) for the exempted utilities.

(d) *Requirements for State Plans Containing Conditional Programs.*

(1) *Condtional Programs.* A conditional program is a partial CACS Program which is permitted due to the existence of certain conditions which would produce significant impairments, as described in § 456.208(b), if full implementation were undertaken.

(2) A conditional program need not provide immediate coverage of all of the commercial buildings and multifamily dwellings in the utility's service area. Conditional programs may not have the effect of changing the nature of the program as defined by Subpart D and E of this part. Allowable partial programs include the following possibilities:

(i) All commercial, no multifamily;

(ii) All multifamily, no commercial;

(iii) Geographic partitioning of utility service area; or

(iv) Partitioning of commercial sector on a Standard Industrial Classification code basis.

(3) A conditional program is conditioned on the existence of significant impairments as described in § 458.208(a). Accompanying a conditional program there must be a plan to alleviate such impairments if possible, whereupon the conditional program shall be converted to a full program meeting all the requirements of this Part.

(4) *State Plan Requirements.* State Plans containing conditional programs must include for each such program the following items:

(i) Specification of the significant impairment(s) and analysis sufficient to demonstrate the engineering and/or economic basis for this determination;

(ii) Specification of the partial program to be implemented and analysis sufficient to demonstrate the rationale for this program as an interim means of avoiding significant impairments;

(iii) Specification of the conditions which will ultimately result in complete alleviation of the impairment(s) and of the steps the utility will take to bring about such conditions;

(iv) Specification of an implementation schedule, identifying the target dates for alleviation of significant impairments and full program implementation;

(v) Specification of special enforcement measures which the State shall employ to monitor the progress of utilities in alleviating significant impairments; and

(vi) Specification of procedures the State will employ to regularly update and review the State Plan until all conditional programs have been brought to full implementation.

Subpart C—Preparation, Submission, and Approval of Nonregulated Utility Plans

§ 458.301 Scope.

This Subpart identifies the responsibilities of covered nonregulated utilities not subject to a State Plan for the preparation and submission of Nonregulated Utility Plans, the procedures for approval of Nonregulated Utility Plans by the Secretary, and the minimum requirements for the content of Nonregulated Utility Plans.

§ 458.302 Coverage.

Subpart C shall apply to all nonregulated covered utilities which are not covered by a State Plan.

§ 458.303 Initial submission.

Each nonregulated utility subject to this Subpart shall notify the Secretary within 60 days after the effective date of these rules, of the person responsible for the preparation of its Nonregulated Utility Plan.

§ 458.304 Coordination requirements.

Each nonregulated utility subject to this Subpart shall, to the extent feasible, coordinate the preparation of its Nonregulated Utility Plan with the preparation of the applicable State Plan for the purpose of minimizing inconsistent provisions between the two plans.

§ 458.305 Notice, comment, and public hearing.

Prior to submission of the Nonregulated Utility Plan to the Secretary for approval, the nonregulated utility shall:

(a) Notice and Comment. Provide meaningful public notice of the requirement for the nonregulated utility to submit a Nonregulated Utility Plan. To be meaningful, this notice shall, at a minimum:

(1) Appear in newspapers of general circulation published in the nonregulated utility's service area;

(2) Indicate where a copy of the proposed Nonregulated Utility Plan can be obtained and where questions concerning the Plan can be answered;

(3) Indicate the date, time, and location of each public hearing to be held with at least 30 days notice; and

(4) Invite public comments on the content of the proposed Nonregulated Utility Plan, at least 30 days prior to the final date for receiving such comments.

(b) *Hearing.* Hold at least one public hearing in the nonregulated utility's service area for the purpose of hearing testimony and receiving comments on the content of the proposed Nonregulated Utility Plan.

§ 458.306 Procedures for submission and approval of nonregulated utility plans.

(a) *Submission.* Each nonregulated utility subject to this Section shall submit to the Secretary within 180 days of the effective date of these rules a proposed Nonregulated Utility Plan. The time for submission may be extended by the Secretary if:

(1) The nonregulated utility requests an extension at least 10 days prior to the formal deadline; and

(2) Good cause is shown for allowing an extension.

(b) *Approval* (1) If a proposed Nonregulated Utility Plan meets the criteria of Subpart C the Secretary shall approve it within 90 days of the date the proposed Nonregulated Utility Plan was submitted.

(2) Within 13 months after the approval of the Nonregulated Utility Plan, the nonregulated utility shall provide to the Secretary a statement certifying whether or not it is in compliance with its Nonregulated Utility Plan.

(c) *Exceptions to Plan Requirements for Nonregulated Utilities.* (1) Except as provided in this Section, each Nonregulated Utility Plan shall meet all the requirements for State Plans in Subparts D and E.

(2) Except as otherwise provided in this Section, all references in Subparts D and E to:

(i) Covered utilities shall be deemed to refer to utilities subject to this section;

(ii) A State Plan shall be deemed to refer to a Nonregulated Utility Plan;

(iii) Participating building heating suppliers shall not apply;

(iv) A State (as a governmental entity, other than references to State laws or regulations) or any State Agency or officer shall be deemed to refer to the nonregulated utility submitting the plan; and

(v) A State (as a geographic area) shall be deemed to refer to the nonregulated utility's service area.

(3) A nonregulated utility shall coordinate with the State Lead Agency to minimze inconsistencies with respect to the estimates of costs and savings contained in the Commercial Announcement and the Apartment Announcement distributed by the nonregulated utility and those distributed by utilities subject to the State Plan in the same area.

(4) A Nonregulated Utility Plan must provide complaint processing procedures similar to those required in State Plans under Subparts D and E, but need not provide a basis in State law for enforcing decisions or appealing decisions.

(5) The requirements of § 458.407 (b) and (c) and of § 458.507 (b) and (c) are not applicable to Nonregulated Utility Plans.

(6) In a State submitting a State Plan, a nonregulated utility may, by written understanding with the appropriate

State agency, utilize services which have been provided for in the State Plan.

(7) If the Nonregulated Utility Plan utilizes State Plan services all references in the State Plan to those services with regard to utilities subject to the State Plan shall be deemed to refer to the nonregulated utility.

(8) If the Nonregulated Utility Plan proposes to utilize any of the State Plan services, the Plan shall so state and copies of the written agreements with the appropriate State Agencies shall be included with the Nonregulated Utility Plan in the submission to the Secretary.

(d) *Disapproval.* (1) If the Nonregulated Utility Plan does not meet the criteria of this Section, the Secretary shall, within 90 days of the date the proposed Nonregulated Utility Plan was submitted, disapprove Nonregulated Utility Plan and specify in writing the grounds for disapproval.

(2) Within 60 days of the date of disapproval of a proposed Nonregulated Utility Plan, or such longer period as the Secretary may determine, the nonregulated utility shall submit another proposed Nonregulated Utility Plan. Except for the time in which a proposed Nonregulated Utility Plan must be submitted and the requirements for notice, comment, and a public hearing, the procedures of this Section for submission of the original proposed Nonregulated Utility Plan shall be applicable to the submission of any proposed Nonregulated Utility Plan submitted after initial disapproval. The Secretary may, in disapproving a plan, require that the notice, comment, and public hearing requirements be complied with prior to resubmission.

(e) *Amendments.* (1) The nonregulated utility may submit proposed amendments to an approved Nonregulated Utility Plan at any time.

(2) Except for the time in which a proposed plan must be submitted, the procedures of this Section for submission of the original Nonregulated Utility Plan shall be applicable to the submission of proposed amendments to an approved Nonregulated Utility Plan. Exception: The Secretary may waive any of the submission requirements for proposed amendments if the Secretary finds that the amendment is unlikely to have a substantial impact on large number of individuals or businesses.

§ 458.307 Special procedures for exemptions.

The procedures for exemptions which apply to State Plans, specified in § 458.208, shall also apply to a nonregulated utility seeking exemption except that, in applying the specifications of § 458.208 in the case of a nonregulated utility, any reference to a regulated utility shall be treated as a reference to a nonregulated utility; any reference to a State (government) or lead agency shall be treated as a reference to a nonregulated utility; any reference to a State Plan shall be treated as a reference to a Nonregulated Utility Plan; and any reference to a State Regulatory Authority shall be treated as a reference to the Governor.

Subpart D—Energy Conservation Services for Commercial Buildings

§ 458.401 Scope and coverage.

(a) *Scope.* This Subpart prescribes the minimum requirements for the content of State Plans regarding energy conservation services for commercial buildings. The State may include additional information and provide additional requirements in the State Plan for commercial buildings in the Commercial and Apartment Conservation Service Program if such information and requirements are not specifically prohibited by these rules or by any applicable law or regulation. All references in this Subpart to covered utilities apply to regulated and nonregulated covered utilities subject to the State Plan.

(b) *Coverage.* (1) *Regulated Utilities.* All regulated utilities providing utility service in a State which meet the definition of "covered utility" in § 458.105(g) shall be subject to the State Plan and shall be identified in the State Plan.

(2) *Nonregulated Utilities.* The State Plan shall identify which nonregulated covered utilities, if any, are covered under the State Plan.

(3) *Building Heating Suppliers.* The State Plan shall state whether or not it includes a Commercial and Apartment Conservation Service Program for building heating suppliers.

(4) *Exemptions.* The State Plan shall identify which regulated utilities have been exempted by the State Regulatory Authority from providing services to commercial buildings, and which nonregulated utilities have been exempted by the Governor from providing services to commercial buildings.

§ 458.402 Eligibility for audit.

(a) The State Plan shall describe how an eligibile commercial customer may request an audit. Such procedures shall not be so cumbersome as to unreasonably limit participation.

(b) The State Plan shall provide that, in order to request an audit from a public utility or participating building heating supplier, the requesting party must:

(1) Be an owner or tenant of a commercial building; and

(2) Be an eligible customer of such public utility or participating building heating supplier.

(c) The State Plan shall include procedures designed to provide that each public utility shall not be required to conduct an energy audit of a commercial building which has been audited previously pursuant to this part or pursuant to Chapter II, Title 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.403 Services provided by utilities and participating building heating suppliers.

(a) *Information to Eligible Customers.* (1) *Commercial Announcement, Distribution and Content.* The State Plan shall require each covered utility and each participating building heating supplier to send to each eligible commercial customer, no later than 12 months after approval of the State Plan and every two years thereafter until January 1, 1990, a Commercial Announcement which shall—

(i) List the program measures and, if any, the State measures applicable to commercial buildings;

(ii) List the energy conserving operation and maintenance procedures and state that they are of low or no cost;

(iii) Offer and describe the audit;

(A) The offer of the program audit may be conditioned upon a nondiscriminatory and reasonable factor such as serving one geographic area at a time. At a minimum, the State Plan shall contain procedures to assure that all customers who receive a conditional offer of a program audit are recontacted and receive an unconditional offer of a program audit within one year of receiving the conditional offer;

(B) Explain how the eligible customer may request the audit; and

(C) List the direct cost, if any, of receiving the audit.

(iv) Include a brief explanation of the benefits of the Federal energy tax credits, and State energy tax credits, if any;

(v) Not include any advertising for the sale, installation or financing by any supplier, contractor, or lender (including the covered utility) of any energy conservation measure, renewable resource measure, State measure, or energy conserving operation and maintenance procedure; however, if the covered utility or participating building heating supplier finances the sale or

installation of such measures, the Commercial Announcement may so state;

(vi) Not include any information regarding any product which is not an energy conservation measure, a renewable resource measure, a State measure, or an energy conserving operation and maintenance procedure.

(2) *New Customers.* (i) A new customer is a person who becomes an eligible customer after initial distribution of the Commercial Announcement but before January 1, 1990.

(ii) The State Plan shall require that each covered utility and participating building heating supplier send a Commercial Announcement which meets the requirements of this section to each new customer within 60 days of such customer becoming a new customer.

(iii) The State Plan shall require that covered utilities and participating building heating suppliers inform each new customer that upon request the customer may receive a copy of the results of any program audit of the customer's building which the covered utility or participating building heating supplier may have performed pursuant to the State Plan and require that upon such a request such utility or building heating supplier provide such results.

(b) *Energy Audits.* (1) *Requirements for Program Audits.* The State Plan shall describe the program audit services to be offered by covered utilities and participating building heating suppliers and shall require at a minimum that each covered utility and participating building heating supplier provide to each eligible customer a comprehensive program audit which addresses all applicable energy conserving operation and maintenance procedures, program measures and State measures, if any, upon request by such eligible customer.

(i) The State Plan shall require that in each program audit, the auditor determines which of the energy conserving operation and maintenance procedures would save energy in the commercial building, inform the eligible customer of such changes in building operation and maintenance, emphasize the importance of the changes and recommend that they be accomplished before the installation of any program measure or State measure.

(ii) The State Plan shall require that in each program audit the auditor determine the applicability of each program measure in the commercial building. If the program measure is not applicable, then the requirements of this section to provide estimates of the cost and savings of the installation of such measures in such building need not apply. A program measure is applicable in a commercial building if:

(A) The measure is not already present in the commercial building.

(B) Installation of the measure is not a violation of Federal, State, or local law or regulation.

(C) With respect to lighting systems, the hours of lighting system operation are greater than the period of time the building is open for occupancy; the existing lighting levels exceed the applicable State regulations; if any of the following conditions exist; if incandescent lighting is present in general use; if mercury lighting is present in general use; if outdoor lighting or security lighting is done with other than high or low pressure sodium lighting; or (for all instances of fluorescent lighting) where low energy lamps or ballasts are not in use.

(D) With respect to ceiling insulation, the difference between the effective R-value of any existing insulation and the program measure level for that building is R-11 or more. If it is not possible to determine the existing insulation level then analysis is not required.

(E) With respect to wall insulation, there is no insulation in a substantial portion of the exterior walls and it is practical to insulate the wall.

(F) With respect to water heater insulation, the remaining useful life of the water heater appears to the auditor to be at least three years and space is available around the water heater to install insulation.

(G) With respect to steam/condensate pipe insulation, the existing insulation level is less than the thermal equivalent of one inch of fiberglass.

(H) With respect to hot water pipe insulation with the presence of a continuous hot water circulator, the insulation level is less than the thermal equivalent of one inch of fiberglass.

(I) With respect to window heat gain and/or loss, retardants, the building has mechanical cooling.

(J) With respect to automatic energy control systems, there is the capability to reduce the period of consumption of energy for lighting, heating, or cooling systems through automatic time regulation; or the capability to reduce the rate of consumption of energy through equipment modulation based on inside or outside temperature and/or humidity or building occupancy; or the the capability to reduce electricity costs through regulation of demand; or the capability to reduce costs through regulation of demand; or the capability to reduce mechanical heating or cooling requirements through replacement with outside air based on inside or outside temperature and/or humidity.

(K) With respect to equipment associated with automatic energy control systems which is required to operate steam, hydronic or ventilating systems, there is an applicable automatic energy control system whose function requires or can be enhanced by electrical or mechanical equipment.

(L) With respect to replacement burners, furnaces, boilers, or any combination thereof, the existing burner, furnace, boiler or combination are approximately five years old or older.

(M) With respect to flue opening modifications, the furnace combustion air is taken from a conditioned area.

(N) With respect to energy recovery systems (which may include but not be limited to, water-to-water, air-to-air and other heat recovery systems), there exists a source of energy presently disposed to the atmosphere or to waste water, while a building energy requirement exists which can be met with the waste energy in a manner that reduces total building energy consumption, and after other measures for reducing the wasted energy have been considered, and is in compliance with all applicable building, health, and safety codes.

(O) With respect to cogeneration systems which produce electricity, as well as steam or other forms of thermal of mechanical energy, there exists a ratio of kilowatt electrical demand to thermal demand of one kilowatt to the range of 4,000 to 12,000 BTU thermal and the demand is coincident on an annual basis.

(P) With respect to wind energy devices: the estimated average annual wind resource in the vicinity of the site is 10 miles per hour, or greater, adjusted to 10 meters (33 feet) above ground level; and there are no major wind obstructions over 55 feet high, greater than 30 feet wide, within 100 feet of a potential location for the wind energy device.

(Q) With respect to active solar heating systems, or combined active solar systems, a site exists on or near the building which is free of major obstruction to solar radiation and the building has a space heating system other than a steam heating, electric resistance radiant heating, or electric resistance baseboard heating system.

(R) With respect to active domestic hot water systems, a site exists on or near the building which is free of major obstruction to solar radiation.

(S) With respect to solaria/sunspace systems, the building has a South-facing ground level wall, which is free of major obstruction to solar radiation.

(T) With respect to replacement central air conditioners, the building has a central air conditioner that is approximately five years old or older.

These above applicability criteria may in a State Plan be expanded or restricted, subject to the approval of the Secretary.

(iii) The State Plan shall require that each estimate of energy cost savings and of installation costs provided as a result of a program audit be based on an adequate assessment including actual measurements or inspections, as appropriate, performed on-site by the auditor, of the building shell, the lighting system and of the space heating, space cooling, and water heating equipment.

(iv) The State Plan shall contain procedures to assure that the estimates of energy cost savings and of installation costs and any other economic calculation provided as a result of a program audit shall be based on typical recent local electricity rates, reasonable real energy cost escalation rates that are likely to be experienced by the eligible customer, typical local prices for materials and installation of program measures, and typical local climate data for the eligible customer's location.

(v) The State Plan shall require that the estimates of energy cost savings for active solar space heating systems, solar domestic hot water systems, and combined active solar space heating and solar domestic hot water systems be based on the calculation procedures contained in the HUD Intermediate Minimum Property Standards Supplement, Solar Heating and Domestic Hot Water Systems, 4930.2, 1977 Edition; U.S. Department of Housing and Urban Development, or equivalent calculation procedures, included in the State Plan and approved by the Secretary.

(vi) The State plan shall contain procedures to assure the validity of the program audit with respect to all program measures and shall contain either:

(A) A brief description of the program audit procedures which shall be followed under the State Plan and a detailed description of the method which will be used by the State to assure the accuracy of these procedures; or

(B) A detailed description of the program audit procedures which shall be followed under the State Plan, subject to the approval of the Secretary as to their validity; and

(C) A certification that the State has sought the approval of the Secretary as to the accuracy of the program audit procedures.

For the purposes of this paragraph, the term "program audit procedures" means the measurements or inspections which the auditor must make in a customer's building and the calculations which must be performed in making energy costs savings estimates.

(vii) The State Plan shall require that any cost and savings estimate for any applicable furnace efficiency modification to a gas or oil furnace or boiler be based on an evaluation of the seasonal efficiency of such furnace or boiler. This seasonal efficiency shall be based on estimated peak (tuned up) steady state efficiency corrected for cycling losses. Steady state efficiency shall be derived from the manufacturer's design data and observation of the furnace components, or alternatively, by a flue gas analysis of measured flue gas temperature and carbon dioxide content.

(viii) The State Plan shall require that detailed costs and savings estimates be calculated for the applicable program measures identified in § 458.403(b)(2)(xvi). The State Plan shall require that the detailed analysis calculations be consistent with accepted engineering practice. The analytic approach shall not be limited to exclude systematized procedures, including computer-based analysis.

(ix) The State Plan shall require that the auditor provide at least installation costs and energy savings estimates based on typical practice for any energy consuming function within the building, including but not limited to the measures identified in § 458.103, if the function accounts for more than ten percent of the total building energy consumption.

(2) *Results of Program Audits.* The State Plan shall require that the auditor deliver the following information in writing, to each eligible commercial customer who receives a program audit, upon completion of the audit. The State Plan shall require that the auditor offer to the eligible customer an opportunity to discuss upon request the audit results.

(i) An estimate of the type, quantity, and rate of energy consumption of the eligible customer's building;

(ii) A determination of the total BTU of fuel consumed by the building, as measured at the building line, of the energy use in BTU per square foot of building floor space as well as description of the BTU consumed by each fuel as proportion of total BTU and of the costs of each fuel as a proportion of total costs, and an estimate of the proportion of each fuel that is consumed by at least the following end-uses: space heating, space cooling, ventilation, lighting, and domestic hot water. This estimate may be based on typical practice in buildings of the same type and climate.

(iii) Notice as to the availability of Government sponsored low-interest loans, weatherization programs, competitive grants, applicable tax credits and other forms of assistance which may reduce implementation costs.

(iv) Guidance for implementation of recommended measures. This activity may include methods of finding and evaluating contractors, suppliers and financing institutions.

(v) An estimate of the costs and savings that the eligible building may experience with adoption of appropriate changes in building operation and maintenance.

(vi) An estimate, based on the calculation procedures developed pursuant to § 458.403(b)(1)(viii), of the total installed cost of each applicable program measure identified in § 458.403(b)(2)(xvi).

(vii) An estimate, based on the calculation procedures developed pursuant to § 458.403(b)(1)(viii), of the energy savings which would occur during the first year from installation of each applicable program measure identified in § 458.403(b)(2)(xvi).

(viii) An estimate, based on typical practice in similar building types in the same climate zone, of the installed total cost of the measure expressed in a range of dollars for the applicable program measures identified in § 458.403(b)(xvii).

(ix) An estimate of the savings in energy costs, based on typical practice in similar building types in the same climate zone, which would occur during the first year from installation of each applicable program measure identified in § 458.403(b)(2)(xvii).

(x) An estimate of the simple payback period of each applicable program measure, taking into account the interactions among the various measures. The simple payback period is calculated by dividing the estimated total cost of the measure, as determined pursuant to § 458.403(b)(2)(vi) or § 458.403(b)(2)(viii), by the estimated annual cost saving accruing from the measure, as determined pursuant to § 458.403(b)(2)(vii) or § 458.403(b)(2)(ix). Other economic analyses, such as life-cycle costing, which consider all costs and cost savings, such as maintenance costs and/or savings, resulting from an energy conservation measure, are recommended, but are not required.

(xi) The following disclosure or its equivalent: "The procedures used to make these estimates are consistent with DOE criteria for commercial energy audits or have been evaluated by the State for accuracy. However, the actual installation costs you incur and energy

savings you realize from installing these measures may be different from the estimates contained in this audit report. Although the estimates are based on measurements of your building, they are also based on assumptions which may not be totally correct for your establishment."

(xii) An estimate of the annual normal maintenance costs, if any, of each applicable program measure.

(xiii) With respect to a program audit addressing an applicable solar domestic hot water system or active solar space heating system, or combination thereof, a description of the solar system assumed by the auditor in preparing energy savings estimates which shall include the following information:

(A) Square feet of collector;

(B) Collector characteristics, including glazing materials and other collector materials;

(C) Any storage system needed, including the capacity of storage;

(D) Any freeze protection needed;

(E) The estimated percent of the space and/or water heating load to be met by solar energy;

(F) Any physical connections needed with existing heating systems;

(G) Any site preparation needed; and

(H) If the results are based on a simulation, the following disclosure or its equivalent: "The energy cost savings estimates you receive are based on systems which may be different from the ones you purchase. Also, these estimates were not determined using actual conditions but using simulated measurements. Therefore, the cost savings we have estimated may be different from the savings which actually occur."

(xiv) With respect to a program audit addressing an applicable passive solar space heating and cooling system:

(A) The generic designation and a pictorial description of the particular system considered by the auditor;

(B) The estimated percent of the heating load to be met by such system;

(C) The approximate dimensions of such system;

(D) Collection storage characteristics, including the recommended heat capacity of storage; and

(E) The disclosure provided in § 458.403(b)(2)(xii)(H) of this subsection.

(xv) With respect to a program audit addressing an applicable wind energy device:

(A) Installation cost estimates as required in § 458.403(b)(2)(viii) based on commercially available wind devices of a kilowatt rating appropriate to the level of electricity consumption in the customer's building;

(B) Estimates of energy cost savings as required in § 458.403(b)(2)(ix), provided in the form of a function of average yearly wind speeds for the system used in § 458.403(b)(2)(xv)(A);

(C) A description of the type of wind energy device used by the auditor in preparing the energy saving estimates;

(D) The average yearly wind speed as indicated by the appropriate Wind Energy Resource Atlas for the region, and the relationship between that data and the likely wind speeds at the residence; or

(E) The average yearly wind speed at the nearest qualified measuring station and the relationship between that data and the likely wind speeds at the residence. A qualified measuring station is one which meets the following requirements:

(1) The anemometer is located no less than 6 meters (19.8 feet) above ground level;

(2) Data used to determine the annual average wind speed has been collected for one year or more; and

(3) Calibration of the data collection and recording instrument(s) had been certified by the instrument manufacturer(s) at the time of purchase.

(xvi) A detailed analysis, developed pursuant to § 458.403(b)(1)(viii), shall be provided for the following energy conservation measures, except where the applicability criteria militate otherwise:

(A) Lighting systems,

(B) Caulking and weatherstripping,

(C) Ceiling, roof and wall insulation,

(D) Storm windows and storm doors, and

(E) Hot water/steam/condensate pipe insulation.

(xvii) The following measures shall be audited for cost and savings estimates determined pursuant to typical practice in similar building types in the same climate zone:

(A) Hot water generation and distribution system;

(B) Furnace, or utility plant and distribution system, modifications, including replacement burners, furnaces, boilers, or any combination thereof, which substantially increase the energy efficiency of the heating system; devices for modifying flue openings which will increase the energy efficiency of the heating system; intermittent pilot ignition devices (IID's) which replace standing gas pilot lights; and devices for modifying and improving the air-conditioning and air-handling systems which may include but are not limited to enthalpy controls, economizers and various load management techniques;

(C) Heat absorbing or heat reflecting window and door systems, reductions in glass area, and other window and door system modifications;

(D) Automatic energy control systems (which include, but are not limited to, computer control systems, time clocks, thermostats, and damper motors);

(E) Equipment, associated with automatic energy control systems, which is required to operate variable steam, hydronic, or ventilating systems;

(F) A solar energy system, as defined in Section 504(8) of the Solar Energy and Energy Conservation Bank Act;

(G) Energy recovery systems (which may include, but are not limited to, water-to-water, air-to-air and other heat recovery systems); and

(H) Cogeneration systems which produce electricity, as well as steam or other forms of thermal or mechanical energy, and which meet such fuel efficiency requirements as the Secretary may, by rule, prescribe.

(c) *Reporting and Record Keeping Requirements.* (1) *Reporting.* The State Plan shall contain provisions to assure that a report is submitted to the Secretary on July 1, 1981, and annually thereafter through July 1, 1990. The report shall contain the following information for the twelve-month period ending the preceding April 1, except that the Secretary may waive any of the reporting requirements, in approving the State Plan, for good cause:

(i) Any revision to the list of covered utilities and a list of participating building heating suppliers subject to the State Plan;

(ii) For each covered utility or participating building heating supplier:

(A) The approximate number of eligible commercial customers and, if available, the percentage of those customers for whom the utility or heating supplier is the primary heating fuel supplier;

(B) A copy of the Commercial Announcement distributed to eligible commercial customers;

(C) The number of eligible commercial customers who have requested an audit and the number of requests the utility or participating building heating supplier has fulfilled;

(D) The number and function of people assigned to the covered utility's or participating building supplier's program, including part-time employees; and

(E) The costs incurred by the utility or building heating supplier in providing commercial audits under the CACS Program including separately those costs paid by individual customers for services received and those costs paid by all ratepayers.

(iii) The number and nature of complaints by eligible customers against

the utility which have been handled through the procedures established under § 458.403(d);

(iv) A brief description of the status of activities carried out pursuant to § 458.405 (Auditor Qualification Requirements) including whether sufficient qualified personnel are available for program needs, the reasons for any shortages and the proposed resolution of any such shortage problem;

(v) The cost to the State of developing and implementing the State Plan; and

(vi) A citation to and brief description of any State or local law or regulation relevant to the State Plan and the status of any proposed State or local legislation or regulation relevant to the State Plan.

(2) *Record Keeping.* The State Plan shall contain procedures to assure that the following records are kept for the periods indicated and made available to the Secretary upon request, except that the Secretary may for good cause waive any of the record keeping requirements in approving the State Plan:

(i) The name and address of each eligible commercial customer who receives a program audit, which shall be kept for ten years from the date of such program audit;

(ii) A copy of the data collected during the audit, and a copy of the estimates of costs and savings presented to the customer, which shall be kept for ten years from the data of such program audit;

(iii) The amount and cost of fuel purchased each month or other billing period for the twelve months following each program audit for each eligible commercial customer, which shall be kept for two years from the date of such program audit; and

(iv) The names of the individuals who have met the qualification criteria described in § 458.405, which records shall be updated within a reasonable time following the qualification of such individuals.

(d) *Complaints Processing Procedures.* The State Plan shall contain procedures for resolving complaints against utilities. The complaint resolution procedures should use the procedures established under the RCS Program, § 456.315, as much as practicable.

§ 458.404 Addition of measures by States.

(a) The State may require or allow covered utilities or participating building heating suppliers to offer services for State measures in conjunction with the CACS Program subject to the approval of the Secretary in the State Plan.

(b) The Secretary may approve a State measure to be offered in conjunction with the CACS Program if:

(1) The measure is an energy conservation measure;

(2) The measure is a renewable resource measure; or

(3) The State Plan contains the following:

(i) Information demonstrating that the measure effectively saves non-renewable energy sources and does not increase the consumption of oil;

(ii) A method for adequately ensuring safe installation and use of such measure;

(iii) Adequate assurances that offering such measure in conjunction with the CACS Program will not adversely affect the environment, competition or the CACS Program in the State and will not increase the cost to an elibible customer of a program audit under the CACS Program; and

(iv) An adequate analysis of the effects on the environment of offering the State measures in conjunction with the CACS Program.

(c) The State plan shall describe how the State measures are to be offered in conjuction with the CACS Program.

§ 458.405 Auditor qualification requirements.

(a) The State Plan shall provide for an auditor training course. At a minimum, course content shall assure that a successful trainee will have gained the following:

(1) A general understanding of the three types of heat transfer and the effects of temperature and humidity on heat transfer;

(2) A general understanding of commercial construction terminology and components;

(3) A general knowledge of the operation of the heating and cooling systems used in the commercial building;

(4) A general knowledge of the different types of each applicable program and State measure of the advantages, disadvantages and applications of each;

(5) The capacity to conduct the audit as required in § 458.403(b), including:

(i) A familiarity with the energy conserving operation and maintenance procedures required to be audited for;

(ii) The capability to determine the applicability of the program measures and any State measures; and

(iii) A proficiency in the pertinent auditing procedures, as prescribed in or pursuant to the State Plan, for each applicable program and State measure.

(6) Where a furnace efficiency modification is an applicable program measure, and the source of fuel for the existing furnace or boiler is either gas or oil, a working ability to calculate the steady state efficiency of the furnace or boiler as required by § 458.403(b)(1)(vii);

(7) Where a renewable resource measure, other than a wind energy device, is an applicable program or State measure, an understanding of the nature of solar energy and its commercial buildings applications, including:

(i) Insulation;

(ii) Shading;

(iii) Heat capture and transport; and

(iv) Where appropriate, heat transfer for hot water and space heating;

(8) Where a wind energy device is an applicable program or State measure, an understanding of the nature of wind energy and its commercial building applications, including:

(i) Wind availability;

(ii) Effects of obstruction;

(iii) Wind capture;

(iv) Power generation; and

(v) Interfaces with residential and utility power lines;

(9) A general understanding of the applicability of air-to-air, water-to-water and air-to-water heat exchangers and the criteria for cost-effective applications;

(10) A general knowledge of pneumatic, electrical and hydronic control systems and their applicability to automatic energy control systems;

(11) The ability to recognize the compatibility between process heat loads and electrical loads in the eligible building population and to recognize when the criteria for potential applicability is appropriate;

(12) A general knowledge of lamps and lighting systems used in commercial buildings;

(13) A general knowledge of the functions and operating characteristics and the various modes and symptoms of failures of steam traps in commercial buildings;

(14) Where an automatic energy control system is an applicable measure, an understanding of the relationships between heating, air-conditioning and lighting systems and the common elements which require system automation;

(b) Each State may determine whether to teach the course in the entirety or in parts, and the State Plan shall indicate how each subject in section (a) will be taught.

(c) The State Plan shall specify how course content shall be monitored to ensure compliance with the requirements of § 458.405(a) above.

(d) The State Plan shall describe the following:

(1) Length of training program,
(2) Name of entity which developed the curriculum,
(3) Subject areas covered,
(4) How trainers shall be selected,
(5) An estimate of how many trainers will be required, and
(6) A description of the facilities and materials to be used.

§ 458.406 Procedures for investigating and enforcing compliance with the State plan.

(a) The State Plan shall require each covered utility and participating building heating supplier to comply with the State Plan.

(b) The State Plan shall contain adequate procedures for investigating and enforcing compliance with the State Plan by covered utilities and participating building heating suppliers.

(c) The State Plan shall cite and describe the existing or proposed State authority(ies) for such investigation and enforcement, including authorities with respect to any nonregulated utility covered in the State Plan.

(d) The State Plan shall identify the State agency(ies) responsible for such investigation and enforcement and shall include a description of the resources available for such investigation and enforcement.

§ 458.407 Coordination.

(a) *Other Programs.* The State Plan shall provide procedures to ensure effective coordination between its CACS Program as described in the State Plan and all local, State and Federal energy conservation programs within and affecting the State which shall include, but not be limited to:

(1) The Residential Conservation Service Program;

(2) The Federal Energy Extension Service;

(3) The Basic State Energy Conservation Program of the Department of Energy; and

(4) The Supplemental State Energy Conservation Program of the Department of Energy.

(b) *Energy Suppliers.* If the State Plan permits coordination of the CACS Program among energy suppliers in the State then it shall provide procedures describing how such coordination may occur and ensuring that no collusion on prices charged to eligible customers will occur.

(c) *State Regulatory Authority.* If the Lead Agency is not the State regulatory authority, then the State Plan shall contain a description of how the Lead Agency shall coordinate the implementation of the State Plan with the State regulatory authority

(d) The State Plan may contain provisions for coordination between utilities and building heating suppliers to ensure that a utility is not required to conduct an energy audit of a commercial building which has been audited previously pursuant to this section or pursuant to Chapter II, 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.408 Accounting and payment of costs.

(a) *Accounting.* The State Plan shall require, and may permit with respect to costs of revenues directly associated with State measures, that covered utilities use the following accounts and procedures:

(1) All amounts expended or received by a covered utility which are attributable to the CACS Program, including any penalties paid under Subpart F (Federal Standby Authority) shall be accounted for on the books and records separately from amounts attributable to all other activities of the covered utility.

(2) Covered utilities subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) shall utilize the Uniform System of Accounts as prescribed in Title 18, CFR Parts 101, 104, 201 and 204. Covered rural electric cooperatives shall utilize the Uniform System of Accounts as prescribed by the Rural Electrification Administration (REA) in Title 7, CFR Part 1701, Appendix A. Other covered nonregulated utilities shall adopt accounts within their accounting system with the attributes of the appropriate accounts prescribed by the FERC.

(i) All amounts expended by a covered utility for the CACS Program shall be charged to subaccounts within Account 908, Customer Assistance Expenses, its equivalent or successor, or the appropriate account designated specifically by FERC or REA for CACS Program expenses. Appropriate records shall be maintained thereunder so as to allow ready indentification of costs attributable to the following program elements:

(A) Program Information and

(B) Program Audit;

(ii) Billed income attributable to the CACS Program shall be accounted for in subaccounts within Account 456, Other Electric Revenue (for electric utilities) or Account 495, Other Gas Revenues (for gas utilities), their equivalents or successors, or the appropriate account designated specifically by FERC or REA for Program billed income.

(b) *Payment of Costs.* The State Plan shall contain provisions requiring that a covered utility treat costs as described below and shall contain a description of how such costs will be treated.

(1) All amounts expended by a covered utility for the Commerical Announcement and all public education and program promotion directly related to providing information about a utility's Commercial CACS Program shall be treated as a current expense of providing utility service and be charged to all ratepayers of the covered utility in the same manner as other current operating expenses of providing such utility service.

(2) Other costs will be charged as determined by the State Regulatory Authority for all regulated utilities covered by the State Plan and individually by each nonregulated utility covered by the State Plan. Such costs include administrative and general expenses, including those associated with program audits.

(3) Costs incurred by a covered utility for services carried out by such utility on behalf of the State may be reimbursed by the State.

(c) *Duplication of Audits.* The State Plan shall contain a provision stating that a covered utility need not conduct an energy audit of a commercial building which has been previously audited pursuant to this Part or pursuant to 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.409 Plans for participating building heating suppliers.

(a) *Requirements.* The procedures for each building heating supplier program shall be identical to the procedures required for utilities in this Subpart.

(b) *Participation and Withdrawal.* The State Plan, if it covers building heating suppliers, shall include a procedure by which the Governor shall allow a building heating supplier to participate in the commerical part of its CACS Program. The State Plan shall also provide for the voluntary withdrawal of participating building heating suppliers from the commercial part of its CACS Program.

(c) *Waiver of Requirements.* The State Plan shall contain a procedure by which the Governor may waive for any participating building heating supplier any requirement of the State Plan, except those listed below, upon a demonstration to the Governor's satisfaction that the resources of such supplier do not enable it to comply with the particular requirement. The requirements which the Governor shall

not waive with respect to any building heating supplier who chooses to participate in the program are those established according to:

(1) Section 458.406 (Procedures for Investigating and Enforcing Compliance with the State Plan);

(2) Section 458.403(b)(1)(iii)–(vii) (Accuracy of Auditing Procedures), for those measures for which a participating building heating supplier performs program audits for its eligible commercial customers;

(3) Section 458.405 (Auditor Qualification Requirements); and

(4) The following reporting and record keeping requirements:

(i) Section 458.403(c)(1)(i);

(ii) Section 458.403(c)(1)(ii), except that the Governor may waive § 458.403(c)(1)(ii)(E) concerning the accounting of program costs; and

(iii) Section 458.403(d) (Record Keeping).

Subpart E—Energy Conservation Services for Multifamily Dwellings

§ 458.501 Scope and coverage.

(a) *Scope.*

This Subpart prescribes the minimum requirements for the content of State Plans regarding energy conservation services for multifamily dwellings. The State may include additional information and provide additional requirements in the State Plan for multifamily dwellings in the CACS Program if such information and requirements are not specifically prohibited by these rules or by any applicable law or regulation. All references in this Subpart to covered utilities apply to regulated and nonregulated covered utilities subject to the State Plan.

(b) *Coverage.*

(1) *Regulated Utilities.* All regulated utilities providing utility service in a State which meet the definition of "covered utility" in § 458.105(g) shall be subject to the State Plan and shall be identified in the State Plan.

(2) *Nonregulated Utilities.* The State Plan shall identify which nonregulated covered utilities, if any, are covered under the State Plan.

(3) *Building Heating Suppliers.* The State Plan shall state whether or not it includes a CACS Program for building heating suppliers.

(4) *Exemptions.* The State Plan shall identify which regulated utilities have been exempted pursuant to § 458.208 in whole or in part by the State Regulatory Authority from providing services to multifamily dwellings, and which nonregulated utilities have been exempted pursuant to § 458.307 in whole or in part by the Governor from providing services to multifamily dwellings.

§ 458.502 Eligibility for audit.

(a) The State Plan shall describe how an eligible multifamily dwelling customer may request an audit. Such procedures shall not be so cumbersome as to unreasonably limit participation.

(b) The State Plan shall require that covered utilities and participating building heating suppliers provide, upon request, an audit to any party who:

(1) Is an owner of a multifamily dwelling,

(2) Is an eligible customer of such public utility or building heating supplier,

(3) Agrees to provide to the tenants, if any, of the customer's multifamily dwelling, the information developed by such audit concerning energy conserving operation and maintenance procedures, program measures, and State measures, if any, applicable to the individual dwelling units in such dwelling, and

(4) Agrees to provide to each tenant of the customer's multifamily dwelling a copy of the Tenant's Energy Conservation Information Package supplied by the utility or building heating supplier that would conduct the audit.

(c) The State Plan shall include procedures to provide that each public utility shall not be required to conduct an energy audit of a multifamily dwelling which has been audited previously pursuant to this part or pursuant to Chapter II, 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.503 Services provided by utilities and participating building heating suppliers.

(a) *Information to Eligible Customers.*

(1) *Apartment Announcement: Distribution and Content.*

The State Plan shall require each covered utility and each participating building heating supplier to send to each eligible multifamily dwelling customer, no later than 12 months after approval of the State Plan and every two years thereafter until January 1, 1990, an Apartment Announcement which shall:

(i) List the program measures and, if any, the State measures applicable to multifamily dwellings.

(ii) List the energy conserving operation and maintenance procedures and state that they are of low or no cost.

(iii) Offer and describe the audit:

(A) The offer of the program audit may be conditioned upon a nondiscriminatory and reasonable factor such as serving one geographic area at a time. At a minimum, the State Plan shall contain procedures to assure that all customers who receive a conditional offer of a program audit are recontacted and receive an unconditional offer of a program audit within two years of receiving the conditional offer.

(B) Explain how the eligible customer may request the audit; and

(C) List the direct cost, if any, of receiving the service.

(iv) Include a brief explanation of the benefits of the Federal energy tax credits, and a description of who is eligible for them. This explanation should include at least the following information:

The Energy Tax Act of 1978 provides a residential energy credit for insulation, certain other energy-conservation components, and certain renewable energy source property expenditures made in connection with the taxpayer's principal residence. In the case of insulation and other energy conserving components, the credit is 15 percent of the first $2,000 of expenditures, or a maximum credit of $300. In the case of solar, wind, and geothermal energy expenditures, the credit is 40 percent of the first $10,000 spent, for a maximum credit of $4,000.

(v) Include a brief explanation of the benefits of the Weatherization Assistance Program for Low Income Persons, 10 CFR Part 440, and a brief description of who is eligible for such assistance.

(vi) Not include any advertising for the sale, installation or financing by any supplier, contractor, or lender (including the covered utility) of any energy conservation measure, renewable resource measure, State measure, or energy conserving practice; however, if the covered utility or participating heating supplier finances the sale or installation of such measures, the Apartment Announcement may so state.

(vii) Not include any information regarding any product which is not an energy conservation measure, a renewable resource measure, a State measure, or an energy conserving operation and maintenance procedure.

(viii) Include information on loans and grants available through the Solar Energy and Energy Conservation Bank.

(ix) Include information on any other loan grant programs available at the State or local level.

(x) Include a notice that, in order to receive the audit, the owner must agree to make any results of the audit applicable to an individual dwelling unit available to the tenant of such unit.

(2) *Supplemental Apartment Announcement.*

The State Plan shall require that a supplement to the Apartment Announcement shall be provided to eligible multifamily customers that have requested an audit. This supplement will contain information designed to show how landlords and tenants may share in the benefits of energy conservation, and will include sample landlord/tenant agreements showing how such benefits may be shared.

(3) *Tenant's Energy Conservation Information Package, Distribution and Content.*

The State Plan shall require each covered utility and each participating building heating supplier to supply to each customer who receives an audit under this subpart, for distribution by such customer to each tenant in the customer's multifamily dwelling, a Tenant's Energy Conservation Information Package (Information Package). The Information Package shall:

(i) List the energy conservation measures and energy conserving operation and maintenance procedures applicable to multifamily dwellings.

(ii) Explain how each of these measures or procedures would affect the level of utility service the tenant receives.

(iii) Contain a pamphlet describing how tenants may conserve energy in their apartments.

(iv) Contain low-cost/no-cost information.

(v) Contain information on tax credits and weatherization programs for renters.

(4) *Alternative.*

The State Plan may contain an alternative requirement for disseminating program information that shall be used instead of the Information Package described in § 458.503(a)(3), if the Secretary determines that such alternative requirement fulfills the same functions as the Information Package in an equivalent manner.

(5) *New Customers.*

(i) A new customer is a person who becomes an eligible customer after initial distribution of the Apartment Announcement but before January 1, 1990.

(ii) The State Plan shall require that each covered utility and participating building heating supplier send an Apartment Announcement which meets the requirements of this section to each new customer within 60 days of such customer becoming a new customer.

(iii) The State Plan shall require that covered utilities and participating building heating suppliers inform each new customer that upon request the customer may receive a copy of the results applicable to the new customer's dwelling unit of any program audit of the customer's building which the covered utility or participating heating supplier may have performed pursuant to the State Plan and require that upon such a request such utility or heating supplier provide such results.

(b) *Energy Audits.*

(1) *Requirements for Program Audits.*

The State Plan shall describe the program audit services to be offered by covered utilities and participating building heating suppliers and shall require at a minimum that each covered utility and participating building heating supplier provide to each eligible multifamily customer a comprehensive program audit which addresses all applicable energy conserving operation and maintenance procedures, program measures and State measures, if any, upon request by such eligible customer.

(i) The State Plan shall require that, in each program audit, the auditor determines which of the energy conserving operation and maintenance procedures would save energy in the multifamily dwelling, inform the eligible customer of such changes in building operation and maintenance, emphasize the importance of the changes and recommended that they be accomplished before the installation of any program measure or State measure.

(ii) The State Plan shall require that, in each program audit, the auditor determine the applicability of each program measure in the multifamily dwelling. If the program measure is not applicable, then the requirements of this section to provide estimates of the cost and savings of the installation of such measures in such multifamily dwelling need not apply.

A program measure is applicable in a multifamily dwelling if:

(A) The measure is not already present in the multifamily dwelling.

(B) Installation of the measure is not a violation of federal, State, or local law or regulation.

(C) With respect to lighting systems, the existing lighting levels exceed the applicable State regulations, if incandescent lighting is present in general use, if mercury lighting is present in general use, if outdoor lighting or security lighting is done with other than high or low pressure sodium lighting, (for all instances of fluorescent lighting) where low energy lamps or ballasts are not in use.

(D) With respect to ceiling insulation, the difference between the effective R-value of any existing insulation and the program measure level for that building is R-11 or more. If it is not possible to determine the existing insulation level then analysis is not required.

(E) With respect to wall insulation, there is no insulation in a substantial portion of the exterior walls and it is practical to insulate the wall.

(F) With respect to water heater insulation, the remaining useful life of the water heater appears to the auditor to be at least three years and space is available around the water heater to install insulation.

(G) With respect to steam/condensate pipe insulation, the existing insulation level is less than the thermal equivalent of one inch of fiberglass.

(H) With respect to hot water pipe insulation with the presence of a continuous hot water circulator, the insulation level is less than the thermal equivalent of one inch of fiberglass.

(I) With respect to window heat gain and/or loss retardants, the building has mechanical cooling.

(J) With respect to automatic energy control systems, there is the capability to reduce the period of consumption of energy for lighting, heating, or cooling systems through automatic time regulation; or the capability to reduce the rate of consumption of energy through equipment modulation based on inside or outside temperature and/or humidity or building occupancy; or the capability to reduce electricity costs through regulation of demand; or the capability to reduce costs through regulation of demand; or the capability to reduce mechanical heating or cooling requirements through replacement with outside air based on inside or outside temperature and/humidity.

(K) With respect to equipment associated with automatic energy control systems which is required to operate steam, hydronic or ventilating systems, there is an applicable automatic energy control system whose function requires or can be enhanced by electrical or mechanical equipment.

(L) With respect to replacement burners, furnaces, boilers, or any combination thereof, the existing burner, furnace, boiler or combination are approximately five years old or older.

(M) With respect to flue opening modifications, the furnace combustion air is taken from a conditioned area.

(N) With respect to energy recovery systems (which may include but not be limited to, water-to-water, air-to-air and other heat recovery systems), there exists a source presently disposed to the atmosphere or to waste water, while a building energy requirement exists which can be met with the waste energy in a manner that reduces total building energy consumption, and after other

measures for reducing the wasted energy have been considered, and is in compliance with all applicable building, health, and safety codes.

(O) With respect to cogeneration systems which produce electricity, as well as steam or other forms of thermal or mechanical energy, there exists a ratio of kilowatt electrical demand to thermal demand of one kilowatt to the range of 4,000 to 12,000 BTU's thermal and the demand is coincident on an annual basis.

(P) With respect to wind energy devices: the estimated average annual wind resource in the vicinity of the site is 10 miles per hour, or greater, adjusted to 10 meters (33 feet) above ground level; and there are no major wind obstructions over 55 feet high, greater than 30 feet wide, within 100 feet of a potential location for the wind energy device.

(Q) With respect to active solar heating systems, or combined active solar systems, a site exists on or near the building which is free of major obstruction to solar radiation and the building has a space heating system other than a steam heating, electric resistance radiant heating, or electric resistance baseboard heating system.

(R) With respect to active domestic hot water systems, a site exists on or near the building which is free of major obstruction to solar radiation.

(S) With respect to solaria/sunspace systems, the building has a South-facing ground level wall, which is free of major obstruction to solar radiation.

(T) With respect to replacement central air conditioners, the building has a central air conditioner that is approximately five years old or older.

(U) The above applicability criteria may in a State Plan be expanded or restricted, subject to the approval of the Secretary. If a large residential building customer covered by the RCS Program requests a CACS type audit, the auditor may substitute alternative applicability criteria for those contained in C, G, J, K, N, and O.

(iii) The State Plan shall require that each estimate of energy cost savings and of installation costs provided as a result of a program audit be based on an adequate assessment including actual measurements or inspections, as appropriate, performed onsite by the auditor, of the building shell, the lighting system and of the space heating, space cooling, and water heating equipment.

(iv) The State Plan shall contain procedures to assure that the estimates of energy cost savings and of installation costs and any other economic calculation provided as a result of a program audit shall be based on typical recent local electricity rates, reasonable real energy cost escalation rates that are likely to be experienced by the eligible customer, typical local prices for materials and installation of program measures, and typical local climate data for the eligible customer's location.

(v) The State Plan shall require that the estimates of energy cost savings for active solar space heating systems, solar domestic hot water systems, and combined active solar space heating and solar domestic hot water systems be based on the calculation procedures contained in the HUD Intermediate Minimum Property Standards Supplement, Solar Heating and Domestic Hot Water Systems, 4930.2, 1977 Edition; U.S. Department of Housing and Urban Development, or equivalent calculation procedures, included in the State Plan and approved by the Secretary.

(vi) The State Plan shall contain procedures to assure the validity of the program audit with respect to all program measures and shall contain either:

(A) A brief description of the program audit procedures which shall be followed under the State Plan and a detailed description of the method which will be used by the State to assure the accuracy of these procedures; or

(B) A detailed description of the program audit procedures which shall be followed under the State Plan, subject to the approval of the Secretary as to their validity; and

(C) A certification that the State has sought the approval of the Secretary as to the accuracy of the program audit procedures.

(D) For the purposes of § 458.503(b)(1)(vi), the term "program audit procedures" means the measurements or inspections which the auditor must make in a customer's building and the calculations which must be performed in making energy costs savings estimates.

(vii) The State Plan shall require that any cost and savings estimate for any applicable furnace efficiency modification to a gas or oil furnace or boiler be based on an evaluation of the seasonal efficiency of such furnace or boiler. This seasonal efficiency shall be based on estimated peak (tuned up) steady state efficiency corrected for cycling losses. Steady state efficiency shall be derived from manufacturer's design data and observation of the furnace components, or alternatively, by a flue gas analysis of measured flue gas temperature and carbon dioxide content.

(viii) The State Plan shall require that detailed costs and savings estimates be calculated for the applicable program measures identified in § 458.503 (b)(2)(xvi). The State Plan shall require that the detailed analysis calculations be consistent with accepted engineering practice. The analytic approach shall not be limited to exclude systematized procedures, including computer-based analysis.

(ix) The State Plan shall require that the auditor provide at least installation costs and energy savings estimates based on typical practice for any energy consuming function within the building, including but not limited to the measures identified in Subpart A 105, if the function accounts for more than ten percent of the total building energy consumption.

(2) *Results of Program Audits.*

The State Plan shall require that the auditor deliver the following information in writing, to each eligible customer who receives a program audit, upon completion of the audit. The State Plan shall require that the auditor offer to the eligible customer an opportunity to discuss the audit results if the customer requests an explanation.

(i) An estimate of the type, quantity, and rate of energy consumption of the eligible customer's building.

(ii) A determination of the total BTU's of fuel consumed by the building, as measured at the building line, of the energy use in BTU's per square foot of building floor space as well as description of the BTU's consumed by each fuel as a proportion of total BTU's and of the costs of each fuel as a proportion of total costs, and an estimate of the proportions of each fuel that are consumed by at least the following end-uses; space heating, space cooling, ventilation, lighting, and domestic hot water. This estimate may be based on typical practice of buildings of the same type and climate.

(iii) Notice as to the availability of Government sponsored low-interest loans, weatherization programs, competitive grants, applicable tax credits and other forms of assistance which may reduce implementation costs.

(iv) Guidance to implementation of recommended measures. This activity may include methods of finding, and evaluating contractors, suppliers and financing institutions.

(v) An estimate of the cost and savings that the eligible building may experience with adoption of appropriate changes in building operation and maintenance.

(vi) An estimate, based on the calculation procedures determined pursuant to § 458.503(b)(1)(viii), of the

total installed cost of each applicable program measure identified in § 458.503(b)(2)(xvi).

(vii) An estimate, based on the calculation procedures determined pursuant to § 458.503(b)(1)(viii), of the energy savings which would occur during the first year from installation of each applicable program measure identified in § 458.503(b)(2)(xvi).

(viii) An estimate, based on typical practice of similar building types in the same climate zone, of the total installed cost of the measure expressed in range of dollars for the applicable program measures identified in § 458.503(b)(2)(xvii).

(ix) An estimate of the savings in energy costs, based on typical practice of similar building types in the same climate zone, which would occur during the first year from installation of each applicable program measure identified in § 458.503(b)(2)(xvii)

(x) An estimate of the simple payback period of each applicable program measure, taking into account the interactions among the various measures. The simple payback period is calculated by dividing the estimated total cost of the measure, as determined pursuant to § 458.503(b)(2)(vi) or § 458.503(b)(2)(viii), by the estimated annual cost saving accruing from the measure, as determined pursuant to § 458.503(b)(2)(vii) or § 458.503(b)(2)(ix). Other economic analyses, such as life-cycle costing, which consider all costs and cost savings, such as maintenance costs and/or savings, resulting from an energy conservation measure, are recommended, but not required.

(xi) The following disclosure or its equivalent: "The procedures used to make these estimates are consistent with DOE criteria for apartment energy audits or have been evaluated by the State for accuracy. However, the actual installation costs you incur and energy savings you realize from installing these measures may be different from the estimates contained in this audit report. Although the estimates are based on measurements of your building, they are also based on assumptions which may not be totally correct for your establishment."

(xii) An estimate of the annual normal maintenance costs, if any, of each applicable program measure.

(xiii) With respect to a program audit addressing an applicable solar domestic hot water system or active solar space heating system, or combination thereof, a description of the solar system assumed by the auditor in preparing energy savings estimates which shall include the following information:

(A) Square feet of collector;

(B) Collector characteristics, including glazing materials and other collector materials;

(C) Any storage system needed, including the capacity of storage;

(D) Any freeze protection needed;

(E) The estimated percent of the space and/or water heating load to be met by solar energy;

(F) Any physical connections needed with existing heating systems;

(G) Any site preparation needed; and

(H) If the results are based on a simulation, the following disclosure or its equivalent:

The energy cost savings estimates you receive are based on systems which may be different from the ones you purchase. Also, these estimates were not determined using actual conditions but using simulated measurements. Therefore, the cost savings we have estimated may be different from the savings which actually occur.

(xiv) With respect to a program audit addressing and applicable passive solar space heating and cooling system:

(A) The generic designation and a pictoral description of the particular system considered by the auditor,

(B) The estimated percent of the heating load to be met by such system,

(C) The approximate dimensions of such system,

(D) Collection storage characteristics, including the recommended heat capacity of storage, and

(E) The disclosure provided in § 458.503(b)(2)(xiii)(H).

(xv) With respect to a program audit addressing an applicable wind energy device:

(A) Installation cost estimates as required in § 458.403(b)(2)(viii) based on commercially available wind devices of kilowatt rating appropriate to the level of electricity consumption in the customer's building;

(B) Estimates of energy cost savings as required in § 458.403(b)(2)(ix), provided in the form of a function of average yearly wind speeds for the system used in § 458.403(b)(2)(xv)(A);

(C) A description of the type of wind energy device used by the auditor in preparing the energy saving estimates,

(D) The average yearly wind speed as indicated by the appropriate Wind Energy Resource Atlas for the region, and the relationship between that data and the likely wind speeds at the residence, or

(E) The average yearly wind speed at the nearest qualified measuring station and the relationship between that data and the likely wind speeds at the residence. A qualified measuring station is one which meets the following requirements:

(1) The anemometer is located no less than 6 meters (19.8 feet) above ground level;

(2) Data used to determine the annual average wind speed has been collected for one year or more; and

(3) Calibration of the data collection and recording instrument(s) had been certified by the instrument manufacturer(s) at the time of purchase.

(xvi) A detailed analysis, developed pursuant to § 458.503(b)(1)(viii) shall be provided for the following energy conservation measures, except where the applicability criteria militate otherwise:

(A) Lighting systems,

(B) Caulking and Weatherstripping,

(C) Ceiling, roof and wall insulation,

(D) Storm windows and storm doors, and

(E) Hot water/steam/condensate pipe insulation.

(xvii) The following measures shall be audited for cost and savings estimates determined pursuant to typical practice in similar building types in the same climate zone;

(A) Hot water generation and distribution system;

(B) Furnance, or utility plant and distribution system, modifications, including replacement burners, furnaces, boilers, or any combination thereof, which substantially increase the energy efficiency of the heating system; devices for modifying flue openings which will increase the energy efficiency of the heating system; intermittent pilot ignition devices (IID's) which replace standing gas pilot lights; and devices for modifying and improving the air-conditioning and air-handling systems which may include but are not limited to enthalpy controls, economizers and various load management techniques.

(C) Heat absorbing or heat reflecting window and door systems, reductions in glass area, and other window and door system modifications;

(D) Automatic energy control systems (which include, but are not limited to, computer control systems, time clocks, thermostats, and damper motors);

(E) Equipment, associated with automatic energy control systems, which is required to operate variable steam, hydronic, or ventilating systems;

(F) A solar energy system, as defined in section 504(8) of the Solar Energy and Energy Conservation Bank Act;

(G) Energy recovery systems (which may include, but are not limited to, water-to-water, air-to-air and other heat recovery systems); and

(H) Cogeneration systems which produce electricity, as well as steam or other forms of thermal or mechanical energy, and which meet such fuel

efficiency requirements as the Secretary may, by rule, prescribe.

(c) *Reporting and Record Keeping Requirements*

(1) *Reporting.* The State Plan shall contain provisions to assure that a report is submitted to the Secretary on July 1, 1981, and annually thereafter through July 1, 1990. The report shall contain the following information for the twelve-month period ending the preceding April 1, except that the Secretary may waive any of the reporting requirements, in approving the State Plan, for good cause:

(i) Any revision to the list of covered utilities and a list of participating building heating suppliers subject to the State Plan;

(ii) For each covered utility or participating building heating supplier:

(A) The approximate number of eligible multifamily dwelling customers and, if available, the percentage of those customers for whom the utility or heating supplier is the primary heating fuel supplier;

(B) A copy of the Apartment Announcement distributed to eligible multifamily dwelling customers;

(C) The number of eligible multifamily dwelling customers who have requested an audit and the number of requests the utility or participating building heating supplier has fulfilled;

(D) The number and function of people assigned to the covered utility's or participating building heating supplier's program, including part-time employees; and

(E) The costs incurred by the utility or building heating supplier in providing audits under the CACS Program including separately those costs paid by individual customers for services received and those costs paid by all ratepayers.

(iii) The number and nature of complaints by eligible multifamily dwelling customers against the utility which have been handled through the procedures established under § 458.503(d);

(iv) A brief description of the status of activities carried out pursuant to § 458.505 (Qualification Procedures for Auditors) including whether sufficient qualified personnel are available for program needs, the reasons for any shortages and the proposed resolution of any such shortage problem;

(v) The cost to the State of developing and implementing the State Plan; and

(vi) A citation to and brief description of any State or local law or regulation relevant to the State Plan and the status of any proposed State or local legislation or regulation relevant to the State Plan.

(2) *Record Keeping.* The State Plan shall contain procedures to assure that the following records are kept for the periods indicated and made available to the Secretary upon request, except that the Secretary may for good cause waive any of the record keeping requirements in approving the State Plan:

(i) The name and address of each eligible multifamily dwelling customer who receives a program audit, which shall be kept for ten years from the date of such program audit;

(ii) A copy of the data collected during the audit, and a copy of the estimates of costs and savings presented to the customer, which shall be kept for ten years from the date of such program audit;

(iii) The amount and cost of fuel purchased each month or other billing period for the twelve months following each program audit for each eligible multifamily dwelling customer, which shall be kept for two years from the date of such program audit, and

(iv) The names of the invididuals who have met the qualification criteria described in § 458.505. These records shall be updated within a reasonable period of time following each implementation of the qualification procedures.

(d) *Complaints Processing Procedures.*

The State Plan shall contain procedures for resolving complaints against utilities. The complaint resolution procedures should use the procedures established under the RCS Program, § 456.315, as much as practicable.

§ 458.504 Addition of measures by states.

(a) The State may require or allow covered utilities participating building heating suppliers to offer services for State measures in conjunction with the CACS Program subject to the approval of the Secretary in the State Plan.

(b) The Secretary may approve a State measure to be offered in conjunction with the CACS Program if:

(1) The measure is an energy conservation measure;

(2) The measure is a renewable resource measure; or

(3) The State Plan contains the following: (i) Information demonstrating that the measure effectively saves nonrenewable energy sources and does not increase the consumption of oil;

(ii) A method for adequately ensuring safe installation and use of such measure;

(iii) Adequate assurances that offering such measure in conjunction with the CACS Program will not adversely affect the environment, competition or the CACS Program in the State and will not increase the cost to an eligible customer of a program audit under the CACS Program; and

(iv) An adequate analysis of the effects on the environment of offering the State measures in conjunction with the CACS Program.

(c) The State plan shall describe how the State measures are to be offered in conjunction with the CACS Program.

§ 458.505 Auditor qualification requirements.

(a) The State Plan shall provide for an auditor training course. At a minimum, course content shall assure that a successful trainee will have gained the following: (1) A general understanding of the three types of heat transfer and the effects of temperature and humidity on heat transfer;

(2) A general understanding of multifamily construction terminology and components;

(3) A general knowledge of the operation of the heating and cooling systems used in the multifamily building;

(4) A general knowledge of the different types of each applicable program and State measure, of the advantages, disadvantages and applications of each;

(5) The capacity to conduct the audit as required in § 458.503(b), including: (i) A familiarity with the energy conserving practices and energy conserving operation and maintenance procedures required to be audited for;

(ii) The capability to determine the applicability of the program measures and any State measures; and

(iii) A proficiency in the pertinent auditing procedures, as prescribed in or pursuant to the State Plan, for each applicable program and State measure.

(6) Where a furnace efficiency modification is an applicable program measure, and the source of fuel for the existing furnace or boiler is either gas or oil, a working ability to calculate the steady state efficiency of the furnace or boiler as required by § 458.503(b)(1)(vii);

(7) Where a renewable resource measure, other than wind energy devices, is an applicable program or State measure, an understanding of the nature of solar energy and its multifamily dwelling applications, including: (i) Insulation,

(ii) Shading,

(iii) Heat capture and transport, and

(iv) Where appropriate, heat transfer for hot water and space heating.

(8) Where a wind energy device is an applicable program or State measure, an understanding of the nature of wind energy and its multifamily dwelling

applications, including: (i) Wind availability,

(ii) Effects of obstruction,

(iii) Wind capture,

(iv) Power generation, and

(v) Interfaces with residential and utility power lines.

(9) A general understanding of the applicability of air-to-air, water-to-water and air-to-water heat exchangers and the criteria for cost-effective applications.

(10) A general knowledge of pneumatic, electrical and hydronic control systems and their applicability to automatic energy control systems.

(11) The ability to recognize the compatibility between process heat loads and electrical loads in the eligible building population and to recognize when the criteria for potential applicability is appropriate.

(12) A general knowledge of lamps and lighting systems used in multifamily dwellings.

(13) A general knowledge of the functions and operating characteristics and the various modes and symptoms of failures of steam traps in multifamily dwellings.

(14) Where an automatic energy control system is an applicable measure, an understanding of the relationships between heating, air-conditioning and lighting systems and the common elements which require system automation.

(b) Each State may determine whether to teach the course in the entirety or in parts, and the State Plan shall indicate how each subject in § 458.505(a) will be taught.

(c) The State Plan shall specify how course content whall be monitored to ensure compliance with the requirements of § 458.505(a) above.

(d) The State Plan shall describe the following: (1) Length of training program,

(2) Name of entity which developed the curriculum,

(3) Subject areas covered,

(4) How trainers shall be selected,

(5) An estimate of how many trainers will be required, and

(6) A description of the facilities and materials to be used.

§ 458.506 Procedures for investigating and enforcing compliance with the State Plan.

(a) The State Plan shall require each covered utility and participating building heating supplier to comply with the State Plan.

(b) The State Plan shall contain adequate procedures for investigating and enforcing compliance with the State Plan by covered utilities and participating building heating suppliers.

(c) The State Plan shall cite and describe the existing or proposed State authority(ies) for such investigation and enforcement, including authorities with respect to any nonregulated utility covered in the State Plan.

(d) The State Plan shall identify the State agency(ies) responsible for such investigation and enforcement and shall include a description of the resources available for such investigation and enforcement.

§ 458.507 Coordination.

(a) *Other Programs.* The State Plan shall provide procedures to ensure effective coordination between its Commercial and Apartment Conservation Service Program as described in the State Plan and all local, State and Federal energy conservation programs within and affecting the State which shall include, but not be limited to: (1) The Residential Conservation Service Program;

(2) The Federal Energy Extension Service;

(3) The Basic State Energy Conservation Program of the Department of Energy; and

(4) The Supplemental State Energy Conservation Program of the Department of Energy.

(b) *Energy Suppliers.* If the State Plan permits coordination of the Commercial and Apartment Conservation Service Program among energy suppliers in the State then it shall provide procedures describing how such coordination may occur and ensuring that no collusion on prices charged to eligible customers will occur.

(c) *State Regulatory Authority.* If the Lead Agency is not the State regulatory authority, then the State Plan shall describe how the Lead Agency shall coordinate the implementation of the State Plan with the State Regulatory Authority.

(d) The State Plan may provide for coordination between utilities and building heating suppliers to ensure that a utility is not required to conduct an energy audit of a multifamily dwelling which has been audited previously pursuant to this section or pursuant to Chapter II, 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.508 Accounting and payment of costs.

(a) *Accounting.* The State Plan shall require, and may permit with respect to costs of revenues directly associated with State measures, that covered utilities use the following accounts and procedures: (1) All amounts expended or received by a covered utility which are attributable to the CACS Program, including any penalties paid under Subpart F (Federal Standby Authority) shall be accounted for on the books and records separately from amounts attributable to all other activities of the covered utility.

(2) Covered utilities subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) shall utilize the Uniform System of Accounts as prescribed in Title 18, CFR Parts 101, 104, 201 and 204. Covered rural electric cooperatives shall utilize the Uniform System of Accounts as prescribed by the Rural Electrification Administration (REA) in Title 7, CFR Part 1701, Appendix A. Other covered nonregulated utilties shall adopt accounts within their accounting system with the attributes of the appropriate accounts prescribed by the FERC.

(i) All amounts expended by a covered utility for the CACS Program shall be charged to subaccounts within Account 908, Customer Assistance Expenses, its equivalent or successor, or the appropriate account designated specifically by FERC or REA for CACS Program expenses. Appropriate records shall be maintained thereunder so as to allow ready identification of costs attributable to the following program elements: (A) Program Information, and

(B) Program Audit;

(ii) Billed income attributable to the CACS Program shall be accounted for in subaccounts within Account 456, Other Electric Revenue (for electric utilities) or Account 495, Other Gas Revenues (for gas utilities), their equivalents or successors, or the appropriate account designated specifically by FERC or REA for Program billed income.

(b) *Payment of Costs.* The State Plan shall require that covered utilities treat cost as described below and shall describe how the costs described in this section will be treated.

(1) All amounts expended by a covered utility for the Apartment Announcement, the Tenant's Information Package, and all public education and program promotion directly related to providing information about a utility's multifamily dwelling CACS Program shall be treated as a current expense of providing utility service and be charged to all ratepayers of the covered utility in the same manner as other current operating expenses of providing such utility service.

(2) That all other amounts expended by a public utility to carry out the provisions of this title, are recovered in the manner specified by the State

Regulatory Authority which has ratemaking authority over such utility (or in the case of a nonregulated utility in the manner specified by such nonregulated utility); except that the amount which may be recovered directly from an eligible multifamily dwelling customer for whom the activities described in § 458.503(b) are performed shall not exceed a total of $15 per dwelling unit or the actual cost of such activities, whichever is less; in determining the amount to be recovered directly from customers as provided under this paragraph, the State Regulatory Authority (in the case of a regulated utility) shall take into consideration, to the extent practicable, the customers' ability to pay and the likely levels of participation in the CACS Program which will result from such recovery.

(3) Costs incurred by a covered utility for services carried out by such utility on behalf of the State may be reimbursed by the State.

(c) *Duplication of Audits.* The State Plan shall contain a provision stating that a covered utility need not conduct an energy audit of a multifamily dwelling which has been audited previously pursuant to this Part or pursuant to 10 CFR Part 455 (Grant Programs for Schools and Hospitals and Buildings Owned by Units of Local Government and Public Care Institutions).

§ 458.509 Plans for participating building heating suppliers.

(a) *Requirements.* The procedures for each building heathing supplier program shall be identical to the procedures required for utilities in this Subpart.

(b) *Participation and Withdrawal.* The State Plan, if it includes building heating suppliers, shall include a procedure by which the Governor shall allow a building heating supplier to participate in the multifamily dwelling part of its CACS Program. The State Plan shall also provide for the voluntary withdrawal of participating building heating suppliers from the multifamily dwelling part of its CACS Program.

(c) *Waiver of Requirements.* The State Plan shall contain a procedure by which the Governor may waive for any participating building heating supplier any requirement of the State Plan, except those listed below, upon a demonstration to the Governor's satisfaction that the resources of such supplier do not enable it to comply with the particular requirement. The requirements which the Governor shall not waive with respect to any building heating supplier who chooses to participate in the program are those established according to: (1) Section 458.506 (Procedures for Investigating and Enforcing Compliance with the State Plan);

(2) Sections 458.503(b)(1)(iii)–(vii) (Accuracy of Auditing Procedures), for those measures for which a participating building heating supplier performs program audits for its eligible multifamily dwelling customers;

(3) Section 458.505 (Auditor Qualification Requirements); and

(4) The following reporting and record keeping requirements: (i) Section 458.503(c)(1)(i);

(ii) Section 458.503(c)(1)(ii), except that the Governor may waive 458.503 (c)(1)(ii)(E) concerning the accounting of program costs; and

(iii) Section 458.503(d) (Record Keeping).

Subpart F—Federal Standby Authority and Enforcement Provisions

§ 458.601 Scope.

The Subpart specifies the procedures to be followed to ensure that eligible customers receive the services of the audit program when a State or nonregulated utility does not submit an acceptable State plan within the necessary time or fails to implement adequately an approved plan. These procedures are required to be implemented by the Secretary by Section 741 of NECPA. Section 458.602 specifies the conditions under which the Secretary shall invoke standby authority for covered regulated utilities (a) and covered nonregulated utilities (b). Sections 458.603(a) and (b) specify the content of the Federal plans for States and nonregulated utilities, respectively. Section 458.604 specifies the procedures followed by the Secretary if a public utility fails to comply with a Federal standby order issued pursuant to 458.603(a) or (b). Section 458.605 specifies the civil penalties which the secretary may assess and the enforcement provisions.

§ 458.602 Conditions under which Federal standby authority shall be invoked.

(a) The Secretary shall invoke standby authority for States and the TVA if he determines: (1) That a State fails to submit a Plan meeting the requirements of Subparts B, D and E within 180 days after the effective date of these rules or within such additional period as the Secretary allows, or

(2) After notice and opportunity for a public hearing, that an approved State plan is not being adequately implemented in a State.

(b) The Secretary shall invoke standby authority for non-regulated utilities if he determines: (1) That a nonregulated utility fails to submit a plan meeting the requirements of Subparts C, D and E within 180 days after the effective date of these rules or within such additional periods as the Secretary allows, or

(2) After notice and opportunity for a public hearing, that an approved plan is not being adequately implemented by a covered nonregulated utility.

§ 458.603 Procedures for Federal standby planning process.

(a) *For States.* When the Secretary determines that one of the conditions specified in § 458.602(a) exists: (1) The Secretary shall promulgate a Plan which meets the appropriate requirements of Subparts B, D and E of this part and which is applicable to each covered regulated utility in the State;

(2) The Secretary shall, by order, require each covered regulated utility in the State to carry out a CACS Program, which meets the requirements of the plan promulgated pursuant to § 458.603(a)(1), within 90 days of the issuance of the order; and

(3) If the State had an approved plan which included nonregulated utilities, the Secretary shall take the actions described in § 458.603(b) with respect to such nonregulated utilities.

(b) *For Nonregulated Utilities.* When the Secretary determines that one of the conditions specified in § 458.602(b) exists: (1) The Secretary shall, by order, require the covered nonregulated utility to promulgate a plan which meets the requirements of Subparts C, D and E of this part; and

(2) The Secretary shall, by order, require such nonregulated utility to carry out a CACS Program, which meets the requirements of the plan promulgated pursuant to paragraph (1) of this section, within 90 days of the issuance of the order.

§ 458.604 Failure to comply with orders.

If the Secretary determines that any covered utility to which an order has been issued pursuant to § 458.603 (a) or (b) has failed to comply with such order, the Secretary may file a petition in the appropriate United States district court to enjoin such utility from violating the order.

§ 458.605 Enforcement provisions.

(a) Any covered utility which violates any requirement of a plan promulgated under § 458.603(a)(1) or § 458.603(b)(1) or which fails to comply with an order under § 458.603(a)(2), § 458.603(a)(3) or § 458.603(b)(2) within 90 days from issuance of such order, shall be subject

to a civil penalty of not more than $25,000 for each violation.

(b) Each day that such violation continues shall be considered a separate violation.

(c) A civil penalty under this section shall be assessed by an order of the Secretary.

(d) Before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty. The notice of the proposed penalty shall inform the person of the opportunity to make an election, in writing, within 30 days after receipt of the notice. The election involves deciding whether to have the procedures of § 458.605(f) apply, in lieu of the procedures in § 458.605(e) with respect to the assessment of a civil penalty.

(e)(1) Unless the election described in § 458.605(d) is made within 30 calendar days after receipt of the notice given under § 458.605(d) the Secretary shall assess the penalty, by order, after a determination of violation has been made on the record. Such determination of violation shall be made after an opportunity has been afforded for an agency hearing pursuant to Section 554 of Title 5, United States Code, before an administrative law judge appointed under Section 3105 of Title 5, United States Code. The assessment order shall include the administrative law judge's findings and the basis for such assessment.

(2) Any person against whom a civil penalty is assessed under this subsection may, within 60 Calendar days after the date of the order of the Secretary assessing the penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with Chapter 7 of Title 5, United States Code. The court shall have jurisdiction to enter a judgement affirming, modifying, or setting aside, in whole or in part, the order of the Secretary, or the court may remand the proceeding to the Secretary for such further action as the court may direct.

(f)(1) In any case where the procedures of this subsection have been elected, as described in § 458.605(d) the Secretary shall assess such penalty by order. The order shall be made not later than 60 calendar days after the alleged violator's date of receipt of notice of the proposed penalty § 458.605(d).

(2) If the civil penalty assessed by order under § 458.605(f)(1) has not been paid within 60 calendar days after the assessment order was made, the Secretary shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgement enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(3) Any election to have this Subsection apply may not be revoked, except with the consent of the Secretary.

(g) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under § 458.605(e), or after the appropriate district court has entered final judgement in favor of the Secretary under § 458.605(f), the Secretary shall recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of the respective final order or judgement imposing the civil penalty shall not be subject to review.

(h) Notwithstanding the provisions of Title 28, United States Code, or of Section 502 of the Department of Energy Organization Act, the Secretary shall be represented by the General Counsel of the Department of Energy (or any attorney or attorneys within the Department of Energy designated by the Secretary) who shall supervise, conduct, and argue any civil litigation to which this section applies (including any related collection action) in a court of the United States or in any other court, except the Supreme Court. However, the Secretary or the General Counsel shall consult with the Attorney General concerning such litigation and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

Appendix: Program Measures by Climate and Category of Building

(a) Climate Zones for Program Measures. In the table of program measures shown in (c) below, the climate zones are as follows:

Climate and Heating Degree-Days

1—0–1000
2—1001–2500
3—2501–3500
4—3501–4500
5—4501–5000
6—5001–6000
7—6001–7000
8—7001 and above

(b) Category of Residential, Multifamily and Commercial Buildings. The program measures are designated in the following tables by categories of residential, multifamily and commerical buildings. These categories are: (1) For energy conservation measures and wind energy devices: (i) "Electricity", which includes all buildings in which the principal source of space heating is an electric resistance heating system;

(ii) "Gas", which includes all buildings in which either natural gas, propane, or butane is the principal space heating fuel;

(iii) "Oil", which includes all buildings in which either No. 2, No. 4, or No. 6 heating oil or kerosene is the principal space heating fuel, and includes all other buildings not included in the categories "Electricity", "Gas" or "Heat Pump";

(iv) "Heat Pump", which includes all buildings in which the principal source of space heating is a electric pump;

(2) For solar domestic hot water systems: (i) "Electricity", which includes all buildings in which electricity is the principal fuel for domestic water heating;

(ii) "Gas", which includes all buildings in which either natural gas, or butane is the principal fuel for domestic water heating; and

(iii) "Oil" which includes all buildings in which No. 2, No. 4, or No. 6 heating oil or kerosene is the principal fuel for domestic water heating, and includes all other buildings not included in the categories of "Gas" or "Electricity";

(3) For active solar space heating systems and for combined active solar space heating and solar domestic hot water systems, "Electricity", "Gas", "Oil", and "Heat Pump" (as in (1) above) with respect to each of the building types.

(4) For passive solar space heating and cooling systems, "all buildings."

(c) (1) The following are program measures for all cateories of buildings in all States and climate zones:

(i) Replacement furnaces or boilers,
(ii) Replacement central air conditioning,
(iii) Caulking and weatherstripping,
(iv) Duct insulation,
(v) Pipe insulation,
(vi) Water heater insulation,
(vii) Heat reflective and heat absorbing window or door material,
(viii) Clock thermostats,
(ix) Passive solar space heating and cooling systems,
(x) Steam/condensate pipe insulation,
(xi) Automatic energy control systems,
(xii) Equipment associated with automatic energy control systems,
(xiii) Energy recovery systems,
(xiv) Cogeneration systems.

(2) Devices associated with electric load managment techniques are program measures for all categories of buildings if the local electric utility offers a rate which relects any differences in the

utility's cost-of-service (either energy or demand costs) between peak and off-peak periods.

(3) Furnace replacement burners (oil). Furnace replacement burners (oil) are program measures for the category "oil" in all States and climate zones.

(4) Flue opening modifications. Flue opening modifications are program measures for the category "gas" in all States and climate zones.

(5) Electrical or mechanical ignition systems. Electrical or mechanical ignition systems are program measures for the category "gas" in all States and Climate zones.

(d) Table of Program Measures by State. All other program measures are displayed in the following table organized by State.

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CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	RESNHPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Alabama	1	Electricity	22	x		x		x			
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	19	x							
	2	Electricity	30	x	11	x		x			
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	22	x							
Alaska	8	Electricity	38	x	19	x	x				x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
Arizona	1	Electricity	19	x				x		x	
		Gas	19	x				x			
		Oil	19	x				x			
		Electric Heat Pump	19	x							
	2	Electricity	22	x		x		x	x	x	
		Gas	19	x				x			
		Oil	19	x				x		x	
		Electric Heat Pump	19	x							
	3	Electricity	30	x	11	x		x	x	x	
		Gas	22	x				x			
		Oil	22	x				x	x		
		Electric Heat Pump	22	x							
	4	Electricity	30	x	19	x		x	x	x	x
		Gas	30	x	11	x		x			x
		Oil	30	x	11	x		x	x	x	x
		Electric Heat Pump	30	x	11	x					x
	5	Electricity	30	x	19	x	x	x	x	x	
		Gas	30	x	11	x		x			
		Oil	30	x	11	x		x	x	x	
		Electric Heat Pump	30	x	11	x					
	6	Electricity	30	x	19	x	x	x	x	x	
		Gas	30	x	11	x		x			
		Oil	30	x	11	x		x	x	x	
		Electric Heat Pump	30	x	11	x					
	7	Electricity	38	x	19	x	x	x	x	x	
		Gas	38	x	11	x		x			
		Oil	38	x	11	x		x	x	x	
		Electric Heat Pump	38	x	19	x	x				

These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	RESNHPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Arkansas	2	Electricity	30	x	11	x		x		x	
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	22	x							
	4	Electricity	30	x	19	x		x		x	x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x			x
		Electric Heat Pump	30	x	11	x					x
California	3	Electricity	22	x		x		x	x	x	x
		Gas	19	x							x
		Oil	19	x				x		x	x
		Electric Heat Pump	19	x							x
	5	Electricity	30	x	11	x		x	x	x	
		Gas	22	x							
		Oil	22	x				x		x	
		Electric Heat Pump	22	x							
	6	Electricity	30	x	19	x		x	x	x	x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x	x	x	
		Electric Heat Pump	30	x	11	x					x
	5	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					x
	6	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	19	x	x				x
	7	Electricity	38	x	19	x	x	x	x	x	
		Gas	38	x	11	x					
		Oil	38	x	11	x		x	x	x	
		Electric Heat Pump	38	x	19	x	x				
	8	Electricity	38	x	19	x	x	x	x	x	
		Gas	38	x	19	x	x				
		Oil	38	x	19	x	x	x	x	x	
		Electric Heat Pump	38	x	19	x	x				
Colorado	6	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	11	x					x
		Oil	38	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	19	x	x				x

These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	BUILDING REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Colorado (Continued)	7	Electricity	38	x	30	x	x	x	x	x	x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	30	x	x				x
	8	Electricity	38	x	30	x	x	x	x	x	
		Gas	30	x	19	x	x				
		Oil	38	x	19	x	x	x	x	x	
		Electric Heat Pump	38	x	30	x	x				
Connecticut	6	Electricity	30	x	30	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	30	x	x				x
Delaware	4	Electricity	30	x	30	x		x		x	x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x			x
		Electric Heat Pump	30	x	11	x					x
District of Columbia	4	Electricity	30	x	30	x		x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					
Florida	1	Electricity	30	x				x			x
		Gas	19	x							x
		Oil	19	x				x			x
		Electric Heat Pump	19	x							x
	2	Electricity	30	x		x		x			
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	19	x							
Georgia	2	Electricity	30	x		x		x			
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	19	x							
	3	Electricity	30	x	30	x		x			
		Gas	30	x							
		Oil	30	x				x			
		Electric Heat Pump	30	x							
	4	Electricity	30	x	30	x		x			
		Gas	30	x	30	x					
		Oil	30	x	30	x		x			
		Electric Heat Pump	30	x	30	x					

*These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	BUILDING REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Hawaii	1	Electricity	19	x				x			x
		Gas	19	x				x			x
		Oil	19	x				x			x
		Electric Heat Pump	19	x							x
Idaho	7	Electricity	38	x	30	x	x				
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	38	x	30	x	x				
	8	Electricity	38	x	30	x	x				
		Gas	30	x	19	x	x				
		Oil	38	x	19	x	x	x	x	x	
		Electric Heat Pump	38	x	30	x	x				
Illinois	4	Electricity	30	x	30	x		x			
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	30	x		x			
	5	Electricity	30	x	30	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x			x
		Electric Heat Pump	30	x	30	x					x
	6	Electricity	30	x	30	x	x	x			x
		Gas	30	x	30	x					x
		Oil	30	x	30	x					x
		Electric Heat Pump	30	x	30	x	x				x
	7	Electricity	30	x	30	x	x	x			x
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	38	x	30	x	x				x
Indiana	4	Electricity	30	x	30	x		x			
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	30	x		x			
	5	Electricity	30	x	30	x	x	x			x
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	30	x					x
	6	Electricity	30	x	30	x	x	x			x
		Gas	30	x	30	x					
		Oil	30	x	30	x					
		Electric Heat Pump	30	x	30	x	x				x

*These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

STATE	BUILDING REGION	CATEGORIES OF BUILDING	CONSERVATION MEASURES: Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	RENEWABLE RESOURCE MEASURES: Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Indiana (Continued)	7	Electricity	38	x	38	x	x				x
		Gas	30	x	22	x					
		Oil	30	x	22	x					
		Electric Heat Pump	38	x	38	x	x				x
Iowa	6	Electricity	38	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	38	x	38	x	x				x
	7	Electricity	38	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	38	x	38	x	x				x
	8	Electricity	38	x	38	x	x	x			x
		Gas	30	x	38	x	x				x
		Oil	30	x	38	x	x	x			x
		Electric Heat Pump	38	x	38	x	x				x
Kansas	4	Electricity	30	x	38	x		x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	22	x					x
	5	Electricity	30	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	22	x					x
	6	Electricity	30	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	38	x	x				x
	7	Electricity	38	x	38	x	x	x	x	x	x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	38	x	38	x	x				x
Kentucky	4	Electricity	30	x	38	x		x			
		Gas	30	x	22	x					
		Oil	30	x	22	x		x			
		Electric Heat Pump	30	x	22	x					
	5	Electricity	30	x	38	x	x	x			x
		Gas	30	x	22	x					
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	22	x					

These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

STATE	BUILDING REGION	CATEGORY OF BUILDING	CONSERVATION MEASURES: Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	RENEWABLE RESOURCE MEASURES: Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Kentucky (Continued)	6	Electricity	30	x	38	x	x	x			x
		Gas	30	x	22	x					
		Oil	30	x	22	x		x			
		Electric Heat Pump	30	x	38	x	x				x
Louisiana	2	Electricity	22	x		x		x			x
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	30	x							x
	3	Electricity	26	x	22	x		x			
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	22	x							
Maine	6	Electricity	38	x	38	x	x				x
		Gas	30	x	38	x	x				x
		Oil	30	x	38	x	x				x
		Electric Heat Pump	38	x	38	x	x				x
Maryland	4	Electricity	30	x	38	x		x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	22	x					x
	5	Electricity	30	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x		x			x
		Electric Heat Pump	30	x	22	x					x
	6	Electricity	30	x	38	x	x	x			
		Gas	30	x	22	x					
		Oil	30	x	22	x		x			
		Electric Heat Pump	30	x	38	x	x				
Massachusetts	8	Electricity	38	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x					x
		Electric Heat Pump	38	x	38	x	x				x
	7	Electricity	38	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x					x
		Electric Heat Pump	38	x	38	x	x				x
Michigan	7	Electricity	38	x	38	x	x	x			x
		Gas	30	x	22	x					x
		Oil	30	x	22	x					
		Electric Heat Pump	38	x	38	x	x				x

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CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	HUD/MPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Michigan (Continued)	5	Electricity	38	x	19	x	x	x			x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
Minnesota	5	Electricity	38	x	19	x	x	x			x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
Mississippi	4	Electricity	22	x		x		x			
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	19	x							
	5	Electricity	38	x	11	x		x			x
		Gas	22	x							x
		Oil	38	x				x			x
		Electric Heat Pump	22	x							x
Missouri	4	Electricity	38	x	19	x		x			x
		Gas	38	x	11	x					x
		Oil	38	x	11	x		x			x
		Electric Heat Pump	38	x	11	x					x
	5	Electricity	38	x	19	x	x	x			x
		Gas	38	x	11	x					
		Oil	38	x	11	x		x			
		Electric Heat Pump	38	x	11	x					x
	6	Electricity	38	x	19	x	x	x			x
		Gas	38	x	11	x					
		Oil	38	x	11	x		x			
		Electric Heat Pump	38	x	19	x	x				x
Montana	8	Electricity	38	x	19	x	x				
		Gas	38	x	19	x	x				
		Oil	38	x	19	x	x	x			
		Electric Heat Pump	38	x	19	x	x				
Nebraska	8	Electricity	38	x	19	x	x	x			x
		Gas	38	x	11	x					
		Oil	38	x	11	x		x			
		Electric Heat Pump	38	x	19	x	x				x
	7	Electricity	38	x	19	x	x	x			x
		Gas	38	x	11	x					
		Oil	38	x	11	x		x			
		Electric Heat Pump	38	x	19	x	x				x

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CONSERVATION MEASURES — RENEWABLE RESOURCE MEASURES

STATE	HUD/MPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Nebraska (Continued)	8	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	11	x	x				x
		Oil	38	x	11	x	x	x			x
		Electric Heat Pump	38	x	19	x	x				x
Nevada	2	Electricity	22	x		x		x	x	x	x
		Gas	19	x				x			x
		Oil	19	x				x	x	x	x
		Electric Heat Pump	19	x							x
	3	Electricity	38	x	11	x		x	x	x	x
		Gas	22	x				x			x
		Oil	22	x				x	x	x	x
		Electric Heat Pump	22	x							x
	4	Electricity	38	x	19	x		x	x	x	x
		Gas	38	x	11	x		x			x
		Oil	38	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	11	x					x
	5	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	11	x		x			x
		Oil	38	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	11	x					x
	6	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	11	x		x			x
		Oil	38	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	19	x	x				x
	7	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	11	x		x			x
		Oil	38	x	11	x		x	x	x	x
		Electric Heat Pump	38	x	19	x	x				x
	8	Electricity	38	x	19	x	x	x	x	x	x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x	x	x	x	x
		Electric Heat Pump	38	x	19	x	x				x
New Hampshire	1	Electricity	38	x	19	x	x				x
		Gas	38	x	11	x	x				x
		Oil	38	x	11	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
	2	Electricity	38	x	19	x	x	x			x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x

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STATE	NCEMPS REGION	CATEGORY OF BUILDING	CONSERVATION MEASURES: Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	RENEWABLE RESOURCE MEASURES: Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
New Jersey	5	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x		x			x
		Electric Heat Pump	30	x	11	x					x
	6	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	19	x	x				x
New Mexico	3	Electricity	30	x	11	x		x	x	x	x
		Gas	30	x				x			x
		Oil	30	x				x		x	x
		Electric Heat Pump	30	x							x
	4	Electricity	30	x	19	x		x	x	x	x
		Gas	30	x	11	x		x			x
		Oil	30	x	11	x		x	x	x	x
		Electric Heat Pump	30	x	11	x					x
	5	Electricity	30	x	19	x	x	x	x	x	x
		Gas	30	x	11	x		x			x
		Oil	30	x	11	x		x		x	x
		Electric Heat Pump	30	x	11	x					x
	6	Electricity	30	x	19	x	x	x	x	x	x
		Gas	30	x	11	x		x			x
		Oil	30	x	11	x		x	x	x	x
		Electric Heat Pump	30	x	19	x	x				x
	7	Electricity	30	x	19	x	x	x	x	x	x
		Gas	30	x	11	x		x			x
		Oil	30	x	11	x		x	x	x	x
		Electric Heat Pump	30	x	19	x	x				x
	8	Electricity	30	x	19	x	x	x	x	x	x
		Gas	30	x	19	x	x	x			x
		Oil	30	x	19	x	x	x			x
		Electric Heat Pump	30	x	19	x	x				x
New York	6	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	19	x	x				x
	7	Electricity	30	x	19	x	x	x			x
		Gas	30	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	19	x	x				x

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STATE	NCEMPS REGION	CATEGORY OF BUILDING	CONSERVATION MEASURES: Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	RENEWABLE RESOURCE MEASURES: Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
New York (Continued)	8	Electricity	30	x	19	x	x	x			x
		Gas	30	x	19	x	x				x
		Oil	30	x	19	x	x				x
		Electric Heat Pump	30	x	19	x	x				x
North Carolina	2	Electricity	22	x		x		x			x
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	19	x							
	3	Electricity	30	x	11	x		x			x
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	22	x							x
	4	Electricity	30	x	19	x		x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					
	5	Electricity	30	x	19	x	x	x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					
North Dakota	8	Electricity	38	x	19	x	x				x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
Ohio	5	Electricity	30	x	19	x	x				
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	11	x					
	6	Electricity	30	x	19	x	x				
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	19	x	x				
	7	Electricity	30	x	19	x	x				x
		Gas	30	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	19	x	x				x
Oklahoma	3	Electricity	30	x	11	x		x		x	x
		Gas	22	x							x
		Oil	22	x				x			x
		Electric Heat Pump	22	x							x

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CONSERVATION MEASURES | RENEWABLE RESOURCE MEASURES

STATE	HUDMPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Oklahoma (Continued)	4	Electricity	22	x	19	x		x		x	x
		Gas	19	x	11	x					x
		Oil	19	x	11	x		x			x
		Electric Heat Pump	22	x	11	x					x
	5	Electricity	22	x	19	x	x	x	x	x	x
		Gas	19	x	11	x					x
		Oil	19	x	11	x		x	x	x	x
		Electric Heat Pump	22	x	11	x					x
	6	Electricity	22	x	19	x	x	x	x	x	x
		Gas	19	x	11	x					x
		Oil	19	x	11	x		x	x	x	x
		Electric Heat Pump	22	x	19	x	x				x
Oregon	4	Electricity	22	x	19	x					
		Gas	19	x	11	x					
		Oil	19	x	11	x					
		Electric Heat Pump	22	x	11	x					
	5	Electricity	22	x	19	x	x				
		Gas	19	x	11	x					
		Oil	19	x	11	x					
		Electric Heat Pump	22	x	11	x					
	6	Electricity	22	x	19	x	x				
		Gas	19	x	11	x					
		Oil	19	x	11	x					
		Electric Heat Pump	22	x	19	x	x				
	7	Electricity	26	x	19	x	x				
		Gas	26	x	11	x					
		Oil	26	x	11	x	x				
		Electric Heat Pump	26	x	19	x	x				
	8	Electricity	26	x	19	x	x				
		Gas	26	x	19	x					
		Oil	26	x	19	x	x				
		Electric Heat Pump	26	x	19	x	x				
Pennsylvania	6	Electricity	26	x	19	x	x	x			x
		Gas	26	x	11	x					x
		Oil	26	x	11	x		x			x
		Electric Heat Pump	26	x	11	x					x
	6	Electricity	26	x	19	x	x	x			
		Gas	26	x	11	x					
		Oil	26	x	11	x					
		Electric Heat Pump	26	x	19	x	x				

CONSERVATION MEASURES | RENEWABLE RESOURCE MEASURES

STATE	HUDMPS REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Pennsylvania (Continued)	7	Electricity	26	x	19	x	x	x			
		Gas	26	x	11	x					
		Oil	26	x	11	x					
		Electric Heat Pump	26	x	19	x	x				
	8	Electricity	26	x	19	x	x				x
		Gas	26	x	19	x					x
		Oil	26	x	19	x	x				x
		Electric Heat Pump	26	x	19	x	x				x
Rhode Island	6	Electricity	30	x	19	x	x	x			x
		Gas	26	x	11	x					x
		Oil	30	x	11	x					x
		Electric Heat Pump	30	x	19	x	x				x
South Carolina	2	Electricity	22	x		x		x			x
		Gas	19	x							
		Oil	19	x				x			
		Electric Heat Pump	19	x							
	3	Electricity	22	x	11	x		x			x
		Gas	22	x							
		Oil	22	x				x			x
		Electric Heat Pump	22	x							x
	4	Electricity	26	x	19	x		x			
		Gas	26	x	11	x					
		Oil	26	x	11	x		x			
		Electric Heat Pump	26	x	11	x					
South Dakota	7	Electricity	26	x	19	x	x	x			x
		Gas	26	x	11	x					
		Oil	26	x	11	x	x	x			
		Electric Heat Pump	26	x	19	x	x				x
	8	Electricity	26	x	19	x	x	x			x
		Gas	26	x	19	x	x				
		Oil	26	x	19	x	x	x			
		Electric Heat Pump	26	x	19	x	x				x
Tennessee	3	Electricity	22	x	11	x		x			
		Gas	22	x							
		Oil	22	x				x			
		Electric Heat Pump	22	x							
	4	Electricity	26	x	19	x					
		Gas	26	x	11	x					
		Oil	26	x	11	x		x			
		Electric Heat Pump	26	x	11	x					

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STATE	BUILDING REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows*	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Tennessee (Continued)	3	Electricity	26	x	19	x	x				
		Gas	22	x	11	x					
		Oil	19	x	11	x		x			
		Electric Heat Pump	26	x	11	x					
Texas	1	Electricity	13	x				x			x
		Gas	13	x							
		Oil	13	x				x			
		Electric Heat Pump	13	x							x
	2	Electricity	22	x		x		x		x	x
		Gas	13	x				x			x
		Oil	13	x				x			x
		Electric Heat Pump	13	x							x
	3	Electricity	26	x	11	x		x		x	x
		Gas	22	x							x
		Oil	22	x				x			x
		Electric Heat Pump	22	x							x
	4	Electricity	26	x	19	x		x		x	x
		Gas	26	x	11	x					x
		Oil	26	x	11	x		x			x
		Electric Heat Pump	26	x	11	x					x
	5	Electricity	26	x	19	x	x	x		x	x
		Gas	26	x	11	x		x			x
		Oil	26	x	11	x		x			x
		Electric Heat Pump	26	x	11	x					x
Utah	1	Electricity	26	x	19	x	x	x	x	x	
		Gas	26	x	11	x					
		Oil	26	x	11	x		x	x	x	
		Electric Heat Pump	26	x	11	x					
	2	Electricity	26	x	19	x	x	x	x	x	
		Gas	26	x	11	x					
		Oil	26	x	11	x		x	x	x	
		Electric Heat Pump	26	x	19	x	x				
	3	Electricity	26	x	19	x	x	x	x	x	
		Gas	26	x	11	x					
		Oil	26	x	11	x		x	x	x	
		Electric Heat Pump	26	x	19	x	x				
	4	Electricity	26	x	19	x	x	x	x	x	
		Gas	26	x	11	x					
		Oil	26	x	19	x	x	x	x	x	
		Electric Heat Pump	26	x	19	x	x				

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STATE	BUILDING REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows*	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
Vermont	7	Electricity	38	x	19	x	x				x
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	38	x	19	x	x				x
	8	Electricity	38	x	19	x	x				
		Gas	30	x	19	x	x				
		Oil	38	x	19	x	x				
		Electric Heat Pump	38	x	19	x	x				
Virginia	3	Electricity	30	x	11	x		x			x
		Gas	22	x							x
		Oil	22	x				x			x
		Electric Heat Pump	22	x							x
	4	Electricity	30	x	19	x		x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					
	5	Electricity	30	x	19	x	x	x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	11	x					
	6	Electricity	30	x	19	x	x	x			
		Gas	30	x	11	x					
		Oil	30	x	11	x		x			
		Electric Heat Pump	30	x	19	x	x				
Washington	6	Electricity	30	x	19	x	x				
		Gas	25	x	11	x					
		Oil	25	x	11	x					
		Electric Heat Pump	30	x	19	x	x				
	7	Electricity	38	x	19	x	x				
		Gas	38	x	11	x					
		Oil	38	x	11	x					
		Electric Heat Pump	38	x	19	x	x				
	8	Electricity	38	x	19	x	x				
		Gas	38	x	19	x	x				
		Oil	38	x	19	x	x	x			
		Electric Heat Pump	38	x	19	x	x				
West Virginia	5	Electricity	30	x	19	x	x	x			
		Gas	30	x	11	x					
		Oil	30	x	11	x					
		Electric Heat Pump	30	x	11	x					

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STATE	HDD/WIN REGION	CATEGORY OF BUILDING	Ceiling Insulation (R-Value)*	Wall Insulation	Floor Insulation (R-Value)*	Storm or Thermal Windows	Storm or Thermal Doors	Solar Domestic Hot Water Systems	Active Solar Space Heating Systems	Combined Active Solar Space Heating & Solar Domestic Hot Water Systems	Wind Energy Devices
West Virginia (continued)	6	Electricity	38	x	19	x	x	x			
		Gas	38	x	11	x					
		Oil	38	x	11	x					
		Electric Heat Pump	38	x	19	x	x	x			
Wisconsin	7	Electricity	38	x	38	x	x	x			x
		Gas	38	x	11	x					
		Oil	38	x	11	x					x
		Electric Heat Pump	38	x	19	x	x				
	8	Electricity	38	x	19	x	x				x
		Gas	38	x	19	x	x				x
		Oil	38	x	19	x	x				x
		Electric Heat Pump	38	x	19	x	x				x
Wyoming	7	Electricity	38	x	19	x	x				
		Gas	38	x	11	x					
		Oil	38	x	11	x		x	x	x	
		Electric Heat Pump	38	x	19	x	x				
	8	Electricity	38	x	19	x	x				x
		Gas	38	x	19	x	x				
		Oil	38	x	19	x	x	x	x	x	
		Electric Heat Pump	38	x	19	x	x				x
Puerto Rico	1	Electricity	19	x				x			x
		Gas	19	x				x			x
		Oil	19	x				x			x
		Electric Heat Pump	19	x							x

These R-Values are minimum. The State may propose, in a State Plan, either (1) to substitute a higher level, subject to the Secretary's approval, as the program measure, or (2) to offer other levels (higher or lower) as States measures in addition to the program measures.

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January 16, 1981

Part XIV

Department of Education

Office of Elementary and Secondary Education

Asbestos Detection and Control: Local Educational Agencies: Asbestos Detection and State Plan: State Educational Agencies; Final Regulations

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education

34 CFR Parts 230 and 231

Asbestos Detection and Control: Local Educational Agencies; Asbestos Detection and State Plan: State Educational Agencies

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education issues these regulations to implement the Asbestos School Hazard Detection and Control Act of 1980. These regulations establish procedures to make available Federal grants to assist local educational agencies (LEAs) and State educational agencies (SEAs) in the identification of asbestos hazards in school buildings and Federal interest-free loans to LEAs to correct those hazards.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Dr. Herman Goldberg, U.S. Department of Education, Room 2079, FOB-6, 400 Maryland Avenue, SW., Washington, D.C. 20202. Telephone: (202) 245-8094.

SUPPLEMENTARY INFORMATION: Regulations to implement the Asbestos School Hazard Detection and Control Act of 1980 (the Act) were published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on September 17, 1980 (45 FR 61950). The purposes of the Act and the major provisions of the proposed regulations were outlined in the preamble to the NPRM.

The Department of Education received a number of comments from the public on those proposed regulations. A summary of the comments and the Secretary's responses, including changes made in the regulations, is attached as Appendix F to this document.

Members of the Asbestos Task Force, an advisory body established in accordance with the Act, played a significant role in reviewing the regulations and the comments, particularly with regard to the scientific procedures for asbestos detection and control. The Environmental Protection Agency, the source of many of those procedures and a member agency of the Task Force, was also helpful to the Secretary in preparing the Secretary's responses to comments requiring scientific expertise.

Members of the Task Force suggested a number of changes in the proposed regulations that reflect their scientific and technical expertise in asbestos-related activities. These changes, which were adopted by the Secretary, are summarized below.

1. The statutory definition of "imminent hazard to the health and safety," which was paraphrased in the proposed regulations, has been changed. The Task Force believes that the change will make the definition more precise scientifically and, thus, less confusing to school districts.

2. The statutory term "likelihood of leakage of asbestos fibers," which appeared in several sections of the proposed regulations, has been changed to read "likelihood of *release* of asbestos fibers." The Task Force believes that the revised language is more precise and more in keeping with current usage.

3. The "Asbestos Exposure Assessment Algorithm," which appeared as Appendix A to the proposed regulations, has been revised. The Task Force believes that a less rigid system for guiding school districts in evaluating the health risks associated with the likelihood of release of asbestos fibers is preferable. The new document, entitled "Guidance System for Assessing Exposure to Asbestos," appears as Appendix B to these regulations. A more detailed summary of the changes made to the original algorithm is contained in the introduction to the new document.

4. A new paragraph has been added to § 230.43 ("What standards does a grantee apply in determining the qualifications of a contractor to carry out an asbestos detection program?"). The Task Force believes this new paragraph will help a grantee avoid a possible conflict-of-interest problem by hiring to carry out its asbestos detection project a contractor different from the one it might later consider hiring to carry out its asbestos control project.

5. The regulations in § 230.11(b) make it clear that loans cannot be provided for management systems. However, the Secretary and the Task Force encourage schools to consider management systems where there are low risks and when corrective actions are not necessary.

At present no funds have been appropriated under the Act for either the Asbestos Detection Program or the Asbestos Control Program. Despite the lack of an appropriation, however, every SEA should note that the Act requires it to have submitted a State plan as described in Part 231 of these regulations by December 15, 1980. Those SEAs that have already submitted their State plans based on the provisions in the NPRM will have an opportunity to amend plans that do not comply with the amended § 231.70(b)(1) of these regulations but will be held accountable for meeting only the statutory requirements.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

Dated: January 9, 1981.

Shirley M. Hufstedler,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number not assigned)

The Secretary amends Title 34 of the Code of Federal Regulations by adding a new Part 230 to read as follows:

PART 230—ASBESTOS DETECTION AND CONTROL: LOCAL EDUCATIONAL AGENCIES

Subpart A—General

Sec.

230.1 Asbestos Detection and Control: Local Educational Agencies.
230.2 Who is eligible for assistance under these programs?
230.3 What regulations apply to these programs?
230.4 What definitions apply to these programs?

Subpart B—What Kinds of Projects Does the Department of Education Assist Under These Programs?

230.10 What kinds of activities are assisted under the LEA Asbestos Detection Program?
230.11 What kinds of activities are assisted under the LEA Asbestos Control Program?

Subpart C—How Does One Apply Under These Programs?

230.20 How does one apply for a grant under the LEA Asbestos Detection Program?
230.21 How does one apply for a loan under the LEA Asbestos Control Program?
230.22 In what circumstances may an LEA apply for a grant or loan greater than 50 percent?
230.23 What records must an LEA maintain?

Subpart D—How Does the Secretary Make an Award?

230.30 How does the Secretary determine the amount of a grant for an asbestos detection project?
230.31 What criteria does the Secretary apply in selecting loan recipients?
230.32 How does the Secretary determine the amount of a loan for an asbestos control project?
230.33 What criteria does the Secretary apply in considering an application for a grant or loan greater than 50 percent?
230.34 What criteria does the Secretary apply if appropriations do not meet the 50 percent levels of assistance?

Subpart E—What Conditions Must Be Met by a Recipient?

Procedures and Standards for an Asbestos Detection Project

230.40 What are the procedures for conducting an asbestos detection project?
230.41 What are the safety measures for conducting an asbestos detection project?
230.42 How does a grantee evaluate the likelihood of release of asbestos fibers?
230.43 What standards does a grantee apply in determining the qualifications of a contractor to carry out an asbestos detection project?
230.44 [Reserved]

Procedures and Standards for an Asbestos Control Project

230.45 What are the procedures for containing or removing asbestos materials?
230.46 What are the procedures for replacing building materials and restoring school buildings?
230.47 What standards does a recipient of a loan apply in determining the qualifications of a contractor to carry out an asbestos control project?
230.48–230.49 [Reserved]

Fiscal Requirements

230.50 What are the rules for repayment of a loan?

Subpart F—What Are the Administrative Responsibilities of a Grantee?

230.60 What report must a grantee submit?

Authority: The Asbestos School Hazard Detection and Control Act of 1980, Pub. L. 96–270 (20 U.S.C. 3601–3611, 94 Stat. 487) and Section 414(a) of the Department of Education Organization Act, Pub. L. 96–88 (20 U.S.C. 3474(a), 93 Stat. 685).

Subpart A—General

§ 230.1 Asbestos Detection and Control: Local Educational Agencies.

The Asbestos Detection and Control Programs for Local Educational Agencies (LEAs) consist of—

(a) *LEA Asbestos Detection Program.* This program provides Federal grants to LEAs to identify asbestos hazards in school buildings; and

(b) *LEA Asbestos Control Program.* This program provides Federal interest-free loans to LEAs to correct imminent hazards to the health and safety of school children and school employees posed by the presence of asbestos in school buildings.

(20 U.S.C. 3604(a)(1)(A); 20 U.S.C. 3605(a)(1) and (2))

§ 230.2 Who is eligible for assistance under these programs?

(a)(1) An LEA [1] is eligible for a grant under the LEA Asbestos Detection Program if that LEA proposes to conduct or has not completed before January 1, 1976 an asbestos detection project that is in conformity with the procedures and standards in §§ 230.40 through 230.42, and 230.43 if applicable.

(2) As used in paragraph (a)(1) of this section and throughout this part, the term "conformity" in reference to any asbestos detection project conducted prior to the effective date of these regulations means substantial conformity.

(b)(1) An LEA is eligible for a loan under the LEA Asbestos Control Program if that LEA—

(i) Has conducted an asbestos detection project in conformity with the procedures and standards in §§ 230.40 through 230.42, and 230.43 if applicable; and

(ii) Proposes to carry out or has not completed before January 1, 1976 an asbestos control project—

(A) In conformity with the procedures and standards in §§ 230.45 through 230.47, as applicable;

(B) Involving more than 2,500 square feet of surface in the school buildings in the LEA; and

(C) Meeting the criteria established by the Secretary under Section 7(a)(2) of the Act. These criteria will be established if appropriations become available for the LEA Asbestos Control Program.

(2) As used in paragraphs (b)(1)(i) and (b)(1)(ii)(A) of this section and throughout this part, the term "conformity" in reference to any asbestos control project conducted prior to the date—which will be published in the Federal Register—when loan applications will be accepted means substantial conformity.

(20 U.S.C. 3604(a)(1)(A) and (b)(3); 20 U.S.C. 3605(a)(2) and (c)(1) and (3))

§ 230.3 What regulations apply to these programs?

(a) In addition to the regulations in this Part 230, the following regulations apply to the LEA Asbestos Detection Program and the LEA Asbestos Control Program:

(1) The Education Division General Administrative Regulations (EDGAR) in 34 CFR Part 77 (General) except the following definitions:

(i) Award.

(ii) Recipient.

(2) The regulations in 34 CFR Part 231 (Asbestos Detection and State Plan: State Educational Agencies).

(b) In addition to the regulations in paragraph (a) of this section, the LEA Asbestos Detection Programs is governed by the regulations in EDGAR, 34 CFR Part 75 (Direct Grant Programs) except the following:

(1) Sections 75.107 and 75.108 (pertaining to applications for new grants under discretionary grant program and under formula grant programs).

(2) Section 75.111 (pertaining to the description of a project).

(3) Section 75.116 (pertaining to the demonstration of capability).

(4) Sections 75.200 through 75.215 (pertaining to the selection of new projects, including selection criteria).

(5) Sections 75.217 through 75.236 (pertaining to selection procedures and procedures for making a grant).

(20 U.S.C. 3474(a))

§ 230.4 What definitions apply to these programs?

The following definitions apply to the LEA Asbestos Detection Program and the LEA Asbestos Control Program:

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
EDGAR
Grant
Grantee
Nonprofit
Private
Project
Secretary
State educational agency (SEA)

(b) *Definitions that apply to this part.* The following definitions apply to this part:

"Act" means the Asbestos School Hazard Detection and Control Act of 1980 (Pub. L. 96–270).

"Asbestos" means—

(a) Chrysotile, amosite, or crocidolite; or

(b) In fibrous form, tremolite-asbestos, anthophyllite-asbestos, or actionolite-asbestos.

"Asbestos control project" means activities—described in § 230.11—designed to correct imminent hazards to the health and safety of school children and school employees posed by the presence of asbestos in school buildings.

"Asbestos detection project" means activities—described in § 230.10—designed to identify asbestos hazards in school buildings.

"Award" means—

[1] (Note: As used in these programs, the term LEA includes the governing authority of a nonprofit private elementary or secondary school as defined in §230.4(b))

(1) The amount of funds that the Secretary provides to a grantee under the LEA Asbestos Detection Program; or

(2) The amount of funds that the Secretary provides to an applicant for a loan under the LEA Asbestos Control Program.

"Friable" means able to be crumbled, pulverized, or reduced to powder by hand.

"Imminent hazard to the health and safety" means, with reference to asbestos, that the asbestos is contained in building material whose fibers could be released into a school building environment.

"Local educational agency" means—

(1) An LEA as defined in EDGAR, 34 CFR 77.1;

(2) The governing authority of a nonprofit private elementary or secondary school, as defined in Section 11 of the Act; or

(3) A school of an agency of the United States.

"Management system" is a system in which the condition of materials that contain asbestos are monitored to ascertain any changes in the materials that may require direct corrective action.

"Recipient" means—

(1) A grantee under the LEA Asbestos Detection Program; or

(2) An applicant that receives a loan under the LEA Asbestos Control Program.

"School buildings" means—

(1) Structures suitable for use as classrooms, laboratories, libraries, school eating facilities, or school facilities used for the preparation of food;

(2) Gymnasiums or other facilities designed especially for athletic or recreational activities included in an academic course in physical education in the regular curriculum;

(3) Other facilities used for the instruction of students, for research, or for the administration of educational or research programs; or

(4) Maintenance, storage, or utility facilities essential to the operation of any of the facilities listed in paragraphs (1) through (3) of this definition.

"State" means—

(1) A State as defined in EDGAR, 34 CFR 77.1; and

(2) The Bureau of Indian Affairs.

(20 U.S.C. 3610; 20 U.S.C. 2854; 34 CFR 77.1)

Subpart B—What Kinds of Projects Does the Department of Education Assist Under These Programs?

§ 230.10 What kinds of activities are assisted under the LEA Asbestos Detection Program?

(a) The Secretary provides a grant to an eligible applicant under the LEA Asbestos Detection Program for the following activities conducted in accordance with the procedures and standards in §§ 230.40 through 230.42, and 230.43 if applicable:

(1) Making a visual inspection of school buildings to detect friable building materials.

(2) Collecting samples of the friable building materials referred to in paragraph (a)(1) of this section, including insulation materials.

(3) Analyzing the samples referred to in paragraph (a)(2) of this section to determine the presence of asbestos and the level of asbestos content.

(4) Determining the extent of the imminent hazards posed by the asbestos referred to in paragraph (a)(3) of this section by evaluating the likelihood of the release of fibers of that asbestos into the school environment.

(b) If appropriate, the Secretary may also provide funds for administrative costs incurred in the preparation and supervision of the LEA Asbestos Detection Program.

(20 U.S.C. 3604(b)(4))

§ 230.11 What kinds of activities are assisted under the LEA Asbestos Control Program?

(a) The Secretary provides a loan to an eligible applicant under the LEA Asbestos Control Program for the following activities conducted in accordance with the procedures and standards in §§ 230.45 through 230.47, as applicable:

(1) Containing or removing school building materials that contain asbestos posing an imminent hazard to the health and safety of school children and school employees.

(2) Replacing the removed materials referred to in paragraph (a) of this section with other appropriate building materials.

(3) Making repairs the Secretary considers necessary to restore school buildings to conditions comparable to those that existed before the activities in paragraphs (a) (1) and (2) of this section were carried out.

(b) The Secretary does not provide loans for an asbestos management system.

Note.—Although the asbestos control program does not fund asbestos management systems, the Secretary and the Asbestos Hazards School Safety Task Force encourage schools to carefully consider this alternative before engaging in costly control projects. These projects may not be funded if a management system is more appropriate and cost-effective.

(Cross-Reference: 34 CFR 230.31)

(20 U.S.C. 3605(a)(2))

Subpart C—How Does One Apply Under These Programs?

§ 230.20 How does one apply for a grant under the LEA asbestos detection program?

(a) To apply for a grant under the LEA Asbestos Detection Program, an applicant must file with the Secretary an application that—

(1) Meets the requirements of—

(i) EDGAR, 34 CFR 75.109 and 75.110; and

(ii) EDGAR, 34 CFR 75.112 through 75.115;

(2) Contains a description of the methods to be used by the LEA to determine whether hazardous concentrations of asbestos fibers or materials emitting those fibers exist in school buildings under the jurisdiction of the applicant agency;

(3) Contains an estimate of the total cost of the detection project, including whatever detailed descriptions of the costs of each component of the project the Secretary may require;

(4) Designates the party that will conduct the detection project and describes that party's qualifications for conducting that project;

(5) Contains assurances that—

(i) The project will be carried out in conformity with the requirements in §§ 230.40 through 230.42;

(ii) Any party employed to carry out the project will satisfy the competency standards established under § 230.43; and

(6) Contains any other information or assurances the Secretary may require.

(b) An applicant for a grant for an asbestos detection project conducted prior to the date of its application but not completed before January 1, 1976 shall include in its application—in addition to the information required in paragraph (a) of this section—an assurance that it conducted the project in conformity with the requirements in §§ 230.40 through 230.42, and 230.43 if applicable.

(20 U.S.C. 3604(b)(1) and (3); 34 CFR 75.109-110; 34 CFR 75.112-115)

§ 230.21 How does one apply for a loan under the LEA Asbestos Control Program?

(a) To apply for a loan under the LEA Asbestos Control Program, an applicant must file with the Secretary an application containing—

(1) All information the Secretary may require, including information describing—

(i) The nature of the asbestos problem for which the loan is sought;

(ii) The asbestos content of the material to be contained or removed by the LEA, as determined from the results of an asbestos detection project conducted in conformity with the requirements in §§ 230.40 through 230.42, and 230.43 if applicable;

(iii) The methods to be used to contain or remove the asbestos materials, in conformity with the requirements in §§ 230.45 through 230.47, as applicable; and

(iv) Any other pertinent details relating to the control project; and

(2) Assurances that—

(i) The LEA conducting the asbestos control project—

(A) Will notify in writing any employee engaged in any activity to carry out the project of the hazards of working with asbestos; and

(B) Will require each employee to use all appropriate safety procedures to minimize health risks;

(ii) The LEA will not permit a child, or a school employee not engaged in asbestos containment, removal, or replacement activity to be in the vicinity of such activity; and

(iii) The LEA will pay employees engaged in containment, removal, or replacement activities to carry out the asbestos control project, reasonable rates of pay, as established by the Secretary on the basis of prevailing wage rates in the location of that work.

(b) An applicant for a loan for an asbestos control project conducted prior to the date of its application but not completed before January 1, 1976 shall include in its application—in addition to the information required in paragraph (a) of this section—an assurance that it conducted the project in conformity with the requirements in §§ 230.45 through 230.47, as applicable.

(20 U.S.C. 3605(c)(1) and (3))

§ 230.22 In what circumstances may an LEA apply for a grant or loan greater than 50 percent?

(a) If an LEA believes that it has limited resources and would be unable to participate in the LEA Asbestos Detection Program or the LEA Asbestos Control Program without an increased award, the LEA may submit to the Secretary, together with its application, a request for a grant or loan greater than the amount provided by the Secretary under §§ 230.30 or 230.32.

(b) The LEA shall include in its request for an increased award information that substantiates its claim of limited financial resources. This may include the most recently available data describing any applicable factors listed in § 230.33(b).

(20 U.S.C. 3604(a)(2); 20 U.S.C. 3605(a)(3); 20 U.S.C. 3474(a))

§ 230.23 What records must an LEA maintain?

An LEA that applies for a grant under the LEA Asbestos Detection Program or a loan under the LEA Asbestos Control Program shall maintain and make available to the Secretary on request whatever records are necessary to substantiate claims—including cost claims—in the LEA's application.

(20 U.S.C. 3604(b)(1); 20 U.S.C. 3605(c)(1); 20 U.S.C. 3474(a))

Subpart D—How Does the Secretary Make an Award?

§ 230.30 How does the Secretary determine the amount of a grant for an asbestos detection project?

(a) Except as provided in §§ 230.33 and 230.34, the Secretary makes a grant equal to 50 percent of the costs that an eligible LEA incurs or has incurred in conducting an asbestos detection project.

(b)(1) The amount awarded by the Secretary is the Federal share of the grantee's project.

(2) This applies whether Federal funds for the project are paid—

(i) Directly to the LEA;

(ii) To the SEA under 34 CFR Part 231 for reimbursement of funds it has paid to the LEA for this project; or

(iii) To both the LEA and the SEA.

(20 U.S.C. 3604(a)(2) and (a)(1)(B))

§ 230.31 What criteria does the Secretary apply in selecting loan recipients?

In selecting loan recipients under the LEA Asbestos Control Program, the Secretary applies the following criteria:

(a)(1) The likelihood of release of asbestos fibers into a school environment, as determined under the Guidance System for Assessing Potential Asbestos Problems in Schools in Appendix B of these regulations; or

(2) Any other evidence of the extent of the hazards caused by the presence of asbestos.

(b)(1) The extent to which the corrective action proposed by the applicant will reduce the imminent hazards to the health and safety of school children and school employees; or

(2) The extent to which corrective action that the applicant took in a control project not completed before January 1, 1976 was successful in reducing imminent hazards to the health and safety of school children and school employees.

(c)(1) The extent to which the corrective action proposed by the applicant is cost-effective compared to other techniques including management of material containing asbestos; or

(2) The extent to which corrective action that the applicant took in a control project not completed before January 1, 1976 was cost-effective compared to other techniques, including management of material containing asbestos.

(20 U.S.C. 3606(a)(2))

§ 230.32 How does the Secretary determine the amount of a loan for an asbestos control project?

Except as provided in §§ 230.33 and 230.34, the Secretary may make an interest-free loan equal to 50 percent of the costs that an eligible LEA incurs or has incurred in conducting an asbestos control project.

(20 U.S.C. 3605(a)(2))

§ 230.33 What criteria does the Secretary apply in considering an application for a grant or loan greater than 50 percent?

(a) The Secretary may increase the amount of a grant or loan if the Secretary determines that an eligible LEA has limited financial resources and would be unable to participate in the LEA Asbestos Detection Program or the LEA Asbestos Control Program without an increased award.

(b) The Secretary considers one or more of the following factors in making the determination described in paragraph (a) of this section:

(1) A measure of financial need used by the State in which the LEA is located.

(2) The per capita income of the LEA or county.

(3) The local school millage rate compared with the millage rate that the State determines to be reasonable for that LEA or county.

(4) The ratio, expressed as a percentage, of the cost of the project to the total budget of the LEA.

(5) Any other factor that demonstrates that the LEA has limited financial resources.

(20 U.S.C. 3604(a)(2); 20 U.S.C. 3605(a)(3))

§ 230.34 What criteria does the Secretary apply if appropriations do not meet the 50 percent levels of assistance?

(a) If appropriations under the LEA Asbestos Detection Program or the LEA Asbestos Control Program do not meet the levels of assistance described in §§ 230.30 and 230.32, the Secretary determines which applicant LEAs have the greatest financial need for receiving

funds to conduct asbestos detection or control activities.

(b) In making the determination described in paragraph (a) of this section, the Secretary considers:

(1) One or more of the factors in paragraph (b) of § 230.33; and

(2) One or more of the following factors:

(i) The square footage of the structures to be included in the project compared with the total square footage of school buildings in the LEA.

(ii) The known or estimated asbestos content in friable building materials used in the LEA's school buildings.

(iii) The likelihood of release of asbestor fibers in building materials used in the LEA's school buildings.

(iv) The number of persons using the LEA's school buildings who are or will be exposed to asbestos that poses an imminent hazard.

(v) Any other factor that demonstrates the extent of the LEA's financial need for receiving funds to conduct asbestos detection or control activities.

(20 U.S.C. 3611(c); 20 U.S.C. 1226a)

Subpart E—What Conditions Must Be Met by a Recipient?

Procedures and Standards for an Asbestos Detection Project

§ 230.40 What are the procedures for conducting an asbestos detection project?

In conducting an asbestos detection project, a grantee under the LEA Asbestos Detection Program shall adhere to the following procedures:

(a) For making a visual inspection of school buildings, the procedures in Part I of Appendix A.

(b) For sampling friable materials, the procedures in Part II of Appendix A.

(c) For analyzing friable materials to determine their asbestos content, the procedures in Part III of Appendix A.

(d) For evaluating the likelihood of release of asbestos fibers, the procedures referred to in § 230.42.

(20 U.S.C. 3606(a)(1) and (c))

§ 230.41 What are the safety measures for conducting an asbestos detection project?

A grantee under the LEA Asbestos Detection Program shall comply with the best available safety measures for conducting its asbestos detection project. A grantee is considered by the Secretary to be in compliance with this section if that grantee adheres to the following safety measures:

(a) Material is sampled only when the area in which that material is located is not in use.

(b) Only persons needed for sampling are present.

(c) The sampling container is held away from the face during the actual collection of the sample.

(d) The material is not disturbed more than is necessary.

Note.—The Secretary and the Task Force recommend that when persons take bulk samples, they use respirators or other respiratory protection.

(20 U.S.C. 3606(a)(1) and (c))

§ 230.42 How does a grantee evaluate the likelihood of release of asbestos fibers?

A grantee under the LEA Asbestos Detection Program shall apply the Guidance System for Assessing Potential Asbestos Problems in Schools in Appendix B of these regulations to evaluate the likelihood of the release of asbestos fibers into a school environment.

(20 U.S.C. 3606(a)(1) and (c))

§ 230.43 What standards does a grantee apply in determining the qualifications of a contractor to carry out an asbestos detection project?

(a) A grantee under the LEA Asbestos Detection Program may, if it so chooses, select a contractor to carry out any or all of the activities under the grantee's asbestos detection project.

(b) A grantee that selects a contractor to carry out any or all of the activities under the grantee's asbestos detection project shall determine the qualifications of that contractor by applying the following standards:

(1) For making a visual inspection of school buildings, the contractor's knowledge of and ability to comply with the procedures in Part I of Appendix A.

(2) For sampling friable materials, the contractor's knowledge of and ability to comply with the procedures in Part II of Appendix A.

(3)(i) For analyzing friable materials to determine their asbestos content, the contractor's knowledge of and ability to comply with the analytic techniques in Part III of Appendix A.

(ii) In addition, the Secretary encourages the grantee to consult the results of the Asbestos Analytic Laboratory Proficiency Program developed by the Environmental Protection Agency (EPA), which assessed the ability of participating laboratories to analyze materials for asbestos.

(iii) The Secretary makes available to SEAs on request the results of the analytical proficiency program referred to in paragraph (b)(3)(ii) of this section.

(4)(i) For evaluating the likelihood of release of asbestos fibers, the contractor's knowledge of and familiarity with the Guidance System for Assessing Potential Asbestos Problems in Schools in Appendix B of these regulations.

(ii) In addition, the Secretary encourages the grantee to consider the contractor's—

(A) Experience with the guidance system referred to in paragraph (b)(4)(i) of this section; and

(B) Past participation in training programs for using the guidance system or an EPA algorithm.

(iii) The Secretary makes available to SEAs on request training materials and instructional aids to assist contractors in applying the guidance system referred to paragraph (b)(4)(i) of this section.

(c) The Secretary encourages a grantee to consider hiring a different contractor to carry out the grantee's control activities than the one the grantee hired to carry out its detection activities.

(20 U.S.C. 3606(a)(1) and (c))

§ 230.44 [Reserved]

Procedures and Standards for an Asbestos Control Project

§ 230.45 What are the procedures for containing or removing asbestos materials?

(a) A recipient of a loan under the LEA Asbestos Control Program shall comply with the applicable procedures in Appendix C of these regulations if the asbestos control project involves—

(1) Removal of asbestos materials; or

(2) Containment of asbestos materials and there is a significant risk of friable materials being released in the air.

(b) If the asbestos control project involves containment of asbestos materials and there is *no* significant risk of friable materials being released in the air, less restrictive procedures than those in Appendix C may be appropriate. Nevertheless, the Secretary recommends, in this case that the recipient follow the applicable procedures in Appendix C.

(20 U.S.C. 3606(b)(1) and (c))

§ 230.46 What are the procedures for replacing building materials and restoring school buildings?

(a) In replacing building materials and restoring a school building to its previous condition, the recipient of a loan under the LEA Asbestos Control Program shall use materials that do not pose an imminent hazard to the health and safety of school children and school employees.

(b) In conducting replacement and restoration activities, the recipient of a loan shall use the most appropriate method. This method should be the most cost-effective.

(c) In conducting restoration activities, the recipient of a loan under the LEA Asbestos Control Program may use those funds to make only those repairs the Secretary considers necessary to restore a school building to a condition comparable to the condition that existed before the recipient carried out activities in § 230.11(a)(1).

(20 U.S.C. 3606(b)(1))

§ 230.47 What standards does a recipient of a loan apply in determining the qualifications of a contractor to carry out an asbestos control project?

(a) If the recipient of a loan under the LEA Asbestos Control Program selects a contractor to contain or remove asbestos materials as part of the recipient's asbestos control project, the recipient shall determine the qualifications of that contractor on the basis of the contractor's—

(1) Knowledge of and ability to comply with EPA's National Emission Standards for Hazardous Air Pollutants, 40 CFR 61.01 through 61.25;

(2) Knowledge of and ability to comply with the standards in the Occupational Safety and Health Act (OSHA) asbestos regulations, 29 CFR 1910.1001;

(3)(i) Knowledge of and ability to comply with the containment and removal practices described in Appendix C of these regulations.

(ii) In addition, the Secretary encourages the grantee to consider the contractor's experience in carrying out asbestos containment and removal operations and past participation in training programs for proper containment and removal operations.

(iii) The Secretary makes available to SEAs on request training materials and instructional aids to assist contractors in carrying out proper containment and removal operations.

(b) If the recipient of a loan under the LEA Asbestos Control Program selects a contractor to replace building materials and restore school buildings as part of the recipient's asbestos control project, the recipient shall determine the qualifications of that contractor on the basis of the contractor's knowledge of and ability to comply with the requirement of § 230.46(a).

(20 U.S.C. 3606 (b)(2) and (c))

§§ 230.48–230.49 [Reserved]

Fiscal Requirements

§ 230.50 What are the rules for repayment of a loan?

The following provisions apply to an interest-free loan to an LEA under the LEA Asbestos Control Program:

(a) The loan period begins on the effective date of the loan agreement.

(b) The LEA shall repay the loan within the period determined by the Secretary, but not to exceed 20 years.

(c) All other terms and conditions of the loan are contained in a loan agreement that the Secretary prepares and sends to the LEA.

(20 U.S.C. 3605(b))

Subpart F—What Are the Administrative Responsibilities of a Grantee?

§ 230.60 What report must a grantee submit?

In addition to any reports required by EDGAR, 34 CFR Part 75, a grantee under the LEA Asbestos Detection Program shall, not later than 120 days after receiving its grant, file with the Secretary a report that shall include—

(a) A detailed accounting of the funds used to carry out the grantee's asbestos detection project; and

(b) A description of—

(1) The detection activities that the grantee conducted;

(2) The results of the asbestos detection project, incuding any findings of the presence in school building materials of asbestos that poses an imminent hazard to the health and safety of school children and school employees; and

(3) The grantee's plans for correcting any imminent asbestos hazards that it detected.

(20 U.S.C. 3604(c); 34 CFR Part 75)

Note.—Information in the following part—34 CFR Part 231—has a direct bearing on programs carried out under this Part 230. Readers are encouraged to read the following part for that information.

The Secretary amends Title 34 of the Code of Federal Regulations by adding a new Part 231 to read as follows:

PART 231—ASBESTOS DETECTION AND STATE PLAN: STATE EDUCATIONAL AGENCIES

Subpart A—General

Sec.

231.1 Asbestos Detection and State Plan: State Educational Agencies.
231.2 Who is eligible for a grant under the SEA Asbestos Detection Program?
231.3 What regulations apply to this part?
231.4 What definitions apply to this part?

Subpart B—[Reserved]

Subpart C—How Does One Apply for a Grant Under the SEA Asbestos Detection Program?

231.20 How does an SEA apply for a grant under the SEA Asbestos Detection Program?
231.21 In what circumstances may an SEA apply for a grant greater than 50 percent?
231.22 What records must an SEA maintain?

Subpart D—How Does the Secretary Make an Award?

231.30 How does the Secretary determine the amount of a grant under the SEA Asbestos Detection Program?
231.31 In what circumstances may the Secretary award a grant greater than 50 percent?
231.32 What criteria does the Secretary apply if appropriations do not meet the 50 percent level of assistance?

Subpart E—[Reserved]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

231.50. What report must a grantee submit?

Subpart G—[Reserved]

Subpart H—What Is the State Plan Under This Act?

231.70 What must a State plan contain?
231.71 What information must a State distribute to its LEAs?
231.72 What records must a State maintain?
231.73 What reports must a State submit?
Appendix A—Procedures for Conducting an Asbestos Detection Project
Appendix B—Guidance System for Assessing Potential Asbestos Problems in Schools
Appendix C—Procedures for Containing and Removing Asbestos-Containing Building Materials
Appendix D—Comments and Responses

Authority: The Asbestos School Hazard Detection and Control Act of 1980, Pub. L. 96-270 (20 U.S.C. 3601–3611, 94 Stat. 487) and Section 414(a) of the Department of Education Organization Act, Pub. L. 96-88 (20 U.S.C. 3474(a), 93 Stat. 685).

Subpart A—General

§ 231.1 Asbestos Detection and State Plan: State Educational Agencies.

The Asbestos Detection Program and State Plan for State Educational Agencies (SEAs) consists of—

(a) *SEA Asbestos Detection Program.* This program provides Federal grants to SEAs to reimburse those States that have made or are making grants to their local educational agencies (LEAs) [1] to conduct asbestos detection projects; and

(b) *State Plan.* The SEA of any State that receives Federal funds for the administration of any applicable program—as defined in Section 400(c)(1)(A) of the General Education Provisions Act—shall submit to the Secretary a plan as described in Subpart H of these regulations. Under the Asbestos School Hazard Detection and Control Act of 1980, the SEA shall

[1] (Note: As used in this part the term LEA includes the governing authority of a nonprofit private elementary or secondary school as defined in 34 CFR 230.4(b))

submit this plan regardless of whether the SEA or its LEAs participate in the SEA or LEA asbestos detection programs.

(20 U.S.C. 3604(a)(1)(B); 20 U.S.C. 3603(a))

§ 231.2 Who is eligible for a grant under the SEA Asbestos Detection Program?

An SEA is eligible for a grant under the SEA Asbestos Detection Program if the State—through the SEA or other appropriate State agency—has made or is making grants to its LEAs to conduct asbestos detection projects—

(a) Conducted on or after the effective date of these regulations in conformity with the procedures and standards in 34 CFR 230.40 through 230.42, and 230.43 if applicable; or

(b) Conducted prior to the effective date of these regulations, but not completed before January 1, 1976, in substantial conformity with the procedures and standards in 34 CFR 230.40 through 230.42, and 230.43 if applicable.

(20 U.S.C. 3604(a) (B); and (b)(3))

§ 231.3 What regulations apply to this part?

In addition to the regulations in this Part 231, the following regulations apply to Asbestos Detection and State Plan: State Educational Agencies:

(a) The Education Division General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs) and 34 CFR Part 77 (General) except the following:

(1) Sections 75.107 and 75.108 (pertaining to applications for new grants under discretionary grant programs and under formula grant programs).

(2) Section 75.111 (pertaining to the description of a project).

(3) Section 75.116 (pertaining to the demonstration of capability).

(4) Sections 75.200 through 75.215 (pertaining to the selection of new projects, including selection criteria).

(5) Sections 75.217 through 75.236 (pertaining to selection procedures and procedures for making a grant).

(b) The regulations in 34 CFR Part 230 (Asbestos Detection and Control: Local Educational Agencies).

(20 U.S.C. 3474(a))

§ 231.4 What definitions apply to this part?

The following definitions apply to Asbestos Detection and State Plan: State Educational Agencies:

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
EDGAR
Grant
Grantee
Nonprofit
Private
Project
Recipient
Secretary
State educational agency (SEA).

(b) *Definitions in 34 CFR Part 230.* The definitions in 34 CFR 230.4(b) (the definitions section of Asbestos Detection and Control: Local Educational Agencies) apply also to this Part 231 except the following:

Award
Recipient.

(c) As used in this part, the term "State plan" or "plan" means the plan referred to in § 231.1(b) and described in Subpart H of these regulations.

(20 U.S.C. 3610; 20 U.S.C. 2854; 34 CFR 77.1)

Subpart B—[Reserved]

Subpart C—How Does One Apply for a Grant Under the SEA Asbestos Detection Program?

§ 231.20 How does an SEA apply for a grant under the SEA Asbestos Detection Program?

(a) To apply for a grant under the SEA Asbestos Detection Program, an SEA must file with the Secretary an application that—

(1) Meets the requirements of—

(i) EDGAR, 34 CFR 75.109 and 75.110; and

(ii) EDGAR, 34 CFR 75.112 through 75.115;

(2) Contains a description of the methods to be used by the LEAs receiving grants from the State to determine whether hazardous concentrations of asbestos fibers or materials emitting those fibers exist in school buildings of the LEA;

(3) Contains an estimate of the total cost of LEA detection projects receiving grants from the State, including whatever detailed descriptions of the costs of the components of the projects the Secretary may require;

(4) Designates the parties conducting LEA detection projects that receive grants from the State, and describes those parties' qualifications for conducting those projects;

(5) Contains assurances that LEA detection projects receiving grants from the State are being carried out in conformity with the requirements in 34 CFR 230.40 through 230.42, and that parties employed to carry out those projects satisfy the competency standards established under 34 CFR 230.43; and

(6) Contains any other information or assurances the Secretary may require.

(b)(1) For asbestos detection projects conducted by its LEAs prior to the effective date of these regulations, but not completed before January 1, 1976, an assurance by the SEA that the LEAs conducted those projects in substantial conformity with the requirements in 34 CFR 230.40 through 230.42, and 230.43 if applicable; and

(2) For asbestos detection projects conducted by its LEAs on or after the effective date of these regulations, an assurance by the SEA that the LEAs conducted those projects in compliance with the requirements in 34 CFR 230.40 through 230.42, and 230.43 if applicable.

(20 U.S.C. 3604 (b)(1); and (b)(3); 34 CFR 75.109–75.110; 34 CFR 75.112–75.115)

§ 231.21 In what circumstances may an SEA apply for a grant greater than 50 percent?

(a) If an SEA believes that it has limited financial resources and would be unable to participate in the SEA Asbestos Detection Program without an increased award, the SEA may submit to the Secretary, together with its application, a request for a grant greater than the amount provided by the Secretary under § 231.30.

(b) The SEA shall include in its request for an increased award information that substantiates its claim of limited financial resources.

(20 U.S.C. 3604(a); 20 U.S.C. 3474(a))

§ 231.22 What records must an SEA maintain?

An SEA that applies for a grant under the SEA Asbestos Detection Program shall maintain and make available to the Secretary on request whatever records are necessary to substantiate claims—including cost claims—in the SEA's application.

(20 U.S.C. 3604(b)(1); 20 U.S.C. 3474(a))

Subpart D—How Does the Secretary Make an Award?

§ 231.30 How does the Secretary determine the amount of a grant under the SEA Asbestos Detection Program?

(a) Except as provided in §§ 231.31 and 231.32, the Secretary makes a grant to an SEA equal to 50 percent of that State's award to its LEAs to conduct asbestos detection projects.

(b) However, the Secretary may restrict the amount of the grant to the SEA to ensure that the Federal share of any LEA asbestos detection project in the State does not exceed the Federal share as specified in 34 CFR 230.30.

(20 U.S.C. 3604(a)(2))

§ 231.31 In what circumstances may the Secretary award a grant greater than 50 percent?

The Secretary may increase the amount of a grant if the Secretary determines that an eligible SEA has limited financial resources and would be unable to participate in the SEA Asbestos Detection Program without an increased award.

(20 U.S.C. 3604(a)(2))

§ 231.32 What criteria does the Secretary apply if appropriations do not meet the 50 percent level of assistance?

If appropriations under the Act do not meet the level of assistance described in § 231.30, the Secretary may determine which applicant SEAs have the greatest financial need for assistance under the SEA Asbestos Detection Program by—

(a) Considering in each of those States the percentage of LEAs that have requested State funds for detecting asbestos hazards; and

(b) Considering—according to one or more of the factors in each of paragraphs (b) (1) and (2) of 34 CFR 230.34—the needs of the LEAs that those SEAs have funded or are funding.

(20 U.S.C. 3611(c))

Subpart E—[Reserved]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

§ 231.50 What report must a grantee submit?

In addition to any reports required by EDGAR, 34 CFR 75, an SEA that receives a grant under the SEA Asbestos Detection Program shall, not later than 120 days after receiving its grant, file with the Secretary a report that shall include—

(a) A detailed accounting of the funds that LEAs have received from the State to conduct asbestos detection projects; and

(b) A description of—

(1) The asbestos detection projects conducted by LEAs with financial assistance from the State;

(2) The results of those asbestos detection projects, including any findings of the presence in school building materials of asbestos that poses an imminent hazard to the health and safety of school children and school employees; and

(3) The plans of the assisted LEAs for correcting any imminent asbestos hazards that those LEAs detected.

(20 U.S.C. 3604(c); 34 CFR Part 75)

Subpart G—[Reserved]

Subpart H—What Is the State Plan Under This Act?

§ 231.70 What must a State plan contain?

An SEA, as described in § 231.1(b)(1), shall submit to the Secretary not later than December 15, 1980, a plan that—

(a) Describes the manner in which the State shall distribute to its LEAs the information required in § 231.71;

(b)(1) Describes the content of the information required in § 231.71(a) and any additional information the State considers desirable to distribute to its LEAs; and

(2) Provides an assurance that the State will continually revise, as necessary, the information described in § 231.71 and distribute the revised information to its LEAs;

(c) Describes the procedures the State will use for maintaining records as required in § 231.72; and

(d)(1) Designates a State agency or other State administrative unit responsible for submitting to the Secretary the reports required under § 231.73; and

(2) Provides an assurance that the designated agency or unit will carry out the duties required under § 231.73.

(20 U.S.C. 3603(a))

§ 231.71 What information must a State distribute to its LEAs?

(a) Not later than March 15, 1981, a State shall distribute to its LEAs information describing—

(1) The asbestos detection and control programs under this Act;

(2) The procedures and standards for conducting asbestos detection projects;

(3) The procedures and standards for conducting asbestos control projects; and

(4) The health hazards associated with exposure to asbestos fibers.

(b) A State that distributes to each of its LEAs a copy of these regulations, including all appendices, is considered by the Secretary to be in compliance with paragraphs (a)(1)–(3) of this section.

(20 U.S.C. 3603(a)(1))

§ 231.72 What records must a State maintain?

(a) A State shall maintain records on every LEA within its jurisdiction concerning the following:

(1) The asbestos detection activities conducted by the LEA.

(2) The presence, if any, of friable building materials containing asbestos in each school building of the LEA.

(3) The asbestos control activities conducted by the LEA. These include any activities related to the—

(i) Containment of asbestos materials;

(ii) Removal of asbestos materials;

(iii) Replacement of asbestos materials with other appropriate building materials;

(iv) The repairs made by the LEA to restore school buildings to conditions comparable to those that existed before the LEA conducted any of the activities listed in paragraphs (a)(3)(i) and (ii) of this section.

(b) A State is considered by the Secretary to be in compliance with paragraphs (a) (1) and (2) of this section if that State maintains a copy of a form filled out by each of its LEAs in compliance with any EPA procedures that require an LEA to record the information in paragraphs (a) (1) and (2) of this section.

(20 U.S.C. 3603(a)(3))

§ 231.73 What reports must a State submit?

(a) The State agency or other administrative unit designated by the State in its State plan (see § 231.70(d)(1)) shall submit to the Secretary reports describing the actions taken by the State in accordance with its plan.

(b)(1) The designated agency or unit shall submit its first report no later than six months after the State submits its State plan.

(2) The designated agency or unit shall submit its subsequent reports every six months after submitting its first report.

(3) The designated agency or unit shall submit its final report no later than June 15, 1982.

(20 U.S.C. 3603(b))

Note.—Information in the preceding part—34 CFR Part 230—has a direct bearing on this Part 231. Readers are encouraged to read the preceding part for that information.

Appendix A—Procedures for Conducting Asbestos Detection Projects

Note.—These procedures originally appeared as 40 CFR 763.3 through 763.5 in proposed EPA regulations published in 45 FR 61987 (September 17, 1980). The Department of Education has made minor stylistic changes in the original procedures.

I. Inspection of School Buildings

LEAs shall visually inspect each school building under their authority to locate all friable materials. This inspection shall include surfaces behind suspended ceilings or other non-permanent structures that may be entered during normal building maintenance or repairs. For further information on inspection procedures,

officials should consult Chapter 4, "Asbestos-Containing Materials in School Buildings: A Guidance Document," Part 1 (EPA No. C00090), which is incorporated by reference. Copies of the document can be obtained by calling 800-424-9065 (in Washington, D.C., call 554-1404). The document is also available for inspection at the Office of the Federal Register Library, Room 8301, 1100 L Street, NW., Washington, D.C. 20408.

II. Sampling Friable Materials

If friable materials are found in a school building, an LEA shall:

(a) Identify each distinct sampling area of friable materials within the school building.

(b) Take at least three samples from locations distributed throughout the sampling area. Sampling locations should not be selected for convenience (ease of reaching the sample) or because the sampler judges the location to be representative. Samples shall be taken using small sealable containers. Samples shall penetrate the depth of the friable material to the substrate.

(c) Label each sample container with a sample identification number unique to the sampling location and building. Officials should consult "Asbestos-Containing Materials in School Building: A Guidance Document," Part 1, Chapter 5, for further information on sampling procedures. The requirement that at least three samples be taken in each sampling area supersedes the recommendation made in the Guidance Document to take one sample per 5,000 square feet of friable material.

"Sampling area" means, within a school building, any area, whether contiguous or not, that contains friable material that is homogeneous in texture and appearance.

III. Analyzing Friable Materials

LEA's shall have all samples of friable material analyzed for asbestos—using Polarized Light Microscopy (PLM), supplemented, if necessary, by X-ray Diffraction—in accordance with "Interim Method for the Determination of Asbestiform Minerals in Bulk Insulation Samples," which is incorporated by reference.

Persons interested in analyzing bulk samples for asbestos can obtain copies of the document by calling 800-424-9065 (in Washington, D.C., call 554-1404) The document is also available for inspection at the Office of the Federal Register Library, Room 8301, 1100 L Street, NW., Washington, D.C. 20408.

A list of laboratories capable of conducting analyses of friable materials can be obtained by calling 800-334-8571, extension 6741. Officials should consult "Asbestos-Containing Materials in School Buildings: A Guidance Document," Part 1, Chapter 6, for further information on analysis of friable materials.

Appendix B—Guidance System for Assessing Potential Asbestos Problems in Schools

I. Introduction

Asbestos fibers may be released within schools from friable materials containing asbestos, leading to exposure of building occupants. A variety of factors may influence the potential for release of fibers. By considering these factors, a school official can determine which friable materials containing asbestos pose the greatest potential to release fibers and, therefore, which materials may require corrective action.

To assist school officials in evaluating health risks, the Education Department and the Task Force has prepared a guidance system for assessing exposure. It must be emphasized that this guidance system does not quantify health risks. It does assist in assessing the potential for contamination. The most important use of this system is to rank several buildings or areas within buildings in order of priority for corrective action.

This guidance system is designed to assist officials to determine not only whether a building has a problem, but, also, which sections of the building have a higher potential for the release of fibers. The system can also be used a number of times within one room, such as a large auditorium, where the content of the material might be the same but the condition of the material changes.

The four factors used in the guidance system are—

(a) Condition of the material;

(b) Proportion of the material exposed;

(c) Friability (very soft to quite hard); and

(d) Total asbestos content.

The guidance system is a numerical combination of these four factors.

The guidance system should be used on friable materials that contain more than 5 percent asbestos. Materials with less than 5 percent asbestos are generally less friable and, therefore, less easily damaged than materials with larger amounts of fiber. A material with less than 5 percent asbestos can usually be assigned a low priority, and may not need corrective action, keeping in mind that the material must be maintained in good condition.

The guidance system presented here is a revision of an earlier draft that has been used by the Environmental Protection Agency (EPA) for the past year. It incorporates a number of changes recommended by persons with extensive experience in using this method.

In order to use this assessment method effectively, evaluators—whether they be school officials or State or local health personnel—should be trained. There is a degree of subjectivity in applying the factors used in the system. To ensure that these factors are uniformly applied, evaluators should visit schools with a range of conditions to become familiar with the various types of materials that may be encountered. Because of extensive evaluating experience, EPA Regional Asbestos Coordinators are able to assist evaluators in the use of the guidance system.

II. Using the Guidance System

Using the guidance system is a two step process: assigning a factor value to each of the four factors (Step A); and then calculating the guidance number (Step B).

Step A. Assigning Values to Each Factor

In each area with friable material containing asbestos, the evaluator must choose the factor score that corresponds to the description best fitting the area. An evaluated area could be an entire building having constant values for each factor, separate rooms, or even sections of one room. For example, an auditorium with a sloping floor might have a section of the ceiling that is accessible and shows marks caused by vandalism, while other sections, beyond reach, remain unmarked. After the evaluator applies the guidance system *specifically to that section of the damaged ceiling*, the evaluator might find that it might be the *only* portion of the ceiling requiring direct corrective action.

Note that for condition of the material, the evaluator assigns only the values 0, 2, or 5; for friability, only 1, 2, or 3. For exposed surface, the evaluator assigns a value between 0 and 4 (it may be a decimal) that is proportional to the percent of the surface exposed. For asbestos content, the evaluator converts the reported mean asbestos concentration to a value between 1 and 3.

Factor One—Condition of Material

This factor is a measure of damage or disruption. Poor condition may be a result of a number of events. These include: everyday use, vandalism, maintenance, building vibration, water damage, or deterioration of the material itself. This damage or deterioration may appear as material delaminating or

separating from the substrate, water spots, gouged out areas, missing pieces of material, or indented areas. The condition shall be scored as follows:

Virtually No Damage or Deterioration: Score 0

The material is intact and shows no signs of deterioration. The material is adhering to the substrate. Essentially there are no missing pieces and no significant water spotting.

Moderate Damage or Deterioration: Score 2

The material is breaking up into layers or beginning to come loose from the substrate. There may be small areas (less than 10% of the total area) where the material is deteriorating. There are signs of accidental or intentional damage that cover no more than 10% of the area.

Extensive Damage or Deterioration: Score 5

Pieces are dislodged, and debris may be evident. Parts of the material may be hanging from the ceiling or may have fallen to the floor. Damage extends over more than 10% of the surface.

Note.—IF FRIABLE MATERIAL CONTAINING ASBESTOS IS WATER DAMAGED, CORRECT THE CONDITION THAT CAUSED THE WATER DAMAGE (e.g. roof leak) BEFORE PROCEEDING WITH ANY CORRECTIVE ACTION.

Factor Two: Proportion of the Material Exposed

The material is exposed if it can be seen by occupants of the area. The material is not exposed if it lies behind a false or suspended ceiling or other barrier that is intact. The exposed surface shall be evaluated as follows:

Estimate the percent of the surface of the friable material containing asbestos that is exposed. Multiply by 4 to convert to the factor score.

(Examples: 25% exposed—Therefore, $0.25 \times 4 = 1.0$; 60% exposed—Therefore, $0.60 \times 4 = 2.40$)

Proportion of the Material Exposed: Score 0–4

Factor Three: Friability

The term friable is applied to material that can be crumbled, pulverized, or reduced to powder by hand pressure. The evaluator must touch the material in order to score friability.

Material containing asbestos can vary in degree of friability. Sprayed asbestos material is generally more friable than trowelled material.

MATERIAL EVALUATED AS NOT FRIABLE NEED NOT BE FURTHER CONSIDERED.

Note.—It is possible to have friable materials with little or no asbestos content. Cellulose, fibrous glass, and other fibers can produce a material that is friable.

Friability shall be evaluated as follows:

Not Friable: Score 0

Low Friability: Score 1

The material can be damaged by hand but with difficulty.

Moderate Friability: Score 2

It is fairly easy to mark, damage, or dislodge the material by hand or to crush or pulverize it by hand. The material can be removed in small or large pieces.

High Friability: Score 3

The material is fluffy in appearance and is soft or spongy to the touch. It may be flaking. It is easy to penetrate the material with the fingers. Almost any brushing or touching of the material causes a visible breaking away or dusting.

Factor Four: Total Asbestos Content

The percentages for all types of asbestos present in a given sample shall be added to determine the total asbestos content.

The asbestos content must be determined by bulk sample analysis. Building records or assumptions are not reliable or acceptable. Only materials with greater than 5 percent asbestos should be evaluated using the guidance system. This cut-off is due to the difficulty of analysis below 5 percent and the uncertainty of establishing percentage of content.

Generally, materials containing less than 5 percent asbestos need not be considered further; however, unusual circumstances, such as extensive damage, may require special consideration.

Asbestos content is scored on a scale of 1 to 3. Convert the mean concentration of asbestos to a score in this range by multiplying the concentration by 2 and adding the result to 1.

(Example: A material has average content of 10% chrysotile-asbestos and 15% amosite-asbestos. The total concentration of asbestos is, therefore, 25%. Convert to a decimal for use in the formula—0.25)

Score = 1 + (0.25 x 2) = 1 + (0.50) = 1.50.
The asbestos content score is 1.50.

Step B. Calculating the Guidance Number

Once scores have been assigned to the individual factors, the evaluator must calculate the guidance number. The number is simply the sum of the first two factors (condition of material and proportion of the material exposed) multiplied by the product of the next two factors (friability and total asbestos content).

Enter the factor numbers in the following table and compute the guidance number—

1. Condition of material:
   No damage, 0
   Moderate damage, 2
   Severe damage, 5, ———
2. Proportion of the material exposed:
   Scale, 0–4 + ———
   Sum (No. 1 + No. 2) = (Sum)———
3. Friability (not friable = 0):
   Low, 1
   Moderate, 2
   High, 3, ———
4. Total asbestos content:
   Scale, 1–3 × ———
   Product (No. 3 × No. 4) = (Product)———
   Guidance No. = Sum (No. 1 + No. 2) × Product of (No. 3 × No. 4) (Guidance No.)———

Example

An 8th grade classroom has been evaluated and found to have the following:

1. Condition of Material: Some of the ceiling material is hanging, and the custodian reports frequently finding clumps of the ceiling material on the floor. Also, the damage covers 25% of the ceiling's surface—Score: 5.

2. Proportion of the Material Exposed: The ceiling material is totally visible and there is no hung ceiling. (100% exposed; $1.0 \times 4 = 4$)—Score: 4.

3. Friability: The material is fairly easy to dislodge and can be crushed by hand—Score: 2.

4. Total Asbestos Content: The analysis of the sample indicates 10–15% chrysotile-asbestos, and 80–85% fibrous glass. (Average the reported asbestos content if a range is given. In this case use 12.5%)

Calculation: $1 + (0.125 \times 2) = 1.25$—Score = 1.25
Guidance No. is: $(5 + 4) \times (2 \times 1.25) = 22.5$

Step C. Interpreting the Guidance No.

The four approaches for dealing with asbestos are—

(1) A management system that monitors the condition of the material (but does not require direct corrective action unless the condition of the material changes);

(2) Enclosure with a containment system to isolate the material behind a solid barrier;

(3) Encapsulation with sealant; and

(4) Removal.

After applying the guidance system, the evaluator shall determine whether a management system or direct corrective action is appropriate. In many cases, the use of a management system to monitor an asbestos condition, prevent material disturbance, and control any necessary disturbance is adequate. In other cases, only some type of direct corrective action is appropriate.

The guidance system does not determine the type of action required. The choice of removal, encapsulation, or enclosure will be determined by a number of other factors as listed in Section III. Removal, encapsulation, and enclosure have advantages and disadvantages that must be considered in each case.

The guidance number can provide guidance for the decision maker. The guidance number is to be used as an indicator for the appropriate approach. The final determination should take into consideration such specific conditions of the building and room as those listed in Section III.

Note.—At present there are no specific guidance numbers that establish criteria to assist school administrators in deciding whether a management program or corrective action program needs to be implemented once asbestos is found. Several members of the Asbestos Hazards School Safety Task Force are conducting a comprehensive analysis of data in order to develop these guidance numbers. When the Task Force completes its analysis, the Secretary will distribute guidance numbers to the appropriate organizations and educational agencies.

The appropriateness of a management program should be reevaluated if the use of the area changes in such a way that damage may increase; e.g., because a more active population uses the space. Also, officials should periodically reconsider the effectiveness of a management program if the condition of the material changes.

III. Other Factors To Be Considered When Deciding Which Approach Is Most Appropriate

A school official will encounter conditions and considerations not explicitly included in the rating system that will influence the action decision. The approach selected will depend on factors not specified in the guidance system. The following is a non-exhaustive list of these considerations and how they may affect the decision:

A. *Number of persons using the area.* This affects likelihood of damage and overall risk because of exposure to the person involved.

B. *Planned renovations and frequency of maintenance and repair.* If renovations are planned or the asbestos is in an area frequently subject to repair work, it may be best to remove the material.

C. *Complexity of surface.* It is difficult to remove friable materials containing asbestos from very complex surfaces. Encapsulation or enclosure may be preferred.

D. *Remaining life of building.* If the building is soon to be demolished or abandoned, good management of the material may be preferred in the interim.

E. *Accessibility.* A highly accessible material should not be encapsulated. A material that is inaccessible (e.g., a very high ceiling)—even though it is totally exposed and has a high asbestos content—might be a candidate for a management approach, rather than direct corrective action, if the material were in good, undamaged condition.

F. *Change in use, activity, and movement.* Increased or changed activity may lead to damage. For example, placing 7th and 8th graders in what had been a kindergarten-through-6th-grade school might make previously inaccessible surfaces vulnerable to damage.

G. *Need to maintain fire rating.* If the friable material containing asbestos is needed to meet fire codes, it cannot be removed without being replaced. Similarly, if it is to be encapsulated, check the fire-retardant characteristics of the sealant.

H. *Need to maintain acoustics.* A material that has acoustic properties may have to be replaced if removed. It may not be appropriate to encapsulate the material since most sealants eliminate the acoustical quality of the material on which they are sprayed.

Some of these factors do not directly affect exposure (e.g., fire rating). However, they will affect the decision to correct a material by limiting the scope of available actions, increasing the cost, etc.

Appendix C—Procedures for Containing and Removing Building Materials Containing Asbestos

These procedures have been developed by the Environmental Protection Agency and represent the best information currently available on controlling the release of fibers from friable materials containing asbestos. The purpose of the procedures is to reduce to the maximum extent possible the risk of contamination of areas of a building adjacent to the area in which asbestos containment or removal activities are being conducted and to provide maximum protection for workers involved in those activities and other users of the building.

I. Introduction

(a)(1) The three methods for containing or removing material containing asbestos are: (i) Encapsulation, in which the material is coated with a bonding agent called a sealant to prevent the release of fibers.

(ii) Enclosure, in which the material is separated from the building environment by impermeable barriers.

(iii) Removal.

(2) Each of these methods can be used separately or in combination with one or both of the others.

(b) In order for encapsulation, enclosure, or removal to reduce imminent hazards to the health and safety of school children and school employees, the work must be performed carefully. Poorly performed work not only creates a risk for persons performing this work, but is likely to increase the risk to students, school employees, and other persons using the building. To insure that the building environment and the outside air are not contaminated and that workers are protected from exposure to asbestos, all procedures for encapsulation, enclosure, or removal must—

(1) Conform to the procedures contained in Section II (of this appendix), General Work Practices;

(2) Conform to the specific work practices contained in the appropriate section of this appendix for the specific control method used. Section III contains work practices for encapsulation. Section IV contains work practices for enclosure. Section V contains work practices for removal;

(3) Comply with OSHA asbestos regulations, 29 CFR 1910.1001; and

(4) Comply with EPA regulations, 40 CFR Part 61, Subpart B, National Emission Standards for Hazardous Air Pollutants (NESHAPS): Asbestos

(c) Persons who perform encapsulation, enclosure, or removal must become familiar with these requirements before taking any action. The OSHA and NESHAPS regulations can be found in "Asbestos-Containing Materials in School Buildings: A Guidance Document," Part 1, which is available by calling 800-424-9065 (in Washington, D.C. 554-1404).

II. General Work Practices

All procedures for containment and removal of asbestos must comply with the following:

(a) *Medical services.* The party responsible for the encapsulation, enclosure, or removal (referred to in these appendices as "the contractor") shall provide medical services to employees as required by OSHA regulations, 29 CFR 1910.1001(j).

(b) *Worker Instruction.* The contractor and its employees shall be instructed, prior to the beginning of the encapsulation, enclosure, or removal, in—

(1) The health hazards of asbestos;

(2) The use of respirators and protective clothing;

(3) Work practices and safety procedures;

(4) Control of the release of asbestos fibers; and

(5) Proper prepation and decontamination of a worksite.

(c) *Materials.* The contractor shall obtain the following materials, which are necessary for any procedure related to the encapsulation, enclosure, or removal of asbestos:

Note.—The following list does not include ordinary construction materials such as lumber and hardware. It also does not include materials that are necessary for one procedure but not the others. These are discussed in the individual sections on encapsulation, enclosure, and removal.

(1) Respirators (see paragraph (d)).
(2) Replacement cartridges for respirators.
(3) Disposable clothing for workers, including headgear and footwear.
(4) Shoes for use in the work area. Workers may not wear the same pair of shoes in the work area as they do in the clean areas of the building.
(5) Duct tape.
(6) Polyethylene sheets (6 mil., and 2 or 4 mil.).
(7) Warning signs. (See OSHA regulations, 29 CFR 1910.1001(g).)

(d) *Respirators.* The contractor shall select the proper type of respirator in accordance with OSHA regulations 29 CFR 1910.1001(d). The contractor shall be able to demonstrate that the type of respirator used by its employees is appropriate for the level of fibers found or expected in the work area, as required by § 1910.1001(d)(2).

(e) *Decontamination area.*

(1) Before beginning the encapsulation, enclosure, or removal, the contractor shall construct a decontamination area to prevent release of fibers to the exterior environment and to protect workers and others from fiber inhalation. This decontamination area must consist of three rooms: (i) A clean room where workers enter and leave the job area.

(ii) A shower for decontamination of workers before they leave the job area.

(iii) A room for removal and storage of contaminated items. This room is referred to in this appendix as the "contaminated room."

(2) If it is possible to use existing rooms in close proximity to the worksite, it may be necessary to construct temporary tunnels, from lumber and plastic, to connect these rooms to the work area. If it is not possible to use existing rooms in close proximity to the worksite, it may be necessary to construct a temporary clean room, shower, and contaminated room, from lumber and plastic, near the work area. Although some innovation is likely to be necessary, the arrangement for the decontamination area must include the following features: (i) There must be one clearly designated route from the clean room through the contaminated room into the work area, and back out. The shower may be used as a segment of the passageway between the clean room and the contaminated room. The doorway between the contaminated room and the work area is the only doorway through which anyone may be allowed to enter the work area; there may not be any other entrance. If there is a doorway directly from the clean room to the contaminated room, it must be used for traffic in that direction only. No one may be allowed to go from the contaminated room to the clean area without first passing through, and using, the shower.

(ii)(A) The contractor shall construct airlocks in any passages between the clean room and the contaminated room. Each airlock must consist of two sets of two plastic sheets: one set at one end of the airlock and the other at the other end, at least two meters away. Each of the sheets must extend from floor to ceiling and be constructed of 2 or 4 mil plastic. The plastic sheets must be hung close together, with one sheet taped along the top of the doorway and down one side and the other taped along the top and down the other side.

(B) The shower should also function as an airlock with a set of two sheets at each entrance. If the shower is the only passage between the clean room and the contaminated room, no other airlocks are necessary.

(iii) The clean room must contain a space where workers can place their street clothes and a space for the storage of clean work clothes, respirators, respirator cartridges, soap, and towels.

(iv) If there are no usable permanent shower facilities, the contractor shall construct a temporary shower. The shower must have a ceiling. The shower must have a container for the disposal of used respirator cartridges. Water from the shower must be pumped to an existing drain in the building or collected for disposal.

(v) The contaminated room must have an area for workers to remove contaminated clothing and shoes and to store contaiminated personal items (such as workshoes and gloves) and contaminated tools and equipment. It must also have containers for disposal of contaminated clothing as contaminated waste (see paragraph (k)).

(vi) Toilets, permanent or portable, must be available in the work area or contaminated room.

(f) *Work area preparation.* Before beginning the encapsulation, enclosure, or removal, the contractor and its employees shall use the following procedures to prevent the release of asbestos fibers from the work area: (1) Clean all movable items—such as furniture and equipment—with damp cloths and store them in a clean area outside of the work area. Clean all immovable items with damp cloths, wrap the immovable items completely in plastic, and secure the plastic with duct tape. Dispose of the cleaning cloths as contaminated waste (see paragraph (k)).

(2) Bring in any large pieces of equipment, such as scaffolds and airless sprayers, that will not fit easily through the airlocks.

(3) Isolate the work area completely from the rest of the building by constructing barriers across all doorways or corridors except those in the decontamination area that are to be used by the workers. Construct the barriers so as to prohibit passage through them. Use 6 mil plastic, and tape the seams securely.

(4) Turn off all heating, ventilation, and air conditioning systems. Seal all heating registers, vents, and air ducts with plastic sheeting and duct tape. Lock windows and seal them with plastic tape. Remove all curtains, blinds, and other window coverings.

(5) Cover the floors with at least one layer of 6 mil plastic sheets. Bring the floor coverings up the walls and attach them with duct tape to the wall coverings approximately two feet above the floor. cover the walls with 2 or 4 mil plastic sheets so that the sheets overlap the floor sheets, and secure them in place with tape.

(6) Turn off all electrical circuits and lock the electrical panels or boxes. If necessary, install temporary lighting.

(7) Post warning signs outside all entrances to contaminated areas of the building as specified in OSHA regulations, 29 CFR 1910.1001(g).

(8)(i) Arrange for air monitoring and inspections as required by OSHA regulations, 29 CFR 1910.1001(f) (air monitoring services should be provided by a reputable laboratory under direct contract to the building owner). At a minimum, have a single environmental sample collected outside the building at the beginning of the project.

(ii) Each day during the encapsulation, enclosure, or removal procedure, collect at least two air samples within the work area and two air samples immediately outside the work area.

(9) Take down light fixtures in the work area. Clean them with damp cloths and remove them from the work area, or—if debris on the fixtures cannot be removed—discard the fixtures as contaminated waste (see paragraph (k)).

(10) If it is necessary to remove a suspended ceiling to reach the materials containing asbestos, carefully take down the ceiling. Clean the ceiling tiles with damp cloths and store them outside the work area, or—if debris on the tiles cannot be removed—dispose of the tiles as contaminated waste (see paragraph (k)).

(g) *Measures for worker protection.* Each worker, and any other person who enters the job site (e.g., an industrial hygienist, an inspector, etc.) shall follow these procedures: (1) In the clean room before entering the work area, remove all street clothing, underwear, and shoes. Put on respirator, then dress in disposable coveralls and headgear (note that it is necessary to put on the respirator before the disposable headgear). Pass through the airlocks into the contaminated room. Then proceed to the work area.

(2) Never remove respirator while in the work area. No one may eat, drink, smoke, or chew tobacco or gum while in the work area.

(h) *Procedures for worker decontamination.* At the end of each work shift and before breaks, workers and any other persons in the work area shall follow these procedures when leaving the work area: (1) Before entering the contaminated room, remove all gross contamination from disposable clothing.

(2) In the contaminated room, remove all clothing and work shoes, leaving on only the respirator.

(3) Proceed to the shower and wet hair, body, and respirator before removing respirator. Complete shower, washing thoroughly with soap and water.

(4) Remove and discard respirator cartridges in the container provided in the shower. Proceed to the clean room. Clean respirator with a disinfectant, dry it, insert new cartridges, and place respirator in a dry, clean plastic bag.

(5) Put on street clothes and shoes or a new set of disposable clothing.

(i) *Corrective action.* Refer to Sections III, IV, and V of this appendix for directions on the specific control procedures being used.

(j) *Procedures for cleaning the work area.*

Note.—The contractor and its employees shall follow personal protection procedures (see paragraphs (g) and (h)) while conducting steps (1) through (7) of this paragraph (j).

(1) Dispose of all scrap and debris from the work area, the contaminated room, and the clean room. Treat this debris as contaminated waste (see paragraph (k)).

(2) Remove all floor and wall coverings except heating and ventilation duct covers, barriers, and airlocks. Dispose of the plastic and other materials as contaminated waste.

(3) Wet-clean—with a damp mop, sponge, or cloth—all floors, walls, and other surfaces—including any furniture and equipment in the work area or contaminated room. Wait 24 hours to allow airborne fibers to settle; during this period allow no ventilation or traffic in the area.

(4) Wet-clean all surfaces again, and again wait 24 hours.

(5) Wet-clean all surfaces once more (EPA recommends that this final cleaning be supplemented by the use of a High Efficiency Particulate Absolute (HEPA) vacuum cleaner).

(6) Visually inspect the entire area to make sure it is clean. If dry wiping of surfaces reveals dust contamination, do further wet-cleaning. The monitoring of air may be required by the State or locality or specified in the contract.

(7) When the entire area is clean, dismantle all airlocks, barriers, and temporary shower facilities. Remove coverings from heating and ventilation ducts. Inspect all ducts, especially the horizontal sections, for debris containing asbestos, and vacuum with a HEPA vacuum or wet-clean the ducts, as necessary. Replace all heating, ventilation, and air conditioning filters, and dispose of old filters as contaminated waste. Dispose of all plastic and lumber as contaminated waste. Remove from the work area all cleaned equipment belonging to the contractor.

(8) Return to the work area furniture and other movable items stored during the encapsulation, enclosure, or removal. Restore electrical and other systems to operation, and return the building to normal use.

(k) *Disposal of contaminated waste.* The contractor and its employees shall follow the procedures in paragraphs (k) (1) through (4) when disposing of asbestos-contaminated waste—including asbestos-containing materials removed from the building structure, lumber and plastic used in barriers and airlocks, debris remaining on the floor, cleaning cloths, and any other contaminated materials.

(1) Place the waste in impermeable containers (EPA recommends that the waste be placed in 6 mil. polyethylene bags and that the bags be placed in sealable fiber drums). The waste containers must be sealed and labeled with warning signs as required by OSHA regulations, 29 CFR 1910.1001(g)(2).

(2) Handle containers carefully so that they do not break. The containers must be taken to the entrance of the work area, cleaned with a damp cloth, and placed in the airlock.

(3) A decontaminated worker shall take the waste containers from the airlock to a loading area for transportation to a disposal site.

(4) EPA recommends that all workers involved in disposal activities wear respirators.

(5) Dispose of the waste in compliance with EPA regulations, 40 CFR 61.22 and 61.25.

(6) Contractors using bags and drums shall observe the following procedures:

(i) If a bag is intact, it may be removed from the drum before disposal, and the drum may be recycled.

(ii) If a drum has been contaminated by leakage from a broken bag inside it, it must be buried with the bags.

III. Work Practices for Removal

These procedures are for wet removal of building materials containing asbestos. Wet removal is the most common removal method. Removal operations using other techniques are also acceptable if the contractor can demonstrate that those techniques are in compliance with EPA and OSHA regulations.

After completing construction of the decontamination area and preparation of the work area, the contractor and its employees shall follow these procedures in removing and disposing of materials containing asbestos:

(a) *The removal process.*

(1) Thoroughly saturate with water the material containing asbestos. EPA recommends the use of water that has been amended with a surfactant, or wetting agent, to increase its penetration and reduce the volume of water required. This surfactant is usually 50 percent polyoxyethylene ether and 50 percent polyoxyethylene ester or the equivalent (such as a low-sudsing soap). It is mixed with water at a rate of one ounce of surfactant to five gallons of water.

(2) Spray the amended water onto the material in a fine mist, using either an airless spray gun set at low pressure or some other low-pressure applicator such as a hand-held pesticide applicator.

(3) To make sure the material is thoroughly saturated, it may be necessary to spray it several times or to spray it once the night before removal is planned and again immediately before removal.

(4) Remove material containing asbestos, using broad-bladed putty knives or any other suitable tools. If any dry areas are exposed during the course of removal, stop scraping immediately and spray the dry material with water. To remove the last of the material containing asbestos, use a wire brush, wet rag, or sponge.

(5) Usually the material containing asbestos is allowed to drop to the ground. If the workers are standing on the ground, they can immediately place

the removed material directly into sealable, impermeable containers. If scaffolding is used, the wet material containing asbestos can be collected in sealable, impermeable containers mounted on the scaffolding. One convenient method involves constructing chutes that lead directly into containers that are also attached to the scaffolding near the floor.

(6) No matter what collection technique is used, the wet material must be placed in sealable, impermeable containers before it dries.

(7) If the material is to remain on the floor for any length of time, it must be periodically resprayed with water to keep it moist.

(8) EPA recommends that 6 mil. plastic bags be used as containers for asbestos waste and that the bags be placed in fiber drums for transportation to the disposal site.

(9) OSHA requires that the filled containers be sealed and warning labels attached. (See 29 CFR 1910.1001(g)(2).)

(b) *The disposal process.*

(1) The contractor shall dispose of containers of asbestos-contaminated waste in accordance with the provisions of paragraph (k) of Section II of this appendix.

IV. Work Practices for Encapsulation

(A) A contractor that encapsulates material containing asbestos in order to reduce imminent hazards to the health and safety of school children and school employees shall use sealants that have been awarded fireproofing ratings of Class "A."

(b)(1) In order to minimize the release of fibers, sealants should be applied with an airless spray gun set at the minimum pressure at which the sealant can be applied.

(2) Sealants that cannot be applied by airless spray shall be applied at the lowest possible pressure to reduce fiber release.

(c) The contractor shall consult with the sealant's manufacturer to learn the recommended coverage rate, number of coats, time allowed between coats, and dilution of sealant, if any.

V. Work Practices For Enclosure

(a) A contractor that encloses material containing asbestos in order to reduce imminent hazards to the health and safety of school children and school employees shall insure that—

(1) The material to be enclosed is not exposed to an air plenum system; and

(2) The barriers constructed to enclose the material are airtight and impermeable.

(b) Installation of an enclosure barrier usually necessitates either penetrating or touching the material containing asbestos. Because this operation is usually performed dry, higher fiber levels than those created during removal operations are usually present and may require more stringent respiratory protection for workers. These requirements are described in OSHA regulations, 29 CFR 1910.1001.

Appendix D—Comments and Responses to Notice of Proposed Rulemaking (NPRM)

These comments and responses are arranged in order of the sections in the NPRM.

§ 230.2 Who is eligible for assistance under these programs?

Comments. One commenter made the following comments: 1. Paragraph (a)(1) of this section refers to projects *conducted* since January 1, 1976, whereas the Act prohibits funding of projects *completed* before January 1, 1976. Also, paragraph (b)(1)(ii) of this section refers to projects *carried out* before January 1, 1976, whereas the Act uses the term *completed.*

2. A provision of the Act states that projects completed before the effective date of the Act must be in substantial conformity with the requirements established by the Secretary for conducting an asbestos detection project. Paragraph (a)(2) of this section, however, changes this provision to apply before the effective date of the *regulations,* and furthermore changes substantial conformity to *substantial compliance.*

3. Paragraph (b)(1)(ii)(B) of this section is vague as to whether the 2,500 square feet minimum applies to the entire LEA or a single school.

4. Paragraph (b)(1)(ii)(C) of this section states that the criteria for determining the minimum asbestos level will be established by the Secretary if appropriations become available for the control program. It would seem preferable to establish those criteria in the one regulations package.

5. Paragraph (b)(2) of this section states that control projects conducted *prior to the date when loans are available* must be in substantial compliance with applicable procedures, whereas the Act refers to projects conducted *prior to the effective date of the Act.* Also, it is unclear what *prior to the date when loans are available* means.

Responses. 1. Paragraph (a)(1) has been changed and now reads: "An LEA is eligible for a grant * * * if that LEA proposes to conduct or has not completed before January 1, 1976 an asbestos detection project * * *." Paragraph (b)(1)(ii) has been changed and now reads: "Proposes to carry out or has not completed before January 1, 1976 an asbestos control project * * *." (Also, paragraph (b) of § 231.2—the analogous section applicable to SEAs—has been similarly changed.)

2. Paragraph (a)(2) has been changed and now reads: "* * * the term 'conformity' in reference to any asbestos detection project conducted prior to the effective date of these regulations means substantial conformity." (Also, paragraph (b) of § 231.2 has been similarly changed.)

The Act itself does not establish the standards and procedures for conducting an asbestos detection project but leaves those requirements for the Secretary to establish in consultation with the Task Force. Those standards and procedures are established in the final regulations. LEAs cannot conform strictly to the standards until the regulations take effect because they will not know what the standards are. Under the Act the Secretary has authority to define conformity with the standards and procedures the Secretary has established. The Secretary has used that authority to establish the "grace period" between the effective date of the Act and the effective date of the regulations.

3. The regulations have been changed. Paragraph (b)(1)(ii)(B) tracks verbatim the language of the Act. The Secretary felt that the only reasonable interpretation of the Act is to apply the minimum to the entire LEA. To remove any doubt, paragraph (b)(1)(ii)(B) now reads "Involving more than 2,500 square feet of surface in the school buildings in the LEA * * *."

4. No change has been made. The Task Force has informed the Secretary that this is an area which calls for extensive analysis based on the scientific and technical expertise of the Task Force. A subcommittee headed by one of the Task Force members is expected to review this area and make recommendations to the Secretary. The scientific information necessary to establish the criteria referred to in paragraph (b)(1)(ii)(C) is currently incomplete.

5. The regulations have been clarified. The comment on paragraph (b)(2) does not take into account the language of the Act. Section 6(C)(3) of the Act reads: "No loans may be made * * * for projects * * * which commenced before the *availability of loans under the loan program* unless * * * any work completed by the applicant has been carried out in substantial conformity * * *." (emphasis ours). The Secretary interprets the underscored phrase to mean the date—published in the Federal

Register—when applications for loans will begin to be accepted. For clarity, paragraph (b)(2) has been changed to read" * * * [t]he term 'conformity' in reference to any asbestos control project conducted prior to the date—which will be published in the **Federal Register**—when loan applications will be accepted means substantial conformity."

Comment. One commenter suggested that the regulations should make assistance under these programs available to universities, colleges, and public meeting places, as well as schools.

Response. No change has been made. The Act, which is concerned with the particular vulnerability of children to environmentally induced illnesses, authorizes funds for these programs in elementary and secondary schools only.

Comment. One commenter felt that the 2,500- square-foot minimum surface amount for a project's eligibility under the LEA Asbestos Control Program discriminates against persons exposed to asbestos found in surface areas that do not meet the minimum square footage.

Response. No change has been made. The 2,500-square-foot minimum is a statutory requirement, which the Secretary is unauthorized to change. The legislative history explains that the reason for the minimum square footage is that school districts are believed to be able to support the costs of very small projects without Federal assistance.

§ 230.4 What definitions apply to these programs?

Comments. One commenter made the following comments on the definitions in paragraph (b):

1. "Asbestos detection project." According to the legislation, detection encompasses more than just the testing of building materials.

2. "Imminent hazards." The term "to the health and safety" was deleted. Also, the Act gives the Secretary the authority to establish additional standards to further interpret this definition, yet this authority was not exercised.

3. "Local educational agency." The regulations use the term "governing body," whereas the Act uses "governing authority." Also, the definition should repeat Section 11 of the Act rather than incorporate it by reference.

4. "School buildings." the regulations add the word "indoor" before "facilities."

5. "State." The regulations should repeat the EDGAR definition rather than incorporate it by reference.

6. The Office of Overseas Schools, which is included in the definition of "State" in the law, is omitted in the regulations.

Responses. 1. The regulations have been changed and now read: "* * * activities—described in § 230.10—designed to identify asbestos hazards in school buildings."

2. The regulations have been changed and now read: "Imminent hazards to the health and safety * * *." The Secretary feels that the definition is satisfactory and that there is no need at this time to establish additional standards to interpret the definition further.

3. The regulations have been changed and now read: "* * * the governing authority * * *." The reference to Section 11 of the Act is not meant to incorporate it by reference, but, rather, to highlight to the reader that the statute mandates the expansion of the traditional definition of an LEA to include nonprofit private schools.

4. The regulations have been changed and now read: "Gymnasiums or other facilities * * *."

5. No change has been made. The EDGAR document was compiled with the intention that it was to be read in conjunction with most grant programs operated by the Department. To incorporate the relevant provisions of EDGAR into all of the Department's grant regulations, including these, would result in very bulky documents and needless duplication. Therefore, the Secretary's general policy, in most instances, is not to reprint relevant EDGAR provisions and definitions in the Department's regulations.

6. No change has been made. The Office of Overseas Schools in the Department of Defense (now called the Office of Dependents' Education) would not qualify as a State under the statute either for purposes of the SEA Asbestos Detection program or the State plan. Therefore, it was omitted from the definition of "State."

Comment. One commenter suggested that the definition of "local building" be modified to reflect ownership rather than function, since many schools use for school activities facilities that are not under their jurisdiction.

Response. No change has been made. The Act clearly defines "school building" according to function, not ownership, and the Department is not authorized to alter the plain wording and meaning of the Act.

Comment. Several commenters felt that the definition of "imminent hazards" is too broad.

Response. A change was made. The Secretary and the Task Force carefully reviewed the definition. The Secretary changed the definition to be more scientifically precise and less confusing to school administrators.

§ 230.10 What kinds of activities are assisted under the LEA Asbestos Detection Program?

Comments. One commenter made the following comments:

1. Paragraph (a) of this section limits the visual inspection to seeking out *friable* materials when the Act does not so limit it. Furthermore, paragraph (b) of this section limits sampling to friable materials when the Act does not so restrict it.

2. The Act states that insulation materials, as well as building materials, can be sampled. Why are insulation materials omitted from paragraph (b)?

3. There is no reference, in paragraph (c) of this section, to tests to determine the level of asbestos content, as suggested in the Act.

4. There is no reference in this section to the use of funds for administrative costs, as suggested in the Act.

Responses. 1. No change has been made. The Environmental Protection Agency (EPA) has concluded—based on available data on exposure and health effects—that friable building materials containing asbestos constitute the major hazard to the health and safety of school children. Based on this conclusion, EPA's proposed regulations published simultaneously with the Department's proposed regulations mandate only that friable school building materials be inspected for asbestos.

Since the Act and legislative history direct the Department to cooperate with EPA and to avoid interference with that agency's efforts to correct asbestos hazards, the inspection and sampling requirements in these regulations are limited to friable building materials to be consistent with the requirements and conclusions of EPA. The Task Force has reviewed those requirements and expressed satisfaction with them.

2. Paragraph (b) has been changed and now reads as paragraph (a)(2): "Collecting samples of the friable building materials referred to in paragraph (a)(1) of this section, including insulation materials."

3. Section 230.10(c) has been changed and now reads as § 230.10(a)(3): "Analyzing the samples * * * to determine the presence of asbestos and the level of asbestos content."

4. The regulations have been changed. A provision has been added to § 230.10, which now reads, as new paragraph (b): "If appropriate, the Secretary may also provide funds for administrative costs incurred in the preparation and supervision of the LEA Asbestos Detection Program."

§ 230.11 What kinds of activities are assisted under the LEA Asbestos Control Program?

Comments. One commenter made the following comments:

1. Paragraph (b) of this section is unclear because it suggests, contrary to the Act, that materials that have been contained, as well as removed, should be replaced.

2. Paragraph (c) of this section refers to restoring school buildings to conditions comparable to those that existed before the containment, removal, and *replacement* activities, whereas the Act speaks only to conditions that existed before the containment and removal activities.

3. What factors will the Secretary take into consideration to make this determination of comparable building conditions?

Responses. 1. Section 230.11(b) has been changed and now reads as paragraph (a)(2): "Replacing the removed materials referred to in paragraph (a) * * *."

2. Section 230.11(c) has been changed and now reads as paragraph (a)(3): "* * * conditions comparable to those that existed before the activities in paragraphs (a)(1) and (2) of this section were carried out."

3. No change has been made. The Secretary believes that school districts will have no trouble in determining what are comparable building conditions. In the absence of any indication that school districts need additional guidance in this matter, the Secretary has not established factors for making this determination. If and when the need for establishing these factors is demonstrated, the Secretary will amend the regulations.

§ 230.20 How does one apply for a grant under the LEA Asbestos Detection Program?

and

§ 230.21 How does one apply for a loan under the LEA Asbestos Control Program?

Comments. One commenter made the following comments:

1. The applicable statutory sections concerning the contents of the applications should be repeated instead of incorporated by reference.

2. See comment No. 1 for § 230.2 regarding the use of the term "conducted" rather than "completed."

3. Is a mere assurance, without substantiating information, adequate grounds for the Secretary to determine whether the detection and control activities were in substantial conformity with the Secretary's guidelines?

Responses. 1. Sections 230.20(a)(3) and 230.21(a) have been changed to include the applicable statutory language, with minor wording changes to be consistent with the language in the regulations. Similarly, paragraph (a)(3) of § 231.20, describing the SEA's procedures in applying for a detection grant, has been changed to include the applicable statutory language.

2. Section 230.20(b) has been changed and now reads: "An applicant for a grant for an asbestos detection project conducted prior to the date of its application but not completed before January 1, 1976 shall include in its application * * *."

Section 230.21(b) has been changed and now reads: "An applicant for a loan for an asbestos control project conducted prior to the date of its application but not completed before January 1, 1976 shall include in its application * * *."

3. No change has been made. Although the Act appears to require only "assurances" of substantial conformity (sections 5(b)(3)(B) and 6(c)(3)(B)), it does provide that the applications contain "such other information * * * as the Secretary may require" (sections 5(b)(1)(E) and 6(c)(1)(A)). Therefore, should the Secretary feel that assurances are not sufficient, the Act authorizes the Secretary to require substantiating information. Paragraph (a)(6) of this section in the regulations reflects this statutory authorization.

Comment. One commenter suggested funding options for the LEA's detection projects other than the direct grant program—such as a reimbursement system—to insure that LEAs are funded only for actual work completed.

Response. No change has been made. Except, of course, for work already completed, the Act provides for a funding system in which the Secretary makes grants to eligible LEAs, based on information in their applications, to conduct asbestos detection activities. The regulations implement this funding system. To insure that the grant funds are to be used to pay for the actual costs of the detection project, these regulations (and the Act) require that, within 120 days of the receipt of a grant, an LEA must submit to the Secretary a report that includes a detailed accounting of the funds used to carry out the detection project (§ 230.60).

Comment. Several commenters felt that requiring LEAs to apply directly to the Secretary for assistance for the detection and control programs circumvents the role of the SEA, and suggested that applications be sent to the SEA for review and sign-off.

Response. No change has been made. The Act establishes application procedures that require LEAs desiring assistance to apply directly to the Secretary. Of course, an SEA on its own may choose to require its LEAs first to submit their applications to the SEA to review for compliance with those procedures. Alternatively, an SEA may require that a copy of an LEA's application to the Secretary be sent to the SEA.

Comment. One commenter pointed out that a State statute currently prohibits boards controlling local school districts from obligating their districts to an indebtedness that extends more than one year without voter approval. The commenter expressed concern that, in light of that statute, LEAs in that State would be reluctant to participate in the Asbestos Control Program.

Response. No change has been made. The Secretary is sympathetic with the potential dilemma in that State, as well as in other States that may have similar statutes. Both the Act and the legislative history, however, make it very clear that the control phase of the Asbestos Program is to be funded by long-term, no-interest loans. The Secretary cannot change the method of funding for the control program, as that would subvert the language and intent of the Congress in enacting this law. Of course, the State statute described by the commenter would not prevent the LEAs from participating in the control program if they obtained voter approval for the long-term indebtedness or agreed to repay the debt within one year.

§ 230.22 In what circumstances may an LEA apply for a grant or loan greater than 50 percent?

Comment. One commenter noted that Section 5(a)(2) of the Act pertains to LEAs that would be unable to participate in the detection and control programs *without receiving such increased award,* whereas this section of the regulations refers to LEAs that would be unable to participate in any event.

Response. Section 230.22(a) has been changed and now reads: "If an LEA believes that it has limited resources and would be unable to participate in the LEA Asbestos Detection Program or the LEA Asbestos Control Program without an increased award * * *."

§ 230.30 How does the Secretary determine the amount of a grant for an asbestos detection project?

Comment. One commenter wanted to know why this section omits the statutory language that the Secretary considers recommendations made by

the Task Force before determining the amount of a grant.

Response. No change has been made. There are several provisions in the Act that indicate that certain decisions of the Secretary will be made in consultation with the Task Force. These are matters of internal procedure; they do not affect the rights or duties of the public or grantees. The Secretary's policy is to omit internal procedures of this sort from the Department's regulations. Repeating those procedures in the regulations whenever they are found in the Act would not be of particular value to an SEA or a potential applicant for whom, primarily, the regulations were written.

The lack of specific references to the Task Force should not be taken to mean that the Task Force has been assigned a secondary role in the decision-making process. On the contrary, the Task Force has met regularly, formed into subcommittees, and is playing an active role in the development of these programs and regulations.

Because the law requires the Secretary to promulgate final regulations within 240 days of the effective date of the statute, it was necessary, in order to meet the deadline, to begin drafting the notice of proposed rulemaking (NPRM) before the Task Force was fully organized. The Secretary expected the Task Force to take a major role in revising the NPRM and in considering the public comments. This expectation has proved correct. At their first meeting members of the Task Force expressed gratitude at having before them the published NPRM to use as a working document. The Task Force has closely reviewed the NPRM and made a number of valuable recommendations to the Secretary.

Furthermore, as outlined in the Act, the Secretary will rely heavily on the recommendations of the Task Force in making decisions mandated by statute, such as approval of applications and determining the amount of an award.

§ 230.31 What criteria does the Secretary apply in selecting loan recipients?

Comment. One commenter noted that the criterion in paragraph (a) of this section—the likelihood of leakage as determined under the algorithm—applies only to prospective projects and therefore penalizes already completed projects that are in competition for loans.

Response. The regulations have been changed. Paragraph (a) has been renumbered (a)(1). Paragraph (a)(2) has been added and reads: "Any other evidence of the extent of the hazards caused by the presence of asbestos."

Comment. One commenter felt that the criterion of "cost effectiveness" in paragraphs (c) (1) and (2) is out of place in dealing with health hazards.

Response. No change has been made. The "cost effectiveness" criterion is only one of several criteria that the Secretary considers in selecting loan recipients and does not take precedence over any of the other criteria dealing with the extent of the health hazards. Nevertheless, this criterion is an important consideration in selecting loan recipients, since it would not be sound public policy to fund corrective action that an LEA proposes to conduct, or has conducted, in an unnecessarily costly manner. For example, the Secretary may reasonably not choose to fund a particular applicant that proposes to remove (or has removed) asbestos-containing materials, if, judging from the extent of the health hazards, containment or management would be (or would have been) a more appropriate corrective action.

§ 230.33 What criteria does the Secretary apply in considering an application for a grant or loan greater than 50 percent?

Comment. One commenter felt that the factors listed in paragraphs (c)(2) through (c)(5)—relating to the Secretary's determination of whether an LEA would be unable to participate in the LEA detection or control program without an increased award—are non-financial factors and have nothing to do with an LEA's ability to participate.

Response. The regulations have been changed. The Act reads: "Upon a determination by the Secretary that an applicant has limited fiscal resources and would be unable to participate in the program * * * (without an increased award) * * *." (Section 5(a)(2)) Originally, the Secretary felt that this language meant that an applicant must meet two separate but related tests to qualify for an increased award: (1) Limited fiscal resources and (2) inability to participate in the program due to non-financial factors relating to the nature of the project. On reconsideration the Secretary concluded that the intention was to base this determination on financial factors only. Therefore, paragraph (c) has been eliminated—except for the first factor relating to fiscal need; that has been placed in paragraph (b).

Comments. One commenter felt that this section addressed only those LEAs that have not yet conducted a detection or control project and was concerned that LEAs that have already completed projects would not be eligible for an increased award. Another commenter expressed difficulty in understanding how LEAs that have already completed projects would qualify for an increased award.

Response. No change has been made. The Act does not rule out making increased awards to LEAs that have already completed detection and control activities. The Secretary will consider the same financial factors in this section to determine whether an eligible LEA that has already completed a detection or control project qualifies for an increased award.

Comment. One commenter urged that the section be revised to indicate to what extent the Secretary will consider one or more of the factors listed in paragraph (b) in determining eligibility for an increased award.

Response. No change has been made. The Secretary determines an LEA's eligibility for an increased award on a case-by-case basis, based upon all the information the LEA submits to demonstrate its financial need. The factors listed in paragraphs (b) (1)–(4) are meant to give an LEA some idea of the type of financial information the Secretary looks for, but, as evidenced by paragraph (b)(5), the Secretary considers any demonstration of an LEA's financial need.

§ 230.34 What criteria does the Secretary apply if appropriations do not meet the 50 percent levels of assistance?

Comment. One commenter made several points. Section 230.34 ties the criteria the Secretary applies if appropriations do not meet the 50 percent levels of assistance to the criteria the Secretary applies for making an increased award. Since the Act makes clear that these are two separate issues, separate criteria for this section should be established. Also, most of the factors that this section incorporates by reference from section 230.33 are not relevant to the determination of greatest financial need.

Response. No substantive change has been made. The Secretary recognizes that the two determinations—which LEAs have limited financial resources and would be unable to participate in the program without an increased award, and which LEAs have the greatest need for financial assistance in the event appropriations are insufficient—involve two separate issues. The Secretary also recognizes that, as explained previously, the non-financial factors in proposed paragraphs (c)(2) through (c)(5) of § 230.33 are *not* relevant to the *first* determination.

However, the Secretary does feel that these non-financial factors *are* relevant to the latter determination in § 230.34. This view is based on sound public policy. If funds are not available to meet all needs, the Secretary cannot ignore students' and teachers' health needs in deciding which containment projects should be funded. A very poor school district with a very modest asbestos problem should not be preferred over a school district that is somewhat less poor but has extremely dangerous levels of asbestos in its schools.

This view is also based on language in the Act. The stated purpose of the Act is to reduce health hazards associated with the presence of asbestos. Section 12(c) provides that if funds appropriated under the Act are insufficient, the Secretary shall establish criteria to be used in determining which applicants have the "greatest financial need for receiving funds *under this Act*" (emphasis ours). A district may have great financial need but still not have the greatest need for assistance under the Act. Therefore, the factors in paragraphs (c) (2) through (5), which have been taken out of § 230.33, are retained and renumbered in § 230.34.

§ 230.40 What are the procedures for conducting an asbestos detection project?

Comment. One commenter asked why the Department chose to adopt EPA's proposed standards for conducting a detection project, and how the Department will proceed if the final EPA regulations should be delayed or substantially changed.

Response. The regulations have been changed. As explained in the preamble to the NPRM, the Secretary's reliance on EPA's procedures is part of a larger effort to coordinate requirements and procedures between two agencies, as contemplated in the Act. The Act states, once in connection with the Task Force and once in connection with the Secretary, that the Department should avoid, to the maximum extent practicable, duplicating similar activities undertaken by EPA. The legislative history makes note of the strides that EPA has made in the matters of asbestos detection and removal and states that the Act is not intended to interfere with the current activities of EPA in these matters.

Since EPA not only has published guidance documents on asbestos detection but, also, was in the process of publishing its own proposed regulation on that subject, and since both the Act and the legislative history contemplate coordination between the Department and EPA, it seemed only reasonable that the Secretary initially rely on EPA's technical and scientific expertise.

As indicated, the Task Force has been reviewing those procedures as part of the regulations document and has made recommendations to the Secretary regarding their adoption. Because EPA's regulations are not yet final however, EPA's proposed procedures—along with any modifications made by EPA and the Secretary in consultation with the Task Force—are now adopted as the Secretary's procedures in this section. Therefore, all citations to the proposed EPA regulations have been deleted from these final regulations. Instead, reference is made in this section to Appendix A, in which the procedures adopted from EPA are reprinted in full as the Secretary's procedures. When EPA publishes final regulations, the Secretary, in consultation with the Task Force will consider what, if any, changes in the Secretary's procedures are appropriate.

§ 230.41 What are the safety measures for conducting an asbestos detection project?

Comment. One commenter inquired from what source the Secretary derived the safety measures in this section.

Response. Those measures were taken from recommendations by EPA as reflected in that agency's guidance documents on asbestos detection.

Comment. One commenter felt that the enumerated safety measures in this section should be made mandatory, since the Act requires the Secretary to establish safety measures for the detection program and requires that grantees comply with those measures.

Response. The regulations have been changed. In the NPRM the Secretary was reluctant to adopt the enumerated safety measures recommended by EPA since various jurisdictions may have adopted other and equally effective measures for the safety of workers conducting asbestos detection projects. The section now reads: "A grantee under the LEA Asbestos Detection Program shall comply with the best available safety measures for conducting its asbestos detection project. A grantee is considered by the Secretary to be in compliance with this section if that grantee adheres to the following safety measures: * * *." (Also, the Task Force recommended that paragraph (e)—"The material should be sprayed with a light mist of water to prevent fiber release during sampling"—be omitted since it may not be an effective safety measure.

§ 230.42 How does a grantee evaluate the likelihood of leakage of asbestos fibers?

Comment. One commenter pointed out that the algorithm method of determining the likelihood of leakage is under question, even by members of the Task Force. The commenter inquired how the Secretary will proceed if the algorithm is changed by EPA or repudiated by the Task Force.

Response. The regulations have been changed. The Task Force reviewed the Asbestos Exposure Assessment Algorithm developed by the EPA that appeared as Appendix A to the proposed regulations and was generally satisfied with it. However, members of the Task Force expressed a preference for a less rigid system for guiding school districts in evaluating the health risks associated with the likelihood of release of asbestos fibers. Therefore, the Task Force suggested a number of changes to the original document, including substituting the term "guidance system" for "algorithm." The revised document, entitled "Guidance System for Assessing Exposure to Asbestos," is found in Appendix B of these regulations, with an introduction explaining the major changes made in the original algorithm.

§ 230.43 What standards does a grantee apply in determining the qualifications of a contractor to carry out an asbestos detection project?

Comments. One commenter made the following comments:

1. The standards a grantee uses for determining the qualifications of a contractor to carry out a detection project—knowledge and familiarity with EPA procedures—are too lenient. They should include the ability, manpower, and equipment to carry out these procedures.

2. The regulations should state who conducted the Asbestos Analytic Laboratory Proficiency Program referred to in § 230.43(c)(2).

3. Are the results of the Analytic Proficiency Program currently available? Also, why aren't those materials included in the information a State must distribute to its LEAs under § 231.71?

Responses. 1. Paragraphs (a) and (b) of this section have been changed and now read, as paragraphs (b) (1) and (2): "* * * the contractor's knowledge of an ability to comply with the procedures * * *." Paragraph (c)(1) has been changed and now reads, as paragraph (b)(3)(i): "* * * the contractor's knowledge of and ability to comply with the analytic techniques * * *."

2. Paragraph (c)(2) has been changed and now reads, as paragraph (b)(3)(ii): "In addition, the Secretary encourages the grantee to consult the results of the Asbestos Analytic Laboratory Proficiency Program developed by EPA. * * *."

3. No change has been made. The results of this program are currently available. Requiring that those materials be included in the information a State must distribute to its LEAs under § 231.71 would be going beyond the requirements of the Act and result in increased burdens on the States. As noted in this section, those materials will be made available to the States upon request, and the States may distribute them to their LEAs.

Comment. One commenter suggested that this section be eliminated since grantees have the resources to conduct the detection projects themselves.

Response. The regulations have been changed. In many instances a grantee may have the resources to conduct some or all of the activities under the detection project. However, there may be a number of grantees with limited resources that would prefer to rely on the expertise of a contractor to carry out those activities. Section 230.43 has been changed to make it clear that a grantee is by no means obligated to select a contractor to carry out the detection project.

Comments. Two commenters suggested that the rules should state the minimum qualifications necessary for a grantee LEA to conduct a detection project, particularly in applying the algorithm. They suggested that the regulations should require some sort of formal instruction in the use of the algorithm. One commenter recommended that SEAs should be required to review and audit their LEAs to determine if they are meeting the minimum qualifications.

Response. No change has been made. The Secretary feels that a grantee is able to determine from the information provided in these regulations and the guidance materials prepared by EPA whether it is capable of conducting the detection project itself or whether it should rely on the expertise of a contractor. The Secretary is not inclined to impose on LEAs and SEAs additional requirements and minimum standards not imposed by the Act. However, an SEA is encouraged to conduct workshops or seminars for its LEAs on how to conduct the detection projects, and the Secretary will make available at the SEA's request helpful materials. The SEA, on its own, may choose to audit or review its LEAs to ensure their compliance with the required procedures.

§ 230.45 What are the procedures for containing or removing asbestos materials?

Comment. One commenter felt that LEAs receiving loans for the control program should not have to adhere to the strict standards in this section but, rather, should be given broad flexibility in deciding when and to what extent to institute corrective procedures.

Response. No change has been made. The Act requires the Secretary to establish, by regulation, procedures for containing and removing asbestos in school buildings. Those procedures, for the most part, have been adopted from EPA guidelines that have proved successful in the past. Furthermore, the Asbestos Task Force, which is charged with reviewing those guidelines, is satisfied that the corrective procedures are based on sound scientific principles for eliminating health hazards associated with asbestos.

Comment. One commenter questioned the stringency of provisions in Appendix C and suggested that ED allow less restrictive practices if the party conducting an asbestos control project employs low-pressure encapsulation or enclosure without disturbance of the asbestos-containing materials.

Response. The regulations have been changed. Section 230.45 now indicates that the procedures outlined in Appendix C are recommended guidelines, rather than requirements, in the case of asbestos control projects that involve containment and present no significant risk of releasing friable materials into the air. These procedures represent the best information currently available on controlling the release of fibers from friable materials containing asbestos. They were developed to protect workers and control contamination during remedial operations.

The Secretary and EPA recommend stringent work practices even in the case of containment because even low-pressure spraying of a sealant will release fibers in elevated concentrations. In addition, reports from contractors have noted that friable surfaces, when heavy with a sealant, often separate from their substrates. Stringent working conditions are recommended in the face of such possibilities.

§ 230.46 What are the procedures for replacing building materials and restoring school buildings?

Comment. One commenter was of the opinion that replacement and restoration are two very different types of activities, and, therefore, the procedures for each of those activities should not be the same. Also, the commenter felt that the procedures seem to be the barest minimum and are too vague to provide any guidance to LEAs.

Response. No change has been made. The Secretary recognizes that replacement and restoration are two different, albeit related, activities. However, the procedures established in paragraphs (a) and (b) of this section are equally applicable to both replacement and restoration. The standards set for restoration and replacement are indeed general. The Department has a policy against excessively detailed or unnecessary regulations. The Secretary is not aware of any particular abuses or improper practices that require more specific regulations than those proposed. If and when the need for more prescriptive rules is demonstrated, the Secretary will amend the regulations.

§ 230.47 What standards does a recipient of a loan apply in determining the qualifications of a contractor to carry out an asbestos control project?

Comments. One commenter made the following comments: 1. The EPA emission standards and the worker protection standards of the Occupational Health and Safety Hazards Administration that are cross-referenced in paragraphs (a) (1) and (2) of this section should be reprinted in full.

2. Are the EPA National Emission Standards referenced in paragraph (a)(1) of this section intended to apply to public buildings?

3. Why was the decision made to hold contractors to the OSHA standards in paragraph (a)(2) of this section since those standards were written to apply to asbestos manufacturing and workplace situations?

4. Paragraph (a)(3)(i) of this section should be consistent with the preceding paragraphs to refer to knowledge of and *ability to comply with*, rather than knowledge of and *familiarity*.

5. Are the training materials and instructional aids referred to in paragraph (a)(3)(iii) of this section already available?

6. The standard for selecting a contractor for replacement or restoration activities in paragraph (b) of this section is too lenient.

Responses. 1. The EPA and OSHA standards referenced in paragraphs (a)(1) and (2) have not been reprinted as appendices to these regulations, because Federal Register regulations do not permit combining regulations of several agencies in one document.

2. Yes. The EPA National Emission Standards referenced in paragraph (a)(1) of this section are intended to apply to public buildings.

3. The legislative history makes clear that the Act is not meant to interfere with the efforts that have already been made by other agencies to set standards for asbestos control. Therefore, the Secretary has agreed that OSHA should have the prime authority to set worker protection standards and that the OSHA regulations apply to contractors who undertake to contain or remove asbestos. The Task Force has reviewed the OSHA standards and generally is satisfied with them. The representative from OSHA who sits on the Task Force indicated at the first Task Force meeting that OSHA would try to take a second look at some of its standards to make sure they reflect the most currently accepted thinking on worker protection in asbestos control situations.

4. Paragraph (a)(3)(i) has been changed to read: "Knowledge of and ability to comply with the containment and removal practices * * *."

5. Yes. The training materials and instructional aids referred to in paragraph (a)(3)(iii) of this section are available.

6. No change has been made. See response to comment for § 230.46 concerning the procedures for replacement and restoration.

Comment. One commenter asked several questions: Is there a standard of protection that a contractor must meet for workers on corrective projects? Are there standards for environmental protection in removing and disposing of asbestos? If so, will those standards be used to determine compliance or eligibility for funding?

Response. These regulations provide that, before an LEA can be considered eligible for a loan to conduct its asbestos control project, it must submit an application that meets certain requirements. If an applicant intends to hire a contractor, the application must contain a description of the methods to be used by the applicant to conduct the control project *in conformity with* § 230.47, the standards for determining the qualifications of a contractor. Those standards include the contractor's knowledge of and ability to comply with the EPA National Emission Standards (which include procedures to prevent emissions of asbestos materials in the air) and the OSHA Asbestos Regulations (which contain standards for the protection of private contractors engaged in asbestos-related activities).

A qualified contractor must also, according to § 230.47, have knowledge of and ability to comply with the containment and removal practices in Appendix C of these regulations. That appendix includes a description of methods to protect the worker.

§ 230.50 What are the rules for repayment of a loan?

Comment. One commenter noted that there is no mention in this section that the loans are interest-free.

Response. This section has been changed to read: "The following provisions apply to an interest-free loan to an LEA * * *."

§ 230.60 What report must a grantee submit?

Comment. Several commenters felt that a grantee LEA should be required to submit to its SEA a copy of the report the LEA must submit to the Secretary describing its detection project.

Response. No change has been made. The Secretary has no inclination to impose on grantee LEAs requirements in addition to those mandated by the Act. However, the Secretary will make available to an SEA on request copies of reports that the Secretary receives from the LEAs. An SEA, on its own, may wish to require or request from its LEAs copies of those reports.

§ 231.2 Who is eligible for a grant under the SEA Asbestos Detection Program?

Comment. One commenter asked if an SEA can receive a grant under the SEA Asbestos Detection Program if it does not currently have an "on-going" budget line specifically covering that program under the Act.

Response. According to the Act, an SEA is eligible for a grant under the SEA Asbestos Detection Program if it has made or is making grants to its LEAs to conduct asbestos detection projects. Although the SEA need not have a specific budget line covering this program, it must be able in its post-grant report (§ 231.50) to give a detailed account of the funds it has provided its LEAs to conduct asbestos detection projects.

§ 231.31 In what circumstances may the Secretary award a grant greater than 50 percent?

Comment. One commenter noted that the criteria in this section are so much broader than the related criteria for LEAs in § 230.33.

Response. No change has been made. The factors for making a determination of an LEA's financial need are much easier to specify than those for making the same determination with regard to an SEA. Furthermore, most of the factors listed in § 230.33 are not applicable to an SEA. Since the number of SEAs in the country is so much smaller than the number of LEAs, and since few SEAs will likely claim fiscal need, the Secretary feels it more reasonable to make those determinations on a case-by-case basis. This approach allows an SEA maximum latitude to demonstrate its need for an increased award.

§ 231.50 What report must a grantee submit?

Comment. One commenter noted that paragraphs (a) and (b)(1) of this section seem to require an accounting of *all* State funds granted to LEAs to assist them in conducting their detection projects. The commenter was of the opinion that those paragraphs should require an accounting only of the *Federal* funds granted to SEAs to reimburse them for the grants they made to their LEAs.

Response. No change has been made. It is the intention that the report required from an SEA grantee include an account of not just the federally reimbursed funds, but, rather, of all State funds granted to its LEAs for their detection projects. This is to ensure that the amount awarded the SEA does not exceed the Federal share of any LEA asbestos detection project in that State, as explained in § 231.30(b).

§ 231.70 What must a State plan contain?

Comments. One commenter made the following comments: 1. Since the regulations will not be final before the State plans are required, will States be held accountable for complying with the proposed guidelines? If not, what guidelines are the States expected to follow in submitting their plans?

2. The Act requires an SEA in its State plan to describe the contents of the information the State is required to distribute to its LEAs, in addition to any other information the State desires to distribute (Section 4(a)(2)). Paragraph (b)(1) of the proposed regulations, however, requires only that the State plan describe the information distributed to the LEAs that is *in addition* to the information the State is required to distribute.

Responses. 1. No change has been made. For the most part, the proposed regulations on the State plan mirrored the statutory requirements, which themselves provide adequate guidance to SEAs in preparing their State plans. SEAs are required by the Act to have submitted their State plans by December 15, 1980. An SEA that submitted its State plan before the publication of these final regulations will have an opportunity to amend its plan in accordance with the

amended § 231.70(b)(1), but will be held accountable for meeting only the statutory requirements.

2. Paragraph (b)(1) has been changed and now reads: "Describes the content of the information required in § 231.71(a) and any additional information the State considers desirable to distribute to its LEAs * * *"

Comment. Several commenters expressed concern that there are insufficient State funds available to implement the required activities under the State plan and to take care of administrative costs incurred in conducting the SEA Asbestos Detection Program.

Response. No change has been made. While the Secretary is sympathetic with the concerns of those commenters, the Congress has already spoken on this subject in the Act. The Act does not authorize the appropriation of any Federal funds to be used toward fulfilling the requirements of the State plan; States must use their own funds to meet those requirements. Also, the Act does not provide for any Federal funds to be used to carry out the State's administrative responsibilities under the SEA Asbestos Detection Program.

Comments. One commenter felt that the "SEA"—not the "State" as referred to in this section—should be the entity that distributes the necessary information and maintains the required records. Another commenter felt that the term "designates" in paragraph (d)(1) is misleading, since SEAs have no authority to assign responsibilities, such as submitting reports to the Secretary, to other State agencies.

Response. No change has been made. This section tracks the language of the Act, which requires the State—not necessarily the SEA—to carry out many of the responsibilities under the State plan. The use of the term "designate" in paragraph (d)(1)—also a statutory term—is not meant to imply that an SEA always has the authority to assign responsibilities to other agencies. Rather, this paragraph allows an SEA the option of identifying another agency, presumably with the agreement of that agency, that is to be responsible for submitting the required reports to the Secretary.

Comment. Several commenters suggested that, for purposes of the Secretary's determination that an LEA is in need of an increased award, this section should require the State plan to include factors used by the State to determine fiscal need of its LEAs.

Response. No change has been made. The Secretary does not want to impose on a State requirements in addition to those mandated by the Act. However, since this section lists only the information that a State plan *must* include, an SEA is free to provide in its State plan whatever additional information it considers helpful to the Secretary.

Comment. Several commenters suggested that the Secretary should provide a form to assist the SEAs in preparing their State plans.

Response. No change has been made. Since there is no prescribed form for the State plan, an SEA is free to prepare its State plan in whatever format it finds most convenient. The Secretary feels that a prescribed form would limit an SEA's flexibility in this regard.

§ 231.71 What information must a State distribute to its LEAs?

Comments. One commenter made the following comments: 1. Regarding paragraph (a)(4) of this section, how far along is the Task Force in developing materials on health hazards, and how will the materials be worked into the States' information program? Also, if the Task Force has not completed this task by next March, are there any other relevant documents prepared by the Department, EPA or another group that the States could use to fulfill this requirement?

2. Regarding paragraph (b) of this section, a State, in order to comply fully with the Act, would also have to distribute to its LEAs a copy of the EPA proposed regulations regarding detection standards that are cross-referenced in the Department's regulations.

3. How will the Task Force's education and technical assistance program be tied in to the information that States are required to distribute under § 231.71? The regulations should mention the future availability of this information.

Responses. 1. No change has been made. The Task Force is in the process of compiling materials on the health hazards associated with exposure to asbestos. These materials will be made available on request for States to distribute, if they so desire, to their LEAs. If the Task Force has not completed compiling these materials before March 15, 1980, a State will be considered to be in compliance with paragraph (a)(4) if it distributes to its LEAs copies of the relevant portions of the preamble to EPA's proposed regulations that document the health hazards associated with exposure to asbestos fibers (45 FR 61966, and 61969 through 61971, September 17, 1980). The Secretary, however, encourages the States to distribute to their LEAs any other available materials on asbestos-related health hazards.

2. Since these regulations have been changed to include the texts of the relevant EPA proposed regulations in the appendices, distribution of the Education Department's regulations is all that is necessary to comply with the law.

3. No change has been made. Any information compiled by the Task Force will be made available on request for States to distribute, if they so desire, to their LEAs. Since these materials are being compiled and, thus, are not yet available, the Secretary feels that a reference in the regulations to their future availability would not at this time be of particular benefit to the States. Omission of this reference is in line with the Secretary's general policy to avoid in regulations prescriptive and descriptive information that would not provide helpful and timely guidance to the reader.

§ 231.72 What records must a State maintain?

Comments. One commenter made the following comments: 1. Paragraph (a)(2) of this section differs from the Act in that it requires recordkeeping of *friable* building materials only.

2. Paragraph (a)(3)(iv) of this section incorrectly refers to conditions that existed prior to *replacement* activities, since the Act refers to conditions that existed prior to containment or removal.

3. Regarding paragraph (b) of this section, if EPA decides not to require every school district to fill out a particular recordkeeping form, how will the Department proceed?

Responses. 1. No change has been made. See response no. 1 to comments for § 230.10 concerning the use of the term "friable."

2. Paragraph (a)(3)(iv) has been changed and now reads: "The repairs * * * before the LEA conducted any of the activities listed in paragraphs (a)(3) (i) and (ii) of this section."

3. If EPA's requirement that LEAs fill out a particular recordkeeping form is eliminated or substantially altered in EPA's final regulations, or if EPA has not yet produced final regulations, States will still have to comply with paragraphs (a) (1) and (2). Paragraph (b) has been changed, however, to provide for the possibility that at some future time EPA may promulgate final regulations that would require LEAs to record the same information SEAs are required to maintain in paragraphs (a) (1) and (2).

Comments. One commenter raised the question whether the requirement on a State to *maintain* records also included

the requirement to *obtain* records, and another commenter suggested revising the section to include the term "obtain."

Response. No change has been made. Since both the statutory language and the legislative history use the term "maintain," the regulations also use that term. However, it is obvious that if a State does not have in its possession the records that it is required to maintain, it must obtain them.

Comment. One commenter asked whether there is a date by which a State must have the records on file.

Response. The Act does not mandate a date. However, in describing in its State plan the procedures it will use to maintain records, a State may wish to set a target date by which it believes it can set up the required recordkeeping system on its LEAs.

Comments. One commenter inquired how long a State must maintain these records. Two commenters suggested that the section require a State to maintain *permanent* records.

Response. No change has been made. Neither the Act nor the legislative history gives an indication of the exact length of time a State must maintain the records. However, the legislative history notes that a file would be necessary if an LEA were to do remodeling or renovation in the future. Bearing this in mind, the Secretary recommends that an SEA, in preparing its State plan, set a reasonable length of time during which it intends to maintain the records.

Comments. Several commenters felt that requiring States to maintain records as described in this section imposed excessive burdens on the States. One commenter suggested the regulations should provide that a State that is aware of the location of an LEA's asbestos files shall be deemed to comply with this section. One commenter suggested that an LEA be required to forward to the SEA a summary of the information recorded from each of the school buildings in the LEA. Another commenter felt that those records should be sent directly from the LEAs to the Secretary.

Response. No change has been made. The requirement that a State maintain records on the asbestos activities of its LEAs was imposed by the Congress. The Secretary has no authority to alter this requirement. Nevertheless, the Secretary has made every effort within the confines of the Act to lessen the record-keeping burdens on the States. For example, the regulations do not require that a State maintain a file on each school building in the State, but, rather, that the State maintain records on each of its LEAs.

Therefore, nothing prevents a State from requiring or requesting each of its LEAs to obtain the necessary information on each of the school buildings in that LEA and to forward that information to the State. Furthermore, paragraph (b) of this section would lessen the burdens on States if EPA should at some future time require LEAs to maintain records on the same information.

Comment. One commenter asked if nonpublic schools are deemed to be under the jurisdiction of the State for purposes of this section.

Response. Since the Act defines "LEA" to include the governing authority of a nonprofit school, states are required to maintain records on the private schools if they are in any way under the jurisdiction of the State.

General

Comments. One commenter asked two questions: Why is there no provision in the regulations pertaining to Section 8 of the Act, which provides that recipients of grants or loans shall permit the United States to sue on their behalf? Also, why is there no provision in the regulations pertaining to section 9 of the Act, which prohibits SEAs and LEAs that receive assistance from discriminating against employees who have brought attention to an asbestos problem?

Response. No change has been made. As explained previously, these regulations were written primarily to guide an LEA and SEA in the grant and loan application process, and to assist an SEA in the development of its State plan. Thus, any provisions in the Act that do not bear on the application and State plan procedures (such as sections 8 and 9) are not repeated or referenced in these regulations on the theory that, initially at least, they would have no particular benefit to an LEA or SEA. This decision is in line with the general policy of the Department to exclude unnecessary material from its regulatory documents.

Comments. One commenter was concerned that the proposed regulations require school administrators to make technical decisions—on inspecting, sampling, and the competence of contractors—that are outside the professional capacities of those officials. Since officials must rely on the expertise of laboratories to analyze samples accurately and must trust in the competence of contractors to contain or remove asbestos properly, the commenter recommends that EPA develop a plan to help school officials ensure the quality of analysis and of contractors throughout the country.

Response. No change has been made. The Secretary and EPA recognize the burden on school administrators, and EPA has taken measures to enable administrators to identify qualified laboratories and contractors.

EPA has developed materials to provide guidance for the analysis of samples. Standards for analysis were published in "Interim Method for the Determination of Asbestiform Minerals in Bulk Insulation Samples." EPA has distributed that publication to 100 participating laboratories.

In addition, EPA has developed a program to identify laboratories capable of performing the analysis. EPA distributed samples to 75 laboratories that claimed expertise in analysis, compared their results with reference analyses, and compiled a list of laboratories that successfully identified the asbestos content of those samples.

EPA is making this list available to the public via the toll-free EPA assistance line (800) 424–9065 (in Washington, D.C. 554–1404). EPA is planning to expand the list of competent laboratories and will publish its findings as soon as they are available.

A description of the methodology used in evaluating laboratories is available in the publication "Asbestos-Containing Materials in School Buildings: Bulk Sample Analysis Quality Assurance Program" (EPA 560/13–80–23). This is also available through the toll-free information line. EPA has also published the document "Asbestos-Containing Materials in School Buildings: Guidance for Asbestos Analytical Programs" (EPA 560/13–80–017). This document provides local school officials with guidance for implementing an analytical program that will, at reasonable cost, provide the information necessary to identify and assess hazards and, if officials choose to remedy hazards, to decide which remedial measures are appropriate.

The Secretary and EPA are similarly concerned about the quality of contractors for abatement. EPA has published "Asbestos-Containing Materials in School Buildings: A Guidance Document," part I and part II, which contains guidance on techniques for containment or removal of hazardous materials in order to enable administrators to assess contracts and monitor operations.

The Secretary and EPA have also developed "Procedures for Containing and Removing Building Materials Containing Asbestos," attached as Appendix C to the regulations. These are specifications for corrective measures, and represent the best information currently available on

containing or eliminating hazards posed by friable materials containing asbestos.

EPA is currently developing additional guidance for encapsulation and removal. This will be published as soon as it is complete. EPA has also trained regional asbestos coordinators in the practices EPA recommends so they can assist local officials in each region.

The Secretary and EPA do not feel that it is appropriate for Federal officials to monitor contractors that carry out remedial operations. By providing local school officials with information and specifications, sponsoring regional asbestos coordinators, and maintaining the toll-free technical assistance information line, EPA furnishes local school administrators with the resources to make accurate assessments of contractors.

Comments. 1. One commenter suggested that schools be required to analyze the materials used in boiler and pipe coverings so that if those coverings contain asbestos, they can be treated appropriately. The commenter recommended that school officials be required to sample and analyze suspect boiler and pipe coverings when renovation or demolition is contemplated.

2. The commenter also indicated that brake shoes and pads used in school automotive shops contain asbestos and pointed out that blowing dust out of brake drums and wheel assemblies with an air hose and resurfacing brake shoes on grinding equipment release fibers into the air. Therefore, the commenter recommended that EPA and ED consider requiring schools to acquire appropriate asbestos containment equipment and train shop teachers to reduce exposure.

Responses. 1. No change has been made. The Secretary and EPA have determined that all types of friable building materials containing asbestos can pose hazards to health. The Secretary intends that its regulations apply to boiler and pipe coverings, as well as to materials applied to ceilings and walls. Section 230.10 of the regulations requires that local educational agencies inspect school buildings "to detect friable building materials," whether on pipes, discarded in a crawl space, or on a ceiling.

2. No changes have been made. The purpose of the Act is to detect and contain or remove asbestos used in the fixed structure of school buildings. The Secretary and EPA are aware of the hazards posed by dust released in automotive shops and EPA has developed a program independent of these rules to address them. Along with the Consumer Product Safety Commission, EPA is considering controlling the use of asbestos in brakes through rulemaking announced in its Advanced Notice of Proposed Rulemaking published in the Federal Register on October 17, 1979.

In the interim, while the rules are being developed, EPA is promoting a program, jointly sponsored with the Occupational Safety and Health Administration (OSHA), to alert mechanics to reduce risks. The program consists of (1) distributing educational pamphlets to people exposed to dust generated in brakes, (2) loaning audio-visual materials to interested groups, and (3) providing training manuals to instructors of automobile repair courses. The program will be aimed at automotive shops in a variety of settings, including schools. EPA expects this educational program to be in operation by mid-1981.

For further information about the Advance Notice published on October 17, 1980, please contact Mr. Peter Principe Chief, Minerals Groups, Chemical Control Division, EPA (202) 755–8023. For further information concerning the educational program, please contact Mr. Albert Colli, Chemical Control Division, EPA (202) 755–8023.

Comments. 1. One commenter pointed out that, based on the experience of State officials who used the guidance system, persons should receive training before using the algorithm. The commenter suggested that States be required to schedule training sessions for LEA personnel.

2. The commenter also suggested that the regulations require persons taking bulk samples to be equipped with an approved respirator while sampling, and to take precautions to avoid contamination of clothing.

Responses. 1. No change has been made. Training would be useful, but the Secretary does not require it. However, EPA has trained the regional asbestos coordinators in the use of the best methods currently available and encourages local officials to refer to those asbestos coordinators.

2. A change has been made. A note has been added, after § 230.41 of the regulations, to indicate that the Secretary recommends the use of respiratory protection when persons take bulk samples.

[FR Doc. 81-1501 Filed 1-15-81; 8:45 am]

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federal register

Friday
January 16, 1981

Part XV

Department of Education

Refugee Education Assistance Act; Proposed Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 540

General Education Assistance for Cuban and Haitian Refugee Children Program

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary of Education proposes new regulations to implement the General Education Assistance for Cuban and Haitian Refugee Children Program under the authority of Title II of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422). This program assists local educational agencies in meeting the costs of providing basic educational services to Cuban and Haitian refugee children enrolled in public and secondary schools within their jurisdictions.

DATES: Comments must be received on or before March 17, 1981.

ADDRESSES: Comments should be addressed to Dr. Josue M. Gonzalez, U.S. Department of Education, 400 Maryland Avenue, S.W., (421 Reporters Building), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. James Lockhart (202) 472–7177.

SUPPLEMENTAL INFORMATION: The Refugee Education Assistance Act of 1980 (Pub. L. 96–422), signed into law on October 10, 1980, authorizes a new three-year program of grants to States for the purpose of assisting school districts in meeting the general and special educational needs of Cuban and Haitian refugee children (including entrant children) who have entered the United States on or after November 1, 1979 and Indochinese refugee children who have entered the United States on or after January 1, 1979. These proposed regulations implement Title II of the Act, which authorizes grants to States based on the numbers of eligible Cuban and Haitian refugee children enrolled in public elementary and secondary schools in school districts in the States for the purpose of providing basic educational services for those children.

Funds under this program are distributed to States on a formula basis, with each State entitled by law to receive $450 per eligible child. The amount of a grant award to a State and the amount of a subgrant to a school district would be ratably reduced if the appropriation for this program in a given year is not sufficient to provide $450 per eligible child. In addition, the amount which a State is entitled to receive under this program is reduced if the State is entitled to receive funds under formula grant program that makes assistance available to the State based on the refugee, parolee, or asylee status of the children to be served under this program.

The amount which a State is entitled to receive will be based on a count of eligible children in the State taken on a date specified by the Secretary in a notice published in the **Federal Register.** To allow for a substantial and disproportionate increase in the enrollment of eligible children that may occur after the award of grants, the Secretary proposes in these regulations (§ 540.20) to provide an opportunity for States with increased enrollments to present evidence of the increases. Where funds are available, the Secretary may then provide additional assistance to States that report increases. A State that receives additional assistance would then increase the amount of subgrants to LEAs based on the increased enrollments of eligible children. An equal amount would be provided for each new child reported. Under no circumstances would the Secretary reduce the award in a particular year to a State on the basis of decreased enrollment of eligible children during that year.

To minimize the reporting burden on States and school districts eligible for assistance under the various Department of Education (ED) programs that authorize support for educational services for refugee and entrant children, (Transition Program for Refugee Children, 34 CFR Part 538; Educational Services for Cuban and Haitian Entrant Children, 34 CFR Part 539; and Impact Assistance for Refugee Children, 34 CFR Part 541), the Secretary expects to require only one count of eligible refugee and entrant children that identifies whether the children of Indochinese, Cuban and Haitian, or other origin, and the recency of their arrival in the United States (in years). The Secretary believes this counting and reporting format will provide reasonable estimates of children eligible for assistance under the various programs and will simplify the reporting and administrative responsibilities and requirements for States and school districts.

Invitation to Comment:

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. Written comments and recommendations may be sent to the address given at the beginning of this preamble. All comments received on or before the 60th day after publication of this document will be considered in the development of the final regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 421, Reporters Building, 7th and D Streets, S.W., Washington, D.C. between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Citation of Legal Authority:

A citation of statutory of other legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

(Catalog of Federal Domestic Assistance Number not assigned yet)

Dated: January 12, 1981.

The Secretary proposes to add a new Part 540 to Title 34 of the Code of Federal Regulations to read as follows:

Part 540—General Education Assistance for Cuban and Haitian Refugee Children Program

Subpart A—General

Sec.

540.1 What is the General Education Assistance for Cuban and Haitian Refugee Children Program?
540.2 Who is eligible to apply for financial assistance?
540.3 What regulations apply to this program?
540.4 What definitions apply to this program?

Subpart B—How Does a State Apply for a Grant?

540.10 What documents does the State submit to receive a grant?
540.11 How is the number of eligible children determined?
540.12 When does a State submit its application?

Subpart C—How Is a Grant Made to a State?

540.20 How does the Secretary provide for a substantial and disproportionate increase in the enrollment of eligible children that may occur after a grant has been made?

Subpart D—How Does a Local Educational Agency Apply to the State for a Subgrant?

540.30 What documents must an applicant submit to receive a subgrant?
540.31 When does an applicant submit its application for a subgrant?

Subpart E—How Is a Subgrant Made to an Applicant?

540.40 How is the amount of a subgrant determined?
540.41 When is the amount of a subgrant increased?

Subpart F—What Conditions Must Be Met by the State and its Subgrantees?

540.50 What are the restrictions on administrative costs for a State and its subgrantees?

Subpart A—General

§ 540.1 What is the General Education Assistance for Cuban and Haitian Refugee Children Program?

This program assists local educational agencies (LEAs) in providing basic educational services to Cuban and Haitian refugee children enrolled in public elementary and secondary schools within their jurisdictions.

(Sections 201(a) and 202(a) of the Refugee Education Assistance Act of 1980)

§ 540.2 Who is eligible to apply for financial assistance?

(a) A State educational agency (SEA) may apply for a grant to assist LEAs in its State in providing basic educational services to Cuban and Haitian refugee children enrolled in public elementary and secondary schools in its State.

(b) An LEA or a consortium of LEAs may apply to the SEA for a subgrant to provide basic educational services to Cuban and Haitian refugee children enrolled in public elementary and secondary schools within its jurisdiction.

(Section 201(a) of the Refugee Education Assistance Act of 1980)

§ 540.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in this part 539.

(b) The Education Department General Administrative Regulations (EDGAR) 34 CFR Parts 74, 76, 77, and 78, except—

(1) Section 76.101 (The general State application); and

(2) Section 76.103 (Three-year State plans).

(20 U.S.C. 3474(a))

§ 540.4 What definitions apply to this program?

(a) The following definitions in EDGAR (34 CFR Part 77) apply to these regulations: Applicant; Application; Award; EDGAR; Elementary; Local educational agency; Project; Secondary school; Secretary; State; and State educational agency.

(b) The following definitions are specific to these regulations:

"Act" means the Refugee Education Assistance Act of 1980.

"Cuban and Haitian refugee children" means aliens who have fled from Cuba or Haiti and who—

(1) On or before November 1, 1979—

(i) Have been admitted into the United States as refugees under Section 207 of the Immigration and Nationality Act;

(ii) Have been paroled into the United States by the Attorney General under Section 212(d)(5) of such Act; or

(iii) Are applicants for asylum, or have been granted asylum, in the United States; or

(2) Are Cuban or Haitian entrants (status pending) who entered the United States on or after November 1, 1979. Any child described in this subparagraph (2) is considered to maintain that status for purposes of this part regardless of any subsequent change in status under any other law.

"Eligible children" means Cuban and Haitian refugee children enrolled in public elementary and secondary schools.

(Section 101 of the Refugee Education Assistance Act of 1980)

Subpart B—How Does a State Apply for a Grant?

§ 540.10 What documents does the State submit to receive a grant?

To receive a grant, an SEA shall submit to the Secretary an application containing the following:

(a) A count of the number of eligible children in the State, as required in § 540.11;

(b) A program plan that includes—

(1) A description of the SEA's method of counting children eligible for assistance under this program;

(2) A brief description of the SEA's plan for administering, monitoring, and evaluating the program.

(c) The following assurances:

(1) An assurance that the SEA will distribute funds among the LEAs in the State in accordance with the provisions in § 540.41.

(2) An assurance that the SEA will not disapprove in whole or in part an application submitted by an LEA for a subgrant without first affording the LEA a hearing according to the provisions in EDGAR (34 CFR 76.104).

(Section 202(a) of the Refugee Education Assistance Act of 1980; 20 U.S.C. 3474(a))

§ 540.11 How is the number of eligible children determined?

On a date specified by the Secretary through a notice published in the **Federal Register**, an SEA shall count the number of eligible children in its State.

(20 U.S.C. 3474(a))

§ 540.12 When does a State submit its application?

To be eligible for funds, an SEA must transmit its application in accordance with an application notice published in the **Federal Register** that establishes a deadline for the transmittal of State applications.

(20 U.S.C. 3474(a))

Subpart C—How is a Grant Made to a State?

§ 540.20 How does the Secretary provide for a substantial and disproportionate increase in the enrollment of eligible children that may occur after a grant has been made?

(a)(1) If the Secretary determines that there has been a substantial and disproportionate increase in enrollment of eligible children, the Secretary may provide SEAs an opportunity to submit evidence of the increase of the nmber of eligible children enrolled in schools in the State.

(2) Through a notice published in the **Federal Register**, the Secretary invites SEAs with increased enrollments of eligible children to submit a recount of the number of eligible children enrolled in schools in the State, according to the provisions in § 540.11.

(b) The Secretary may provide additional assistance to an SEA based on the increase in the number of eligible children in the State if—

(1) Funds are available, and;

(2) The SEA submits a plan outlining how the additional funds would be spent to provide services for those children.

(c) The Secretary does not decrease the amount of an award during that year to an SEA where there is a decrease in the enrollment of eligible children.

(Sections 103(b) and 201 (b) and (c) of the Refugee Education Assistance Act and 20 U.S.C. 3474(a))

Subpart D—How Does a Local Educational Agency Apply to the State for a Subgrant?

§ 540.30 What documents must an applicant submit to receive a subgrant?

To receive a subgrant, an LEA or a consortium of LEAs shall submit to the SEA an application containing the following information:

(a) A count of the number of eligible children in its jurisdiction, as required in § 540.11.

(b) A brief description of the educational services to be provided for the eligible children.

(20 U.S.C. 3474(a))

§ 540.31 When does an applicant submit its application for a subgrant?

An SEA shall establish a deadline for receipt of applications for subgrants in any fiscal year that funds are available under this program.

(20 U.S.C. 3474(a))

Subpart E—How Is a Subgrant Made to an Applicant?

§ 540.40 How is the amount of a subgrant determined?

(a) To determine the amount of a subgrant, the SEA—

(1) Subtracts from the SEA's award, the costs budgeted for the administration of the SEA grant award (these costs may not exceed one percent of the SEA award);

(2) Divides the remainder by the total number of eligible children to be served by LEAs in its State under subgrants under the program; and

(3) Multiplies that dividend by the number of eligible children to be served under the subgrant.

(Sections 104 and 201(b)(1) of the Refugee Education Assistance Act of 1980)

§ 540.41 When is the amount of a subgrant increased?

(a) If an SEA receives additional assistance under § 540.24, the SEA shall increase the amount of a subgrant to an LEA, based on the number of new eligible children to be served under the subgrant.

(b) In distributing funds to subgrantees under this paragraph, the SEA shall provide an equal amount for each new child reported.

(Sections 104 and 201 (b) and (c) of the Refugee Education Assistance Act of 1980)

Subpart F—What Conditions Must Be Met by the State and its Subgrantees?

§ 540.50 What are the restrictions on administrative costs for a State and its subgrantees?

An SEA and each subgrantee are limited to an administrative cost of one percent of the total amount of funds that each receives under the program.

(Section 104 of the Refugee Education Assistance Act of 1980)

[FR Doc. 81-1619 Filed 1-15-81; 8:45 am]
BILLING CODE 4000-01-M

34 CFR Part 541

Impact Assistance for Refugee Children Program

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary of Education proposes new regulations to implement the Impact Assistance for Refugee Children Program under the authority of Title III of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422). This program assists local educational agencies, which have experienced substantial increases in the enrollment of Cuban, Haitian, and Indochinese refugee children, in meeting the costs of providing educational services to those children.

DATE: Comments must be received on or before March 17, 1981.

ADDRESSES: Comments should be addressed to Dr. Josue Gonzalez, U.S. Department of Education, 400 Maryland Avenue, S.W., (421 Reporters Building), Washington, D.C., 20202.

FOR FURTHER INFORMATION CONTACT: Mr. James Lockhart, (202) 472–7177.

SUPPLEMENTAL INFORMATION: The Refugee Education Assistance Act of 1980 (Pub. L. 96–422), signed into law on October 10, 1980, authorizes a new three-year program of grants to States for the purpose of assisting school districts in meeting the general and special educational needs of Cuban and Haitian refugee children (including entrant children) who have entered the United States on or after November 1, 1979 and Indochinese refugee children who have entered the United States on or after January 1, 1979. These proposed regulations implement Title III of the Act, which authorizes grants to States, based on the numbers of eligible Cuban, Haitian, and Indochinese refugee children enrolled in elementary or secondary public schools under the jurisdiction of, or in elementary or secondary nonpublic schools within the district served by, school districts that meet the eligibility threshold established in the legislation. To be eligible for a subgrant, a school district's enrollment of Cuban, Haitian, and Indochinese refugee children must be at least 500 students or five percent of the total student enrollment, whichever number is smaller. Eligible school districts may apply to the State for a subgrant to serve those refugee children.

Activities eligible for assistance under this program include the provision of educational services designed to improve the English language skills of the refugee children and to assist the

children in achieving and maintaining a satisfactory level of academic performance. Funds may also be used for inservice training of education personnel that work with these refugee children and may cover basic costs associated with instruction that the school district has incurred due to the influx of the refugee children. Section 541.10 of the proposed regulations describes in detail the activities eligible for support under this program.

The amount which a State is entitled to receive will be based on a count of Cuban, Haitian, and Indochinese refugee children enrolled in schools in the eligible school districts in the State, taken on a date specified by the Secretary in a notice published in the Federal Register.

Funds are distributed through grants to States and subgrants to school districts on the basis of the formula described in Section 301(b)(1) of the Act, which makes funds available to school district. More money is provided for children who have been enrolled in schools in a school district for a shorter period of time. School districts should, therefore, strive to maintain accurate records on the enrollment of the Cuban, Haitian, and Indochinese refugee children.

To allow for a substantial and disproportionate increase in the enrollment of eligible Cuban, Haitian, and Indochinese refugee children that may occur after the award of grants, the Secretary proposes in these regulations (§ 541.30) to provide an opportunity for States with increased enrollments to present evidence of the increases. Where funds are available, the Secretary may provide additional assistance to States that report increases. In addition, assistance may be provided to a newly eligible school district that was previously ineligible for assistance because of low concentration of eligible children. A State that receives additional assistance would then increase the amounts of subgrants to school districts based on the increased enrollment of eligible children. Under no circumstances would the Secretary reduce the award in a particular year to a State on the basis of decreased enrollment of eligible children during that year.

If the appropriation for this program in a given year is insufficient to provide the full amounts to which a State is entitled, the amounts of grant awards to States and the amounts of subgrants to school districts would be ratably reduced. In addition, the amount which a State is entitled to receive under this program shall be reduced if the State is entitled to receive funds under another formula grant program that makes assistance available to the State because of significant concentrations of Cuban, Haitian, and Indochinese refugee children in the State. However, the level of funding which a State is entitled to receive under this program will not be reduced because of funds made available under the Transition Program for Refugee Children or under the Educational Services for Cuban and Haitian Entrant Children Program.

To minimize the reporting burden on States and school districts eligible for assistance under the various Department of Education (ED) programs that authorize support for educational services for refugee and entrant children (Transition Program for Refugee Children, 34 CFR Part 538; Educational Services for Cuban and Haitian Entrant Children, 34 CFR Part 539; and General Education Assistance for Cuban and Haitian Refugee Children, 34 CFR Part 540), the Secretary expects to require only one annual count of eligible refugee and entrant children that identifies whether the children are of Indochinese, Cuban or Haitian, or other origin, and the recency of their arrival in the United States (in years). The Secretary believes this counting and reporting format will provide reasonable estimates of children eligible for assistance under the various programs and will simplify the reporting and administrative responsibilities and requirements for SEAs and LEAs.

Invitation to Comment: Interested persons are invited to submit comments and recommendations regarding the proposed regulations. Written comments and recommendations may be sent to the address given at the beginning of this preamble. All comments received on or before the 60th day after publication of this document will be considered in the development of the final regulations.

All comments submitted in reponse to these proposed regulations will be available for public inspection, during and after the comment period, in Room 421, Reporters Building, 7th and D Streets, S.W., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

Citation of Legal Authority: A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

(Catalog of Federal Domestic Assistance Number not assigned yet)

Dated: January 12, 1981.

Shirley M. Hufstedler

Secretary of Education.

The Secretary proposes to add a new Part 541 to Title 34 of the Code of Federal Regulations to read as follows:

PART 541—IMPACT ASSISTANCE FOR REFUGEE CHILDREN PROGRAM

Subpart A—General

Sec.

541.1 What is the Impact Assistance for Refugee Children Program?
541.2 Who is eligible to apply for financial assistance?
541.3 What regulations apply to this program?
541.4 What definitions apply to this program?

Subpart B—What Activities May Be Supported Under this Program?

541.10 What activities are eligible for support?

Subpart C—How Does a State Apply for a Grant?

541.20 What documents does the State submit to receive a grant?
541.21 How is the number of children eligible for services determined?
541.22 To what extent must a State provide services to eligible children enrolled in nonpublic schools?
541.23 When does a State submit its application?

Subpart D—How Is a Grant Made to a State?

541.30 How does the Secretary provide for a substantial and disproportionate increase in the enrollment of eligible children that may occur after a grant has been made?

Subpart E—How Does a Local Educational Agency Apply to the State for a Subgrant?

541.40 What documents must an applicant submit to receive a subgrant?
541.41 When does an applicant submit its application for a subgrant?

Subpart F—How Is a Subgrant Made to an Applicant?

541.50 How is the amount of a subgrant determined?
541.51 When is the amount of a subgrant increased?

Subpart G—What Conditions Must Be Met by a State and Its Subgrantees?

541.60 What are the restrictions on administrative costs for a State and its subgrantees?

Subpart A—General

§ 541.1 What is the Impact Assistance for Refugee Children Program?

This program provides assistance to local educational agencies (LEAs) which have experienced substantial increases in the enrollment of Cuban, Haitian, or Indochinese refugee children in elementary or secondary public and private schools within their districts.

(Section 301(a) of the Refugee Education Assistance Act of 1980)

§ 541.2 Who is eligible to apply for financial assistance?

(a) A State educational agency (SEA) may apply for a grant to assist LEAs in its State that are eligible under paragraph (b) of this section in meeting the costs of providing basic and supplementary educational services for Cuban, Haitian, and Indochinese refugee children.

(b)(1) An LEA that meets either of the following requirements may apply to the SEA for a subgrant.

(i) *Concentration.* There are at least 500 Cuban, Haitian, or Indochinese refugee children who are enrolled in elementary or secondary public schools under the LEA's jurisdiction or in elementary or secondary nonpublic schools within the districts served by the LEA.

(ii) *Proportion.* The enrollment of Cuban, Haitian, or Indochinese refugee children in the schools described in paragraph (b)(1)(i) of this section comprises at least 5 percent of the total student enrollment in those schools.

(2) For the purposes of determining eligibility to apply under paragraph (b)(1)(i) or (ii) of this section, an LEA counts the number of eligible children who are enrolled in elementary or secondary public schools under the LEA's jurisdiction or elementary or secondary nonpublic schools within the districts served by the LEA.

(Section 301(b)(2) of the Refugee Education Assistance Act of 1980)

§ 541.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in this part 541.

(b) The Education Department General Administrative Regulations (EDGAR) 34 CFR Parts 74, 76, 77, and 78, except—

(1) Section 76.101 (The general State application); and

(2) Section 76.103 (Three-year State plans).

(20 U.S.C. 3474(a))

§ 541.4 What definitions apply to this program?

(a) The following definitions in EDGAR (34 CFR Part 77) apply to these regulations:

Applicant
Application
Award
EDGAR
Elementary school
Local educational agency
Secondary school
Secretary
State
State educational agency

(20 U.S.C. 2854)

(b) The following definitions are specific to these regulations:

"Act" means the Refugee Education Assistance Act of 1980.

"Cuban and Haitian refugee children" means aliens who have fled from Cuba or Haiti and who—

(1) On or after November 1, 1979—

(i) Have been admitted into the United States as refugees under Section 207 of the Immigration and Nationality Act;

(ii) Have been paroled into the United States by the Attorney General under Section 212(d)(5) of such Act; or

(iii) Are applicants for asylum, or have been granted asylum, in the United States; or

(2) Are Cuban or Haitian entrants (status pending) who entered the United States on or after November 1, 1979.

Any child described in this subparagraph (2) is considered to maintain that status for purposes of this part regardless of any subsequent change in status under any other law.

"Elementary or secondary nonpublic schools"—

(1) Means schools that—

(i) Comply with the compulsory education laws of the State; and

(ii) Are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1954; and

(2) Includes the term "private school" used in EDGAR (34 CFR 76.650–76.662).

"Eligible children" means Cuban, Haitian, or Indochinese refugee children who are enrolled in public elementary or secondary schools under the jurisdiction of an LEA or who are enrolled in elementary and secondary nonpublic schools within the districts served by an LEA that is eligible to apply for assistance under this program.

"Indochinese refugee children" means aliens who have fled from Cambodia, Vietnam, or Loas, and, on or after January 1, 1979—

(1) Have been admitted into the United States as refugees under Section 207 of the Immigration and Nationality Act;

(2) Have been paroled into the United States by the Attorney General under Section 212(d)(5) of the Immigration and Nationality Act; or

(3) Are applicants for asylum, or have been granted asylum in the United States.

(Sections 101(1)(B) and 101(4) of the Refugee Education Assistance Act of 1980)

Subpart B—What Activities May Be Supported Under This Program?

§ 541.10 What activities are eligible for support?

Funds under this program may be used to meet the costs of providing the following educational services for eligible children:

(a) Supplementary educational services necessary to enable eligible children to achieve a satisfactory level of performance. These services include, but are not limited to, the provisions of—

(1) English language instruction;

(2) Other bilingual education services; and

(3) Special materials and supplies.

(b) Basic instructional services that may be directly attributed to the presence of eligible children. Allowable costs related to the provision of these services include, but are not limited to,—

(1) The costs of additional classroom supplies;

(2) Additional overhead costs;

(3) Additional construction costs;

(4) Additional costs for the acquisition and rental of space; and

(5) Additional transportation costs.

(c) Special inservice training for education personnel to enable them to provide more effectively the basic and supplementary educational services described in paragraphs (a) and (b) of this section.

(Section 302 of the Refugee Education Assistance Act of 1980)

Subpart C—How Does a State Apply for a Grant?

§ 541.20 What documents does the State submit to receive a grant?

To receive a grant, an SEA shall submit to the Secretary an application containing the following:

(a) A count or estimate as required in § 541.21 of the number of eligible children in the State.

(b) A program plan that includes—

(1) A description of the SEA's method of counting children eligible for assistance under this program;

(2) A brief description of the services to be provided for those children; and

(3) A brief description of the SEA's plan for administering, monitoring, and evaluating the program.

(c) The following assurances:

(i) An assurance that funds under this program will be used to meet the costs of providing the supplementary educational services described in § 541.10.

(ii) An assurance that the SEA will distribute funds among LEAs in the State according to the provisions in § 541.50.

(iii) An assurance that the SEA will not disapprove in whole or in part an application submitted by an LEA for a subgrant without first affording the LEA a hearing according to the provisions in EDGAR (34 CFR 76.401(d)).

(iv) An assurance that the SEA will provice educational services for children eligible for services who are enrolled in elementary and secondary private schools in the State, according to the provisions in EDGAR (34 CFR 76.650–76.662).

(v) The certification required in EDGAR (34 CFR 76.104).

(Section 303(a) of the Refugee Education Assistance Act of 1980; 20 U.S.C. 3474(a))

§ 541.21 How is the number of children eligible for services determined?

(a) For the purposes of this section, the term "schools in the LEA" means elementary or secondary schools under the jurisdiction of an LEA and elementary and secondary nonpublic schools within districts served by an LEA.

(b) On a date specified by the Secretary through a notice published in the **Federal Register**, an SEA makes a count of the number of eligible children enrolled in schools in the LEAs in its State to determine which LEAs meet the eligibility requirement in § 541.2(b).

(c)(1) For each LEA that meets the eligibility requirement, an SEA reports in its application the total number of Cuban, Haitian, and Indochinese refugee children enrolled in schools in the LEA.

(2) An SEA reports its count in the following manner:

(i) An SEA applying for a grant in fiscal year (FY) 1981 reports the number of eligible children in each LEA.

(ii) An SEA applying for a grant in FY 1982 identifies in its count the number of eligible children in each LEA—

(A) Who were first enrolled in schools in the LEA during FY 1982; and

(B) Those who were enrolled in schools in the LEA in FY 1981.

(iii) An SEA applying for a grant in FY 1983 identifies in its count of the number of eligible children in each LEA—

(A) Those children who were first enrolled in schools in the LEA during FY 1983;

(B) Those children who first enrolled in schools in the LEA during FY 1982; and

(C) Those children who were enrolled in schools in the LEA in FY 1981.

(Sections 301 (b)(1), (b)(2), and (c) of the Refugee Education Assistance Act of 1980)

§ 541.22 To what extent must a State provide services to eligible children enrolled in nonpublic schools?

(a)(1) The SEA shall provide—through subgrants to LEAs, through contracts or cooperative arrangements with public and nonprofit agencies, organizations, and institutions, or through direct services—opportunities for eligible children enrolled in nonpublic schools to receive educational services under this program.

(2) The requirements which must be met by an SEA with respect to eligible children enrolled in nonpublic schools are set forth in EDGAR (34 CFR 76.651–76.662).

(b) If a State is prohibited by law from providing educational services for eligible children enrolled in elementary and secondary nonpublic schools, as required in Section 303(a)(6) of the Act, or if the Secretary determines that an LEA has failed or is unwilling to provide for the participation on an equitable basis of children enrolled in such schools, the Secretary may waive such requirements and arrange for the provision of services to meet the requirements of the Act.

(Sections 303(a)(6) and 304(b) of the Refugee Education Assistance Act of 1980; 20 U.S.C. 3474(a))

§ 541.23 When does a State submit its application?

To be eligible for funds, an SEA must transmit its application in accordance with an application notice published in the **Federal Register** that establishes a deadline for the receipt of State applications.

(20 U.S.C. 3474(a))

Subpart D—How Is a Grant Made to a State?

§ 541.30 How does the Secretary provide for a substantial and disproportionate increase in the enrollment of eligible children that may occur after a grant has been made?

(a)(1) If the Secretary determines that there has been a substantial and disproportionate increase in the enrollment of eligible children, the Secretary may prove SEAs an opportunity to submit evidence of the increase of the number of eligible children enrolled in schools in the State.

(2) Through a notice published in the **Federal Register**, the Secretary invites SEAs with increased enrollments of eligible children to submit a recount of the number of eligible children enrolled in schools in the State according to the provision in § 541.21.

(b) The Secretary may provide additional assistance to an SEA based

on the increase in the number of eligible children in the State, if—

(1) Funds are available; and

(2) The SEA submits a plan outlining how the additional funds would be spent to provide services for those children.

(c) The Secretary does not decrease the amount of an award during that year to an SEA where there is a decrease in the enrollment of eligible children.

(Sections 301(b) and (c) of the Refugee Education Assistance Act of 1980 and U.S.C. 3474(a))

Subpart E—How Does a Local Educational Agency Apply to the State for a Subgrant?

§ 541.40 What documents must an applicant submit to receive a subgrant?

To receive a subgrant, an LEA that meets the eligibility requirements in § 541.2(b) shall submit to the SEA an application containing the following:

(a) A count of the number of eligible children who are enrolled in elementary or secondary public schools under the LEA's jurisdiction or elementary or secondary nonpublic schools within the districts served by the LEA;

(b) A brief description of the educational services to be provided for the eligible children; and

(c) The information required in EDGAR [34 CFR 76.656], pertaining to the participation of students enrolled in private schools.

(20 U.S.C. 3474(a))

§ 541.41 When does an applicant submit its application for a subgrant?

An SEA shall establish a deadline for receipt of applications for subgrants in any fiscal year that funds are available under this program.

(20 U.S.C. 3474(a))

Subpart F—How Is a Subgrant Made to an Applicant?

§ 541.50 How is the amount of a subgrant determined?

(a) In determining the amounts of subgrants to LEAs, the SEA—

(1) Subtracts from the SEA's award, the costs budgeted for the administration of the SEA grant award (these costs may not exceed one percent of the SEA award);

(2) Divides the remainder of the award into subgrants for LEAs in its State based on application of the appropriate formula in Section 301(b)(1) of the Act.

(Sections 102(b)(1), 104 and 301(b)(1) of the Refuge Education Assistance Act of 1980)

§ 541.51 When is the amount of a subgrant increased?

(a) If an SEA receives additional assistance under § 541.30, the SEA shall increase the amounts of the subgrants to LEAs based on the number of new eligible children under each subgrant.

(b) In distributing funds to subgrantees, the SEA—

(1) Determines the amounts that each child is entitled to receive based on application of the appropriate formula in Section 301(b)(1) of the Act;

(2) Ratably reduces these amounts, if necessary, to bring the total amount of the increases to subgrantees to an amount within the increase received by the SEA.

(Sections 102(b)(1), 104, and 301(b)(1) and (c) of the Refuge Education Assistance Act of 1980).

Subpart G—What Conditions Must Be Met by a State and its Subgrantees?

§ 541.60 What are the restrictions on administrative costs for a State and its subgrantees?

An SEA and a subgrantee are each limited to an administrative cost of one percent of the total amount of funds that it receives under the program.

(Section 104 of the Refugee Education Assistance Act of 1980)

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Part XVI

Department of Labor

Employment and Training Administration

Labor Certification Process for the Temporary Employment of Aliens in Agriculture: Adverse Effect Wage Rate Methodology

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture: Adverse Effect Wage Rate Methodology

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL) is establishing a new methodology for computing the agricultural adverse effect wage rate (AEWR), that is, the minimum wage rate which DOL has determined must be offered and paid by the employers proposing to employ nonimmigrant alien agricultural workers in the United States. The new methodology would set a single national rate governing the admission of foreign temporary workers admitted to perform agricultural employment, principally cultivation and harvesting of crops, anywhere in the United States.

A separate and distinct methodology for sheepherding historically has been used. No change is made in that methodology other than updating the data base and rounding the figure to the nearest dollar rather than to the nearest five dollars as was past practice. No change is made for logging employment, which has been governed by the prevailing wage rates for the occupation in the area of intended employment.

EFFECTIVE DATE: This amendment is effective with respect to applications for temporary alien labor certification received for processing on or after February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth D. Bell, Office of Technical Support, United States Employment Service, Telephone: 202-376-6297.

SUPPLEMENTARY INFORMATION:

Introduction

The Employment and Training Administration (ETA) of the Department of Labor (DOL) is amending its regulations at 20 CFR 655.207, to establish a new methodology for computing the adverse effect wage rate for the temporary employment of nonimmigrant aliens in agricultural occupations. DOL's regulations for the certification of temporary employment of nonimmigrant aliens are issued pursuant to the Immigration and Naturalization Service (INS) regulations at 8 CFR 214.2(h)(3)(i), set forth in pertinent part below:

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii) of the [Immigration and Nationality] Act [8 U.S.C. 1101(a)(15)(H)(ii)].

Temporary Alien Employment Certification Process

Whether to grant or deny a nonimmigrant visa petition under 8 U.S.C. 1101(a)(15)(H)(ii) and 1184 is solely the decision of INS. It is INS policy, however, as expressed in its above-quoted regulation, that, before INS will grant or deny such a visa, it first requests DOL to advise INS with respect to two issues:

(a) Whether there are a sufficient number of able, willing, and qualified U.S. workers available to do the work proposed to be done by the alien; and

(b) Whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers.

If DOL determines that there are not able, willing, qualified, and available U.S. workers, and that the employment of the alien will not adversely affect similarly employed U.S. workers, DOL advises INS of these findings, by issuing a temporary labor certification. The employer proposing to use the alien for temporary work then attaches the certification as part of the alien's visa petition, pursuant to 8 CFR 214.2(h)(3)(i). INS then considers the "H-2" visa petition submitted by the employer on behalf of the alien(s).

If DOL cannot make one or both of the above findings, DOL so advises INS. DOL may be unable to make the two required findings for any of one or more reasons, including, but not limited to:

(a) The employer seeking the temporary labor certification on behalf of the alien has not submitted a proper application, or has not followed the proper procedural steps.

(b) The employer has not submitted sufficient evidence of attempts to obtain available U.S. workers; and/or the employer has not submitted sufficient evidence that the wages and working conditions which the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers; and thus the employer has not met its burden of proof under section 291 of the Immigration and Nationality Act (INA) [8 U.S.C. 1361]:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act * * *.

(c) DOL through its own knowledge and experience, has found that U.S. workers are available and/or that an adverse effect on similarly employed U.S. workers will result, and the employer has not met the burden of rebutting DOL's finding or findings.

Department of Labor Regulations

DOL has published regulations at 20 CFR Part 655, Subpart C, governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in agricultural and logging occupations. Part 655 was promulgated pursuant to the INS regulations at 8 CFR 214.2(h)(3)(i), quoted above.

The regulations in 20 CFR Part 655, Subpart C, set forth the factfinding process resulting in the granting or denial of a temporary alien agricultural labor certification. They describe the potential of the Federal-State system of public employment offices (established pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*) for assisting employers in finding available U.S. workers, and how this process is utilized by DOL as a basis of information for the certification determination. See also 20 CFR Parts 602, 621, 651, 654, and 656-658.

Part 655, Subpart C, also sets forth the responsibilities of employers who desire to employ nonimmigrant aliens in temporary agricultural and logging jobs. Such employers are required to demonstrate that they have attempted to recruit U.S. workers through advertising, through the Federal-State job service system, and by other specified means. The purpose is to assure an adequate test of the availability of U.S. workers to perform the work, and to insure that aliens are not admitted for employment under conditions adversely affecting the wages and working conditions of similarly employed U.S. workers.

Adverse Effect Wage Rates

So that the importation of temporary nonimmigrant alien agricultural workers will not adversely affect the wages of similarly employed U.S. workers, DOL has since 1964 computed and published

adverse effect wage rates (AEWRs).[1] See, *e.g.*, 29 FR 19101, 19102 (December 30, 1964); 32 FR 4569, 4571 (March 28, 1967); 35 FR 12394–12395 (August 4, 1970); and 43 FR 10306, 10317 (March 10, 1978). The AEWR is the minimum wage rate that agricultural employers seeking temporary nonimmigrant alien workers are required to offer to and pay their U.S. and alien workers.

AEWRs apply only to those employers who are seeking certification to import temporary foreign labor into the United States. Employers applying for temporary labor certifications also must agree to comply with all employment-related laws. 20 CFR 655.203(b); see also 8 CFR 214.1(h)(3)(i). If the employment is covered by a higher wage standard applicable under any Federal, State, or local minimum wage law, the employer must comply with that law. See, *e.g.*, 29 U.S.C. 206(a). If the prevailing wage for the occupation in the labor market is higher, the employer must offer and pay that wage. Thus, a worker in employment under the temporary alien labor certification program must be compensated at the highest of the applicable wage rates, whether that highest rate is the AEWR, the prevailing wage, or the Federal, State, or local statutory minimum wage.

The purpose of an AEWR, as described by the Fifth Circuit U.S. Court of Appeals, is "to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." It is a "method of avoiding wage deflation." *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000; see *Florida Sugar Cane League* v. *Usery*, 531 F. 2d 305 (5th Cir. 1976); see also *Limoneira Co.* v. *Wirtz*, 225 F. Supp. 961 (S.D. Cal. 1963), *aff'd*, 327 F. 2d 499 (9th Cir. 1964).

The U.S. Court of Appeals for the First Circuit has recognized that the AEWR is a minimum and neither forbids employers from offering more, nor employees from seeking more. See *Flecha* v. *Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). However, that court recognized two competing statutory purposes, quoting from a Third Circuit decision:

> The common purposes are to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force. *Rogers* v. *Larson*, 3 Cir. 1977, 563 F.2d 617, 626.

The First Circuit then capsulized the purpose of the statute and regulations as "to provide a manageable scheme * * * that is fair to both sides." 567 F.2d at 1156. Thus, the AEWR computation methodology must recognize the need to balance the goals of supplying an adequate labor force and protecting the jobs of citizens.

The current AEWR methodology is published at 20 CFR 655.207 (1980). However, based on requests for rulemaking received from farmworker groups and the Department's experience in the temporary labor certification program over the past 15 years, and on comments received from the public in writing and at recent public hearings, DOL has concluded that the current AEWR methodology has not successfully achieved the purpose of preventing wage deflation of similarly employed U.S. workers, occasioned by the presence of significant numbers of nonimmigrant alien workers. This adverse effect has reduced the number of U.S. workers available for employment in agriculture. Therefore, DOL is revising the methodology, as described below, in furtherance of the statutory objective of preserving U.S. jobs for U.S. workers. See *Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493, 500 (1st Cir. 1974).

Development of Final Rule

I. Necessity to Change Methodology

Before 1968, AEWRs were established at the State level and modified periodically. Since 1968, these rates have been indexed to changes in the previous season's annual average hourly wages of livestock and field hands in each State as estimated by the U.S. Department of Agriculture. (USDA).[2]

AEWR wages currently apply directly to the approximately 500 agricultural employers using temporary foreign workers, out of a total of over 700,000 agricultural employers nationwide. The rates are guaranteed to about 18,000 workers out of total harvest seasonal workforce of over 1.3 million.[3] The AEWR workers are typically paid piece rates and work in hand-picked crops. The largest agricultural users of nonimmigrant aliens admitted on H–2 visas (so-called "H–2 workers") are the East Coast apple growers (6,552 H–2 workers certified by DOL for 1979) and Florida sugarcane producers (8,530 H–2 workers certified by DOL for 1979).

In re-examining the methodology used since 1968, DOL found that fixed base annual adjustment approach for determining AEWRs resulted in AEWRs that were based neither on prevailing wage levels nor on relevant labor markets. Pegging AEWRs to annual changes in wage series indexed to a low base has led to AEWRs computed substantially below prevailing wages and sometimes even below the Fair Labor Standards Act minimum wage.[4] See 29 U.S.C. 206(a)(1). As a result, the traditional methodology was found to be an ineffective tool for testing the availability of domestic workers and in neutralizing adverse wage effects for U.S. farmworkers.

Specifically: a. Significant variations in AEWRs had developed between States using H–2 alien farmworkers (so-called "user States") and those not using such workers, with rates in States using H–2 alien farmworkers generally well below those not using such workers.

b. This led to significant distortions in agricultural wages between user and nonuser States. Relative growth rates in wages were also lower in States using H–2 alien farmworkers.

c. Within the same crop, variations in average wage levels had developed between user and nonuser States.

d. Piece rates in areas which heavily use H–2 alien farmworkers had remained unchanged for long periods and actually declined substantially in real terms.

In addition to the shortcomings noted above, it is particularly important to change the methodology at this time, to avoid the loss to H–2 aliens of jobs which currently go to U.S. workers. As the FLSA minimum wage (which applies to many agricultural workers) increases and approaches the level of the AEWR, the H–2 aliens become more economically attractive to the growers. Thus, the existing methodology poses grave risks in the next two or three years for the continued loss of jobs for U.S. workers.

These factors led DOL to re-evaluate the existing methodology. DOL realized

[1] Congress recognized some years before 1964 that the Department of Labor had the authority to set adverse effect rates. H. Rept. 274 (on H.R. 2010), 87th Cong., 1st Sess. (1961) at 9. Similar language appeared in the Senate debate on H.R. 2010. H.R. 2010 was enacted as Public Law 87–345. 75 Stat. 761 (October 3, 1961).

[2] The USDA data had been published each February in the USDA publication *Farm Labor*. However, publication of combined field and livestock worker data was discontinued after 1979, but was prepared by USDA specifically for DOL use in 1980. *Farm Labor* is published by the Crop Reporting Board, of the Economics, Statistics, & Cooperatives Service, USDA, Washington, D.C. 20250.

[3] Various sources indicate that virtually all of the H–2 alien workers are hired for harvest season jobs.

[4] Even if computed below the FLSA minimum wage, the AEWR would never be set below that wage. See 20 CFR § 655.207(e) (1980).

that any solution which tended to correct these distortions would, by definition, have an impact on H–2 growers. After a series of six public hearings (see 44 FR 59890 (October 16, 1979)), DOL proposed a new methodology for establishing an AEWR. 45 FR 15914 (March 11, 1980). The proposal is outlined below. After several extensions, the comment period closed on July 14, 1980. 45 FR 29854 (May 6, 1980). During the comment period, several problems were raised by the public commenters, which led to this re-evaluation of the initially-proposed AEWR formula. DOL considered each comment in designing the final rule. Because of the large number of written comments received (307 from 29 States, including 210 comments from the State of Virginia alone), DOL contracted with Ruttenberg, Friedman, Kilgallon, Gutchess & Associates, Inc., to assist DOL in organizing and summarizing the comments. Selected portions of Ruttenberg's summary are excerpted in the *Appendix* to this document.

II. Designing an Appropriate Regulation; Comments on Proposed Rule

The AEWR should be designed to mirror, to the extent possible, rates that would be determined by competitive domestic labor market forces. Thus, the wage-setting methodology should parallel the piece-rates actually paid during the harvest season for those hand-picked crops where H–2 temporary workers dominate; but it should take into account the fact that wages are currently depressed for crops and areas which make heavy use of alien workers. It should also compensate for the labor cost differential between domestic and alien farmworkers (currently about 15 percent) that results from social security and unemployment insurance tax requirements for U.S. workers. See, *e.g.*, 26 U.S.C. 3306(c)(1)(B) and (18). Finally, the AEWR methodology should reflect the structure of domestic agricultural labor markets for hand-picked crops.

While agricultural labor markets for seasonal, labor-intensive crops have a local component, an interstate character to these markets emerges in the presence of migratory workers that move from State-to-State and crop-to-crop. This interstate labor supply source would tend to equalize seasonal farm wages across local labor markets in the absence of regulation.

The fixed base annual adjustment approach, as noted above, reflects neither prevailing wage levels nor the interstate movement of farmworkers and thus perpetuates artificial variations in wage rates among user and non-user States. It is based on arbitrarily established State wage bases indexed to changes in previous season rates not closely related to harvest activity.

The methodology proposed in March 1980 would have set a single AEWR for all States based on a historical relationship between the average hourly earnings of piece-rate paid hired workers in agriculture and the average hourly wages paid private nonfarm workers during the previous year. This relationship, established through a regression model, would predict farmworkers' wages for the upcoming harvest season.

The March 1980 proposed approach more accurately reflects agricultural labor market conditions than the fixed base annual adjustment methodology. It would have eliminated noncompetitive interstate wage differentials that have led to distortions in labor costs between user and nonuser States. The proposed rule thus would have afforded a fairer test of labor availability and more effective protection of the wages of similarly employed agricultural workers. That proposed methodology also would have directly linked the AEWR to prevailing hourly wages for piece-rate paid hired farmworkers, the group most affected by the importation of temporary alien workers.[5] Finally, the proposed rule would have established a single AEWR which is easy to administer and does not call for additional data collection.

While the March 1980 proposal was clearly superior to the methodology used since 1968, it raised several new problems. These problems were suggested by many of the commenters responding to the proposed rule. First, the proposed methodology carried higher initial costs for impacted growers estimated at $2.72 million in 1980. While these overall costs are not significant when applied industry-wide, they hide relatively large increases for certain crops that use H–2 labor. Labor cost increases for growers using H–2 workers, under the March 1980 proposal, are estimated at 25.8 percent for tobacco, 19.6 percent for citrus, and 16.2 percent for apples. These larger initial cost increases reflect in part the movement from a wage determination based on the past year's wages to one based on projected wages for the upcoming harvest season. The large cost increases in some crops also stem from much lower prevailing wages and AEWRs. In addition to these direct costs, there was concern over the likelihood of spillovers or induced wage effects into other agricultural labor markets that could add unnecessarily to the costs of the proposal.

Secondly, the regression methodology, while based on sound mathematics, was criticized by some commenters as needlessly complex and confusing to the industry. Other commenters raised questions of statistical accuracy, given the limited nature of the data available at the present time.

Finally, while alleging that the current AEWR methodology incorrectly treated each State as a separate labor market, some commenters suggested that labor markets are better characterized as regional rather than national. The proposed methodology implied a national scope to such labor markets, which would operate to eliminate regional wage differentials in the absence of regulation. However, if legitimate regional wage variations exist, *i.e.*, regional labor markets, multiple AEWRs that follow existing labor market contours might better approximate competitive conditions in the absence of H–2 workers. Since this criticism focuses most directly on the generic approach of setting a single AEWR, rather than on any specific formula, DOL carefully reviewed the structure of agricultural labor markets, as discussed below.

III. The Structure of Agricultural Labor Markets

The seasonality of labor demand and skill requirements define the nature and scope of individual agricultural labor markets. With the mechanization of most agricultural production, the principal crops currently using seasonal labor are fruit and vegetable crops, and (to a lesser extent) tobacco. These crops exhibit an intensive need for labor during the heaviest season. These hand-picked crops also display few skill requirements, in contrast to the highly mechanized forage operations. Thus, livestock operations, as one example, have relatively stable employment requirements.

These characteristics determine the structure of agricultural labor markets. Year-round farm activities will tend to be met by full-time farmworkers, while seasonal labor-intensive crops give rise to casual, seasonal and migratory farmworkers to meet peak demand requirements. An interstate character to labor markets for certain crops emerges in the presence of migrant workers who move to job opportunities away from their home location when sufficient local workers are not available. However,

[5] However, the prevailing rate refers to yearly averages and not harvest season wages (which are higher). Also, the initially proposed AEWR did not address the issue of added compensation for the payroll tax savings associated with hiring H–2 temporary workers. See, *e.g.*, 26 U.S.C. 3306(c)(1)(B) and (18), cited above.

labor mobility is not perfect; there is also evidence of segmentation across certain crops (particularly, highly mechanized operations) and non-crop agricultural activities.

The majority of hired farmworkers are employed on a casual or seasonal basis. Casual workers are defined as those working less than 25 days on farms and seasonal workers are those working 25 to 149 days. Most of these workers are local residents. USDA data (1977) show the local casual farmworkers comprise about 38 percent of the hired farm workforce and non-migrant seasonals represent an additional 32 percent. Together these groups performed only 30 percent of the total person-days worked in 1977. Many of the local casual and seasonal workers are students and homemakers who work in the fields for several weeks or a month each year during peak harvest periods.

Only limited statistics exist on the current migrant farmworker population. The most recent USDA estimate (1977) indicates about 191,000 migrant workers, or seven percent of the U.S. agricultural labor force. This represents a 50-percent drop in the number of persons performing migrant farmwork since 1960. However, most of this decline occurred during 1960–69. Since 1970, the migrant farmworker population has remained relatively stable at about 200,000. Nearly half of the migrant workers in 1977 were employed in farm jobs that were over 500 miles from their home base and about 20 percent traveled distances in excess of 1500 miles. While migrant farmworkers are not a numerically large group, they work more days than nonmigrants and are heavily concentrated in the seasonal, labor-intensive fruit and vegetable crops.

To account for this interstate movement of farmworkers in the AEWR methodology, labor market boundaries must be established based on migratory travel patterns. The March 1980 proposed methodology would have set a single nationwide AEWR, implicitly assuming a national labor market. Some commenters suggested that there are three regional migratory streams—a Pacific Coast stream with a home base in Southern California; a Mid-Continent stream that begins in the Rio Grande region of Texas; and an Atlantic stream that starts in Florida flowing up the Eastern Seaboard. These commenters rely upon information published by the Public Health Service in 1965. However, more recent data suggest that this simple three-stream pattern may no longer apply.

For example, recent USDA data (1977) reveals that the Southwest standard Federal region (which includes Texas) is the largest home base, representing 37 percent of migrant farmworkers. The Southeast (with Florida) and the lower Pacific Coast region (with Southern California) follow with 14 percent each. These correspond to the three regional home bases described by the Public Health Service in 1965. However, a survey of migrant programs and DOL Employment Services conducted by the Legal Services Corporation in 1977 shows a wide dispersion of States of origin. While this survey supports the USDA results of large home bases in Texas, Florida, and California, more than half the States were represented as home bases for migrants.

The Legal Services Corporation found further evidence of the increasing complexity of patterns of movement in the preceding and succeeding interstate destinations of migrant workers for each State. While some heavy migrational flows do follow the traditional patterns, the wide diversity of interstate movements is also evident. This data clearly shows the increasing fragmentation of historical migratory streams.

Other evidence also points to a breakdown of traditional flow patterns. DOL's State-by-State data on peak month employment activity fail to show a steady progression of employment from May to September across neighboring States up the East Coast. While based solely on the number of workers appearing in adjacent areas according to some hypothetical flow sequence, this data raises serious questions about the current validity of traditional migrant circles. The 1977 survey documented numerous cases of Florida migrants in Washington and Puerto Rican and Florida migrants in California. Conversely, California migrants were regularly found in New Jersey.

The relative importance of structural trends in explaining the breakdown of the simple, three-stream migratory concept strongly suggests that this dispersion represents a permanent change in agricultural markets resulting in a national agricultural labor market structure for H–2 crops.

IV. Description of Final Rule

Since agricultural labor markets for H–2 crops are national in scope, the final rule retains the proposed single nationwide AEWR concept. However, instead of predicting upcoming season wages, the methodology in the final rule uses last year's USDA annual average hourly wage for piece-rate paid hired agricultural workers, phased in over a three-year period. This methodology would be easy to understand and administer because the AEWR would be tied exclusively to prevailing wages in the agricultural sector and would not rely on a regression model linked to nonfarm wages.

Setting the AEWR at last year's annual average hourly wage rate for piece-rate paid hired farmworkers will reduce substantially the cost impact of setting a single nationwide AEWR. In addition, a three-step phase-in will further reduce this cost impact by allowing H–2 growers to adjust to the proposed increase over a three-year period.

This final rule improves the wage levels for the U.S. and alien workers while showing substantial employer savings over the proposed rule, with estimated direct costs for H–2 growers in 1980 (had the final rule been in effect for the 1980 harvest season) of only $3,651.00 compared with $2,720,000.00 under the initial proposal. When compared with the March 1980 initial proposal, costs for impacted growers are lowered by over 77 percent during the phase-in period, and in 1981 will be an estimated $288,027 compared with $2,910,291 under the initial proposal. See Table I, *infra.*

This approach also reduces substantially the direct cost increases for individual crops. Labor costs increases would be under one percent in tobacco. Apple and citrus growers would have experienced no labor cost increase in 1980 had the rate been in effect for the entire 1980 harvest season. No added costs are foreseen for sugar cane (about half the agricultural H–2 workers are employed in sugar cane harvesting, where wages have been above the applicable AEWR since at least 1976).

While these cost estimates refer only to the direct economic impact of establishing a single nationwide AEWR, potential spillover effects are expected to be limited by such factors as (1) a lower AEWR resulting from the use of previous season wages phased in over a three-year period; (2) the small number of workers to whom this final rule applies relative to the labor force; and (3) partial segmentation of agricultural labor markets based on skill needs and seasonality of demand.

V. Direct Cost Estimates

This section compares the projected *direct* cost impacts for H–2 growers of the initially proposed rule and the final rule. These costs are also compared with those calculated under the current methodology. Although the new formula will not go into effect for a full year until the 1981 harvest season, the cost

estimates on which this rule was based were prepared for the period 1980–1983. In making these estimates, DOL used data on labor force in prevailing wages by crops for 1979 which were the most recent data available when these estimates were prepared.

To derive the 1980 cost estimates, DOL has assumed that the 1979 levels of H–2 employment (both domestic and alien workers employed by impacted growers) by crop activity continued in 1980. Prevailing hourly wages for these crops in H–2 States were projected forward to 1980 using the average annual growth rate in USDA average hourly wages for piece-rate hired agricultural workers for the period 1974–1979, which is 9.6 percent. Projected hourly wages in 1980 by crop were then compared to the relevant AEWRs (either State or national) to obtain estimates of the costs added by these proposals for changing the AEWR methodology over those under the current methodology.

A. *Proposed Rule Costs.* As stated above, under the March 1980 proposed rule, the AEWR would have been set at $4.51 per hour in all H–2 workers user States in 1980. The overall direct cost increase would have been estimated at a modest $2.72 million nationwide for all crop activities in 1980. However, the aggregate cost estimate obscures relatively large increases for certain crops that use H–2 labor. Estimated labor cost increases resulting from the initial proposal would have been 25.8 percent for tobacco, 16.2 percent for apples, and 19.6 percent for citrus. These large cost increases reflect in part the movement from a wage determination based on prior year wages to one based on projected wages for the upcoming harvest season. The large cost increases in some crops also stem from much lower prevailing wages and AEWRs.

B. *Final Rule Phase-in Costs.* Establishing a nationwide AEWR based on last year's annual average hourly wage rate for piece-rate paid hired agricultural workers, phased in over a three-year period, would produce substantial cost savings for impacted growers relative to the initial proposal. To calculate the four-year cost of this approach, DOL predicted the 1982 United States annual average hourly wages of piece-rate paid hired farmworkers which, under the rule, would become the 1983 AEWR. This rate was calculated by using the actual average 1979 wages of $4.07 (as determined by the USDA) and the 9.6 percent average annual increase in this wage series over the 1974–1979 period.[6] By 1983, 100 percent of the 1982 United States annual average hourly earnings of piece-rate paid hired farmworkers would become the 1983 AEWR under the final rule.

The estimated cost of this phase-in approach depends on the 1979 baseline selected from which to extrapolate interim AEWR's until reaching an estimated $5.36 in 1983. If DOL uses the average 1979 H–2 user state AEWR of $3.10, calculated under the current methodology,[7] as the baseline for 1979 and the estimated $5.36 for the 1983 end period of the phase-in, a straight-line phase-in methodology would produce intermediate AEWRs of approximately 90 percent the USDA rate for 1980 ($3.67), approximately 95 percent for 1981 ($4.23), and approximately 98 percent for 1982 ($4.80). If DOL had chosen to apply the new methodology in the final rule without a phase-in, the AEWRs would be estimated to be $4.07 for 1980, $4.46 for 1981 and $4.89 for 1982. If DOL had chosen to apply the methodology initially proposed in the March 11, 1980, document, the AEWRs would be estimated to be $4.51 for 1980, $4.89 for 1981, $5.32 for 1982, and $5.77 for 1983.

Cost estimates for the phase-in approach adopted in this final rule are presented in Table I below. The final rule shows substantial cost savings, with projected direct costs in 1980 of only $3,651.00 compared with $2.72 million, and in 1983, of $1.41 million compared with $3.10 million. When compared with the proposal, annual costs spread out over the four-year period for impacted growers are reduced by over 77 percent under the final rule, averaging $651,695.00 per year. See Table I, *infra*.

This final rule establishes a nationwide AEWR based on the previous year's annual average hourly wage for piece-rate paid hired farmworkers nationwide, and both avoids imposing a double increase in the first year and reduces substantially the direct cost increases for individual crops. Labor costs increases for tobacco growers would be limited to under one percent. Apple and citrus growers are expected to experience no cost increases in 1980 under the final rule.

While these estimates do not account for any wage spillover to non H–2 growers or other indirect effects in local labor markets, these secondary effects are expected to be limited, as noted earlier.

[6] Alternatively, DOL could predict average hourly earnings of piece-rate hired farmworkers for 1982 from the estimated parameters in the regression methodology used in the initial proposal to establish the 1980 AEWR. For this projection, production worker earnings were assumed to increase at 7.6 percent, the average annual increase in production worker earnings over the 1973–1979 period. These calculations would produce a similar AEWR for 1983 of $5.32. However, DOL has based the cost estimates on the approach likely to be used by DOL to set interim AEWRs during the phase-in period.

[7] The average AEWR is calculated as the unweighted mean of the relevant State AEWRs.

Table I.—*Estimated Additional Cost of Implementing Previous Season AEWR by Major Crops Using Alien Labor in 1980 to 1983 With a 3-Year Phase-in (1980–1983)* [1]

Crop	Net cost added by $3.67 AEWR in 1980 [2]	Cost added $4.23 AEWR in 1982 [2]	Cost added $4.80 AEWR in 1982 [2]	Cost added $5.36 AEWR in 1983 [2]
Apples	0	0	$427,319	$772,689
Sugarcane	0	0	0	0
Tobacco	$3,651	$227,843	309,553	375,482
Citrus	0	60,184	166,549	243,410
Peaches/pears	0	0	2,776	17,324
Peaches	0	0	0	0
Estimated added cost of final rule	3,651	288,027	906,197	1,408,905
Estimated added cost of initial proposal [3]	2,717,544	2,910,291	3,028,695	3,071,608

[1] A linear technique was applied to extrapolate predicted AEWR's for 1980, 1981, and 1982, using the unweighted average 1979 AEWR under the current methodology for 1979 and the predicted AEWR of $5.36 for 1983. This Table should *not* be taken to indicate that the *actual* AEWR's will equal these estimates.

[2] Estimated added costs under the current methodology were not netted out for 1981, 1982, and 1983. The $3.67, $4.23, $4.80, and $5.36 AEWR's are approximately 90 percent, 94 percent, 98 percent, and 100 percent of the estimated United States annual average hourly wage rates of piece-rate paid hired farmworkers for the years 1979–82, respectively. However, based on data published in the USDA publication *Farm Labor* on February 21, 1980, the 1979 average was $4.07, 90 percent of which would be $3.66, or $0.01 *less* than the 1980 AEWR used in the cost estimate.

[3] The regression model of the initial proposal predicted AEWR's of $4.51 for 1980, $4.89 for 1981, $5.32 for 1982, and $5.77 for 1983.

VI. Piece rates

As in the proposed rule, piece rates for workers under the final rule would be examined annually. Growers requesting temporary nonimmigrant alien workers would submit to ETA (or

to a State job service agency designated by ETA) data on their previous year's employment and earnings, and on the piece rate paid to workers in the applicable crop activity.

Using the data, the employer would be required to calculate new piece rates for the coming season. The employer would be required to adjust the previous year's piece rate(s) upward by the same percentage as the increase in the hourly AEWR for the coming season, provided, however, that the employer first would be required to demonstrate that the previous season's piece rate was adequate to yield the previous season's AEWR, based upon the employer's average worker's production in that activity in that season.

Thus, if the previous season's hourly AEWR was $4.00 and the coming season's hourly AEWR would be $4.40 (a 10% increase), an employer whose average harvester picked 8 bushels per hour last season at a piece rate of $.50 per bushel would have to offer and pay its workers $.55 per bushel for that activity in the coming season.

However, if the employer's average worker picked only 7 bushels per hour in the previous season, at a piece rate of $.50 per bushel that worker would have earned only $3.50 per hour (absent make-up pay), $.50 per hour less than the hourly AEWR for that season. To earn last year's hourly AEWR, at a production rate of 7 bushels per hour, that average harvester should have been paid a piece rate of $.571 per bushel ($.571 piece rate = $4.00 AEWR divided by 7 bu./hr. average production). In that situation, the employer must offer and pay to its workers in the coming season a piece rate based upon what the previous season's piece rate should have been ($.571 per bushel), increased by the same percentage as the increase in the hourly AEWR (10%). Thus, the employer's piece rate in the coming season would have to be $.628 per bushel (110% of $.571 per bushel).

Each worker who earns less than the hourly AEWR at the applicable piece rate would have to be paid make-up pay, to bring his/her hourly earnings up to the season's hourly AEWR.

The employer would be required to offer and to pay to workers at least that adjusted piece rate for the growing season, so that the wages of similarly employed U.S. workers will not be adversely affected by the employment of the aliens. If a grower pays separate rates for different activities in the same crop (*e.g.*, spot picking vs. stripping fruit trees) or separate rates for different crops, then piece rates shall be adjusted independently for each activity.

If, during a pay period, any individual worker did not earn at least the AEWR for the number of hours he/she worked, the employer would have to pay that worker the piece rate earned, plus the difference, to achieve the AEWR for the number of hours worked. When this occurs, the employer would be required to notify the local job service office that makeup pay has been provided to the worker(s). The grower may be audited by DOL to ensure the piece rate actually is generating the AEWR for the average worker.

Where an employer has no historical data available from which an adjusted piece rate may be computed (*i.e.*, where the employer is growing a crop for the first time), and the employer elects to use a piece-rate system, the employer will be required to establish a piece rate reasonably expected to generate the AEWR, for inclusion in the job order for U.S. workers. The employer's specific methodology for establishing a piece rate resulting in the AEWR for such a crop would have to be submitted in writing to the ETA Regional Administrator for approval. DOL may then audit the employer to ensure that the piece rate is actually generating the AEWR. "DOL" has been substituted to indicate that the auditing agency may be a DOL auditing agency other than ETA giving DOL a greater degree of flexibility in utilizing its resources.

If another grower or growers produce the same crop in the area of employment, the employer producing the crop for the first time may base its piece rate on the average hourly earnings and production of workers employed in that crop activity in the area of intended employment. The State job service would determine what those average hourly earnings are, through its in-season wage surveys or its collected prevailing wage information.

VII. Sheepherding Employment

Sheepherding employment has been included as farm work covered by 20 CFR Part 655, Subpart C, since the promulgation of the subpart. See 43 FR 10307 (March 10, 1978). Because of the unique nature of the hours and the work involved in sheepherding, it would be inappropriate to set an hourly AEWR for that occupation. The final rule continues the practice of setting a monthly wage for range sheepherding, which must be guaranteed to the worker unless the local prevailing wage for such work is higher. As in past years, the monthly AEWR will be changed annually by the average percentage change in the USDA-determined hourly wage rates (set forth in each February issue of *Farm Labor*), for livestock farm workers in the eleven Western States where the aliens historically have been employed.

The base rate will be the 1980 AEWR, which was $523.00 per month.* The wage is rounded off to the nearest $1.00. The 1980 rate has been substituted for the 1979 rate, since that new data became available after the development of the proposed rule. The new data result in no greater costs to the employers.

VIII. Logging Employment

The current methodology for wages in logging employment is unchanged in the final rule, because loggers' wages have equalled or exceeded the annual average hourly wages of nonagricultural production workers. The AEWR for logging is the prevailing wage for the occupation in the area of intended employment.

Development of Final Rule

The final rule was prepared under the direction and control of Mr. David O. Williams, Administrator, United States Employment Service, Employment and Training Administration, United States Department of Labor, Washington, D.C.

Regulatory Impact

The rule affects only those agricultural employers who request certification to employ nonimmigrant alien workers, and has less impact than specified in DOL's criteria, so that the effect of the proposed regulation is not so major as to require the preparation of a regulatory analysis. See 44 FR 5576 (January 26, 1979).

Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment".

Final Rule

Accordingly, § 655.207 of Part 655 of Chapter V of Title 20, Code of Federal Regulations, is revised to read as follows:

§ 655.207 Adverse effect rates.

(a) *Scope.* This section sets forth the methodology by which the adverse effect rates are computed for agricultural employment and for logging employment.

(b) *Agriculture.* For all agricultural employment in the United States (except

*Employers were required to pay the higher prevailing rates in 1980 in Nevada ($525.00) and California ($550.00).

sheepherding), the hourly adverse effect rate shall be the previous calendar year's United States annual average hourly wage rate for "piece-rate paid hired farmworkers". This annual average hourly rate is determined by the United States Department of Agriculture (USDA) and is published in the USDA publication *Farm Labor* in the February following the calendar year reported. For agricultural employment (except sheepherding), the single adverse effect rate applicable nationwide shall be:

(1) 90 percent of the 1979 USDA rate, for the period from the effective date of this regulation through March 31, 1981;

(2) 95 percent of the 1980 USDA rate, for the period from April 1, 1981, through March 31, 1982;

(3) 98 percent of the 1981 USDA rate, for the period from April 1, 1982, through March 31, 1983; and

(4) 100 percent of the previous calendar year's USDA rate, for each 12-month period beginning April 1, 1983, and April 1 of each calendar year thereafter.

(c) *Logging and sheepherding.* (1) For logging employment, the adverse effect rate shall be the prevailing wage rate in the area of intended employment.

(2) For sheepherding employment, the monthly adverse effect rate for each year shall be computed and set by adjusting the prior year's sheepherding adverse effect rate by the average percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture hourly wage rates for livestock farm workers for the following States: Arizona, California, Colorado, Idaho, Oregon, Nevada, Montana, Texas, Utah, Washington, and Wyoming. The base adverse effect rate for sheepherding, which is the rate that must be paid in the season beginning in 1980, is $523.00 per month. The rate shall be rounded off to the nearest $1.00.

(d) *Piece rate adjustments.* (1)(i) In any year in which the applicable hourly adverse effect rate is increased, the employer shall increase the piece rate for such activity by the same percentage as the increase in the hourly adverse effect rate over the previous season's adverse effect rate. Before calculating the increase in the piece rate, the employer first must adjust the previous season's piece rate upward to a point where the employer's average worker in that activity would have made hourly earnings equal to that season's adverse effect rate (absent make-up pay described in paragraph (e) of this section).

(ii) If a grower pays separate rates for different activities in the same crop (*e.g.*, spot picking vs. stripping) or separate rates for different crops, then piece rates shall be adjusted independently for each activity.

(2) Where an employer has no historical data available from which an adjusted piece rate may be computed (*i.e.*, where the employer is growing a crop for the first time), the employer will be required to establish a piece rate reasonably expected to generate the adverse effect rate. The employer's specific methodology for establishing a piece rate resulting in the adverse effect rate for such a crop would have to be submitted in writing to the RA for approval. The Department of Labor (DOL) then may audit the employer to ensure that the piece rate is actually generating the adverse effect rate. If another grower or growers produce the same crop in the area of employment, the employer producing the corp for the first time would base its piece rate on the average hourly earnings and production of workers employed in that crop activity in the area of intended employment. The State job service shall determine what those average hourly earnings are, through its in-season wage surveys or its collected prevailing wage information.

(e) *Make-up pay.* If, during a pay period, any individual worker working for the employer did not earn at least the adverse effect rate for the number of hours the worker worked, the employer shall pay that worker the piece rate earned, plus the difference, to achieve the adverse effect rate for the number of hours worked (see § 655.202(b) (9) (ii) of this Part). When this occurs, the employer shall notify the local job service office that makeup pay has been provided to the worker(s). The grower may be audited by DOL to ensure that the piece rate is actually generating the adverse effect rate for the employer's average worker.

(f) *Minimum and prevailing wage rates.* Notwithstanding any other provision of this Subpart, an employer seeking labor certification(s) or to whom labor certifications have been granted must offer and pay to its workers a wage no lower than the highest of the adverse effect rate, the prevailing wage for the occupation in the area of intended employment, or the Federal, State, or local statutory minimum wage applicable to the occupation.

(g) *Publication.* The Administrator annually shall publish in the **Federal Register** a notice announcing the adverse effect rates computed pursuant to paragraphs (b) and (c)(2) of this section.

(Immigration and Nationality Act, (8 U.S.C. 1101, 1184(c)); 8 CFR 214.2(h)(3)(i); (5 U.S.C. 301))

Signed at Washington, D.C. this 13th day of January, 1981.

Ray Marshall,

Secretary of Labor.

Appendix

Note.—This Appendix will not appear in the Code of Federal Regulations.

The following are selected excerpts from the report prepared by Ruttenberg, Friedman, Kilgallon, Gutchess & Associates, Inc., for the U.S. Employment Service, summarizing the comments received from the public in response to the March 11, 1980 proposed rule (see 45 FR 15914):

I. Overview of Public Comments Received

* * * * *

Commenters

A total of 307 individuals submitted written comments to the Department of Labor on the proposed methodology. More than three-fourths were employers or employer representatives. Over one-tenth were worker representatives. Other commentors included elected officials, representatives of a state Employment Service and other state agencies, members of private nonprofit organizations, and persons with other or unidentified affiliations.

Table 1.—Number of Comments Received by Interest Group.

Employer representatives, 240
Worker representatives, 37
Elected officials, 3
State Employment Service, 1
Other state agencies, 5
Private nonprofit organizations, 4
Other, 13
Unidentified, 4

A preponderance of commentors, over two thirds, were Virginians, apparently reflecting a letter-writing campaign mounted by the tobacco growers' association there. The remainder were from 28 other states.

Table 2.—Number of Comments Received by State.

Virginia, 210
New York, 12
California, 10
North Carolina, 9
Washington, D.C., 9
Washington, 7
West Virginia, 6
Texas, 4
Florida, 4
Idaho, 4
Massachusetts, 4
Pennsylvania, 4
Illinois, 2
Maryland, 2

Michigan, 2
Ohio, 2
Oregon, 2
Wisconsin, 2
Connecticut, 1
Iowa, 1
Louisiana, 1
Maine, 1
Montana, 1
Nevada, 1
New Hampshire, 1
Tennessee, 1
Vermont, 1
Wyoming, 1

Tobacco was the crop activity with which commentors were most frequently associated, with over 30 percent identifying themselves in this way. Another large response came from persons associated with apples, who comprised 14 percent of the commentors. One hundred commentors were placed for purposes of this report in the category of "general agriculture" because they indicated an involvement in agriculture but not in a specific crop(s). Smaller numbers of commentors represented sugar, vegetables, citrus, logging, and fruit other than apples. For the remaining commentors, a crop activity was either not applicable or not identifiable.

Table 3.—Number of Comments Received by Crop Activity.

General agriculture, 100
Tobacco, 90
Tobacco and vegetables, 1
Apples, 28
Apples and tobacco, 2
Apples and other fruit, 13
Other fruit, 5
Sugar, 2
Citrus, 1
Sugar and citrus, 1
Vegetables, 2
Logging, 1
Not applicable, 40
Unidentified, 21

Positions on Proposed Methodology

Public comments received by the Labor Department tended to be of two general kinds. In the first group were the majority of comments, which were directed to the methodology itself. These usually offered criticisms or endorsements of the technique by which the Labor Department proposed to set the AEWR, sometimes suggesting modifications or alternative methodologies. In some cases, the commentors focused narrowly on the proposed 1980 wage rate of $4.51, which the Labor Department announced would result from the proposed methodology, without addressing the technique by which it was computed. All of these comments on issues raised by the proposed methodology are discussed and analyzed in Section II of this paper.

* * * * *

Persons commenting on the methodology tended to be critical of the proposal, with relatively few indicating that it satisfied them completely. A total of 257 commentors expressed generally negative positions on the methodology; 39 expressed generally positive positions; 7 rejected the concept of an AEWR methodology entirely; and 4 wrote only to ask for an extended comment period. Of those whose comments were considered "generally positive," some nevertheless criticized aspects of the methodology; similarly, some "generally negative" comments indicated acceptance of portions of the proposal. One of the positive comments was conditional upon effective monitoring and enforcement to protect workers.

Fifty-seven commentors suggested modifications of or alternatives to the proposed methodology. These are analyzed in the discussion of issues in Section II, and are briefly mentioned below:

- There were 30 commentors who advocated using the federal minimum wage, either

Alone,

In combination with the area's prevailing wage rate,

In combination with the state or local minimum wage,

In combination with the state or local minimum wage, whichever was the highest, unless the Labor Department determined the prevailing rate was necessary to offset the adverse effect of H–2 workers in the area, or

As a base rate to which a certain percentage would be added.

- The pre-1968 AEWR methodology, setting rates by state and crop, was advocated by seven commentors.
- One individual proposed setting local crop-by-crop rates, adjusted to compensate for the depressant effect of H–2s in the area and for the tax advantages enjoyed by H–2 employers.
- Three persons recommended setting the AEWR state-by-state without regard to crop as is presently done.
- Two additional letter writers offered detailed proposals for an AEWR set state-by-state, with no state's AEWR to be lower than a national rate.
- Setting regional AEWRs was recommended by one commentor.
- Another commentor suggested use of the prevailing wage rate in an area.
- A methodology utilizing adjustments of the employer's basic (but not abnormal) piece rate was offered by one letter writer.

Relying upon the forces of supply and demand to set the rate was put forth by another commentor.

- Nine persons recommended setting the AEWR at $6.50 an hour, the average nonagricultural production workers wage rate.
- One letter writer suggested that the AEWR be applied to the workforce of the employer rather than to each individual worker.

Congressional and White House Letters

The Department of Labor also received 41 letters from representatives of Congress and White House staff. The White House letters and most of the Congressional ones forwarded correspondence on the AEWR methodology from constituents. Most of these constituents had also separately submitted comments directly to the Department of Labor.

The Congressional and White House correspondence came from 18 states: California, Connecticut, Florida, Idaho, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Oregon, South Carolina, Texas, Vermont, Virginia, Washington, and West Virginia.

In addition to forwarding constituent correspondence, some Members of Congress wrote to express a particular point of view or to request extension of the comment period. Ten Congressional commentors were opposed to the proposed methodology, with seven citing the proposed methodology's impact on wage levels, two opposing a single national rate, two disagreeing with the farm-nonfarm wage relationship, and one discussing the issue of available domestic farmworkers.

II. Comments on the Proposed Methodology

This section discusses the specific comments submitted to the Labor Department on the proposed AEWR methodology, as well as alternative methodologies suggested.

For purposes of this report and analysis, comments have been examined in relation to 10 principal issues which are involved in the setting of the adverse effect rate. These issues are:

Use of a single national rate
Application of a relationship between farm and nonfarm wages
The setting of adverse effect piece rates
Use of average piece-rate earnings data
Impact of the AEWR on wage levels
Make-up pay requirement
Ease of use and comprehension
Administration and enforcement
Timing of publication of the AEWR

Methodology for logging and sheepherding

Each of these principal issues is discussed in turn. Comments for and against the methodology are described.

Issue: Single national rate

Fifty-one of those commenting on the proposed methodology directed their remarks to the establishment of a single national adverse effect wage rate—a feature that is in contrast to the present system of setting separate AEWRs for each user state. Twenty-one persons were generally positive toward a single national rate, and 30 were generally negative.

Arguments for

Support for a single national rate came almost exclusively from farmworkers and their representatives, although worker opinions on this point were not unanimous. Proponents believed that a single national rate would more accurately reflect the interstate nature of the workforce and the competitive market forces that affect agricultural employment. Some commended the proposal for recognizing that American workers can and do cross state lines to obtain employment.

A representative of a nonpartisan, private nonprofit organization commented that by establishing AEWR comparability among states, the single national rate would strike a better balance between the needs of employers to obtain labor and the needs of workers to avoid wage deflation and exploitation. "The present haphazard pattern of geographically based AEWRs does not accomplish either of these ends," he said.

Another argument given in favor of the single rate was that it would end confusion that presently exists as to the AEWR level that applies in a particular locale.

Several worker representatives voiced acceptance of a single national rate but said their preference would have been a rate set by crop and location, capable of reflecting higher regional or local wage levels. This concern was evident among commentors from California and New York State, where the average earnings of piece-rate-paid agricultural workers are higher than the national average. (In California, where farmworkers have made wage gains through collective bargaining, piece-rate-paid farmworkers earned an average of $5.42 per hour in 1979, according to one letter writer, and the 1980 level was of course expected to be higher.) Most (though not all) of these commentors believed, however, that workers in their areas would be protected against wage depression by the provisions of § 655.207(f) of the proposed methodology, which requires employers to offer and pay the prevailing wage for the occupation in the area of intended employment if it is higher than the adverse effect wage rate. With this protection, as one worker representative put it, "we can live with a national rate." Another said he could accept one national rate "as an initial benchmark" but asked DOL to hold open the possibility of regional adjustments if experience with a national rate indicates a need.

Two worker advocates who supported the methodology as proposed nevertheless offered alternative methodologies which they would have preferred:

One recommended setting a separate AEWR for each federal region, based on the relationship between regional earnings of nonfarm production workers and piece-rate-paid hired farmworkers. In no case would the regional AEWR be permitted to be less than the corresponding national rate similarly computed. This method would have the advantage of eliminating any regional wage depression; it would not be confusing to employers or workers; and it would utilize data by region which is presently available, its proponent stated.

The other recommended calculating local crop-by-crop piece rates as follows:

1. Use data gathered by the Employment Service on Form 232, regarding piece rates in certain crops which are used in determining whether clearance orders offer prevailing wages and working conditions.

2. Find the "top rate" paid to local domestic workers by crop—i.e., the wage that is at the 90th percentile of local wages.

3. Adjust the top rate to correct for the depressant effect of any H–2 workers in the area. This would be done by increasing the top rate in proportion to the penetration of the labor market by H–2 workers—e.g., a 0.5 percent increase in the top rate for each 1 percent of market penetration.

4. Use DOL's proposed methodology for projecting next season's rates.

5. Increase the anticipated piece rate by 10 percent to offset the tax advantages of H–2 workers.

6. A similar methodology should be followed to compute hourly rates.

A number of worker representatives called attention to what they felt were inequities of the present state-by-state AEWRs, which they believed would be corrected by a single national rate. The lowest adverse effect wage rates, some pointed out, have often occurred in states where wages (presumably nonagricultural wages) are highest. This has meant exploitation of foreign workers at low wages, they contended, and has discouraged domestic workers from accepting agricultural jobs in which they cannot earn a living wage.

Some worker representatives said they supported a national rate because it would require growers with low average wages to increase their wage rates. One commented that the single rate would uniformly protect not only U.S. workers but also employers, who would not face competition from others paying lower wages.

Arguments against

Those opposed to a single national wage rate usually objected to it because it would fail to take into account the differences between states, regions, crops, or harvesting conditions. A few rejected the Labor Department's assertion that agriculture utilizes a national workforce. Opposition was voiced mainly by employers and their representatives, but worker representatives also raised objections—particularly with regard to the depressant effect of a single national rate in high-wage areas.

A worker representative claimed the national rate could have a "devastating effect" in California where wages and working conditions generally exceed the national average. While acknowledging that the methodology would require growers to pay the prevailing wage if it exceeds the AEWR, this commentor asserted that the national AEWR would still have the effect of putting a ceiling on wages which would prevent the natural rise resulting from normal economic interaction.

Several commentors cited the varying degree of difficulty in harvesting different crops as justification for setting adverse effect wage rates by crop. Harvesting conditions also need to be considered in setting the wage, some said—e.g., the size of the crop per tree.

An employer representative from North Carolina offered data which he said supported his view that agriculture does not utilize a national workforce: Out of 145,000 farmworkers in North Carolina in 1978, 85,000 were family workers and 60,000 were hired workers. As family workers, the majority were not part of a mobile, interstate, or national workforce, he asserted. Therefore, wages in other areas of the U.S. have little if any influence on wages paid in North Carolina, where the wage rate is a function of the work to be done and the availability of local labor.

An employer advocate recommended that DOL develop an AEWR for his state

of New Hampshire specifically, using only New Hampshire wages as a base and excluding nonfarm wages.

An alternative methodology utilizing the prevailing hourly wage for the crop and location was suggested by one employer representative. Where piece rates are paid, he recommended that the AEWR would be no less than the prevailing hourly wage or the applicable federal or state minimum wage, whichever was higher.

Another commentor similarly urged the use of the prevailing wage as the AEWR where wages were expressed in hourly rates. But where the wage is expressed as a piece rate, he asserted that "the federal minimum wage is the only appropriate adverse effect hourly wage rate." The minimum wage is simple, widely understood, and commonly accepted by both employer and employee, he stated. Furthermore, Congress has determined that that wage is sufficient to protect the interests of workers.

Still another methodology proposed as an alternative to a single national rate was as follows:

1. Determine what percentage of foreign workers employed in specific jobs in an area will have an adverse effect on U.S. workers. "We suggest that where foreign workers constitute less than 10 percent of the jobs in specific employment in a specific area it would be reasonable to expect no adverse effect, since it has always cost employers more to employ temporary foreign workers than to employ domestic workers under the H(ii) program."

2. Set the AEWR at the highest of the federal, state, or local minimum wage, except where the Labor Department determines that there will be an adverse effect on U.S. workers because foreign workers will exceed the level set in the first step, above. In such cases, the prevailing wage should be the AEWR.

3. Where the prevailing wage is determined to be necessary, set the AEWR as was done prior to 1968: Make crop-by-crop, area-by-area wage surveys to set a prevailing wage, and adjust this annually for actual economic and market conditions.

Another alternative methodology proposed by this commentor would be for employers to submit a statement of wages or piece rates paid in the previous year, and the wages and benefits planned for the coming year. Employers would have to show evidence that wages would approximate the prevailing wage of the crop and area.

Several growers' organizations recommended setting the AEWR by state on the basis of the U.S. Department of Agriculture's state-by-state data on average hourly earnings of field workers (or field and livestock workers, some said). This relates more closely to the wages being paid in the areas in which H–2 certification is sought, in their opinion. One of these commentors said this data should be used as follows to set the AEWR:

1. Compute a state-by-state AEWR each year by adjusting the previous year's field and livestock worker hourly average rate, as determined by USDA for that state, by the average percentage change in the rate during each of the five preceding years.

2. DOL would use the same formula to calculate an adjusted rate for the nation. If a state's adjusted field and livestock worker rate fell below the national rate, the state would have to use the national rate.

The commentor claimed this procedure would be "self-correcting" and would not compound errors in the AEWR from year to year. It would also recognize workers' geographical and occupational mobility.

Another commentor elaborated on a similar state-by-state methodology:

1. Use USDA annual average hourly wage data for field workers, both by state and nationally.

2. One-year projections should be made by state each year, based on a simple average of the percentage increase over the past five years applied to the prior year's actual field worker hourly rate (not to the prior year's AEWR).

3. If the rate for any state, after this adjustment, fell below the nationally adjusted rate, that state would use the national rate as its AEWR. But the annual increase in any state would be limited to 150 percent of the percentage change in the national rate. (This, according to the commentor, would result in a "self-correcting" formula which would not compound aberrations in the prior year's AEWR.)

4. If the new AEWR, set in this way, is lower than the rate under the old methodology, the old AEWR would be increased at a rate of 50 percent of the actual percentage increase in field workers' earnings over the five year period, until it caught up to the rate computed by this new approach.

* * * * *

Issue: Application of Relationship Between Farm and Nonfarm Wages

Twenty-seven persons discussed the proposed methodology's application of the relationship between farm and nonfarm wages as a means of predicting the AEWR for the coming year. Nine of these generally favored this feature of the methodology, and 18 were generally opposed to it.

Arguments for

Several persons, mainly worker representatives, endorsed the Labor Department's rationale for establishing a relationship between farm and nonfarm wages for purposes of setting the adverse effect wage rate. One applauded the methodology's "recognition that farm earnings are affected by the same forces that impact on other sectors of the economy and the earnings of laborers in those sectors" and "that farm and nonfarm earnings are not independent of each other."

A few supporters said they would prefer to link the AEWR even more closely to nonagricultural wages but could accept this methodology. Among these were several representatives of organized labor who said the rate should be based upon wages paid to production workers alone and not related to the current U.S. farmworker wage rate at all, because farmworker wage rates have been historically depressed. Low farm wages simply prove that farmworkers have been discriminated against in the past and were treated as "second-class citizens" in labor legislation such as the lower federal minimum wage in agriculture, one said. Rather than penalize farmworkers for their past low wages, these organized labor representatives reasoned, the AEWR should be set at the $6.50-an-hour average wage rate of nonfarmworkers. At this wage rate, American workers could be found to fill the jobs and the need for foreign workers would be averted.

Endorsing a link to nonfarm wage rates, one organized labor spokeman stated that when Secretary of Labor Willard Wirtz commented on the first DOL regulations for importing foreign labor in 1964, he anticipated that their entry would be "greatly reduced or hopefully eliminated."

Instead, more alien workers entered the U.S. in 1979 than in 1978, with 80,000 entering over the last five years, the commentor said. At the same time, there have been an average of seven million persons aged 16 or over unemployed in the U.S. With domestic unemployment so high, it appears questionable to import labor at $2.00-an-hour less than the average wage paid to production and nonsupervisory workers in nonagricultural industries, he said.

Arguments Against

Those opposed to this aspect of the methodology came from two polar camps: Some felt the formula's farm-

nonfarm wage relationship inflated the AEWR too much, and the others felt it kept the AEWR from rising high enough.

Employers and their representatives comprised the first group. Many of these asserted it is illegal to include nonagricultural wages in the AEWR formula. They contended that the Immigration and Nationality Act and INS regulations seek to prevent an adverse effect on workers "similarly employed." Nonagricultural workers, they argued, are not employed "similarly" to those agricultural workers whom the adverse effect wage rate seeks to protect. Their earnings therefore are not relevant to a determination of adverse effect * * *.

Another argument voiced by employer representatives was the lack of reliable evidence of a relationship between farm and nonfarm earnings. The two sectors are influenced by different factors, they said. "While there may be a demonstrable relationship between the two to date, there is no assurance it will continue," one employer representative wrote. "Nonagricultural workers' earnings, tied to union contracts in many instances, will not jibe with the economics of agricultural endeavors."

Nor are the farm and nonfarm sectors related through the relative movements of wages, an employer representative argued. Industrial workers will not leave their urban homes to become farmworkers, and farmworkers do not move regularly from country to city in response to fluctuating wage rates.

Other employer representatives argued that production workers are more highly skilled than agricultural workers and therefore command a higher wage rate. A comparison of farm and nonfarm wages ignores the differences in education and abilities required in the two sectors. The inclusion of these skilled production workers' wages in the formula distorts the AEWR, they said. In this vein, one commenter suggested that if nonfarm workers' earnings are considered in calculating the AEWR, only entry-level wages should be used and overtime pay should be omitted, along with workers' earnings in industries that have hefty collective bargaining agreements. Earnings of workers employed in industries operating in a limited competitive business environment should also be excluded, this commentor said.

In the second group of opponents to this feature of the methodology were worker representatives. They felt that the formula will maintain the historical disparity between agricultural and nonagricultural wages, so farm wages can never catch up. One commented that the methodology "insufficiently emphasizes the competitive market" by relying too heavily on an "asserted correlation" between farm and nonfarm earnings.

* * * * *

Issue: Setting adverse effect piece rates

Twenty-one people commented on the setting of adverse effect piece rates. Six responded positively and fifteen negatively.

Arguments for

Worker representatives were in favor of the Department of Labor setting adverse effect piece rates. They noted that as the hourly adverse effect wage rate was increased in past years, piece rates remained fairly stable. The growers adjusted the piece rate minimums upward, expecting farmworkers to produce more quickly or be fired. Thus, farmworkers paid on a piece rate basis did not experience increases in earnings as the hourly adverse effect wage rate was raised. One worker representative expressed approval of the requirement that each employer should make an initial adjustment in his/her piece rates from last season such that the employer's average worker would have earned the hourly AEWR without makeup pay.

Another worker representative endorsed the annual adjustment of piece rates but offered an additional suggestion. This involved setting the adverse effect piece rate to produce either the hourly adverse effect wage rate or the "90th percentile rate" for farmworkers in the area of intended employment, whichever was higher.

Yet a third worker representative was concerned with cases in which an employer paid piece rates in past years higher that the proposed adverse effect wage rate. To clarify the issue, he suggested that language be added preventing employers from decreasing an existing piece rate which is higher than the AEWR and preventing employers from allowing these higher piece rates to remain stagnant while the AEWR increases.

Arguments Against

Many growers were concerned about the possibility of an abnormally high piece rate serving as their base which would put them at a disadvantage with their competitors forever. An apple grower with lightly loaded trees, either due to their youth or poor weather conditions, must pay higher piece rates for picking. As the trees mature and in years with better weather, the grower would ordinarily be able to pay a relatively lower piece rate. From the employer's viewpoint, this would not be the case under the Department of Labor's methodology.

An employer representative therefore recommended that paragraph (d) be revised to provide that piece rates which reflect abnormal or unusual conditions shall not be the basis for future years' adverse effect piece rates.

Other employers believed that piece rates should be left to the determination of the grower. According to many, only the farmer is knowledgeable enough concerning crop size, tree size, etc. to set piece rates. As long as the piece rates are locally competitive and produce wages above the federal minimum, a commentor felt the Department of Labor should not make an "unwarranted intrusion" into a grower's business operations. Another employer believed it was unfair to require set annual increases in piece rates if his workers' average piece rate earnings were greater than the national average.

Some letter writers pointed out that H–2 workers are already protected through the hourly adverse effect wage rate and make-up pay. In Florida, an employer representative wrote, piece rates have kept pace with increases in the hourly adverse effect wage rate in order to maintain workers incentive.

* * * * *

Issue: Use of Average Piece-Rate Earnings Data

Of the 10 individuals who commented on the use of average piece-rate data in the proposed methodology, 1 was in favor and 9 were in opposition.

Arguments for

The current methodology for computation of the adverse effect wage rate is based upon annual average wage rates of all field and livestock workers combined. However, the U.S. Department of Agriculture (USDA) has stopped compiling data for the combined worker category; only separate figures are available for field workers and for livestock workers.

Due to this change in the current methodology's data base and the determination by the Department of Labor that another data base is more appropriate, the proposed methodology partly relies upon the USDA national average hourly earnings of piece-rate-paid hired workers in agriculture. The incorporation of piece rates into the methodology recognizes that most agricultural jobs for which H–2 workers are employed are paid on a piece-rate basis.

This proposed change was termed its "principal strength," according to one farmworker advocate. Use of piece-rate

earnings data was considered to be more realistic and a shift that "farmworker advocates have been urging for years."

Arguments Against

Opponents pointed out that the proposed use of piece-rate data contradicts the Department of Labor's earlier position with regard to this data base. According to one employer representative, the Department of Labor believed the field and livestock worker figures preferable to the piece-rate data base because the latter included packing-house workers, machine operators, and supervisors. The commentor contended that the presence of piece-rate-paid crew foremen and harvest equipment operators inflates the piece-rate data base by about 10 percent. Rather than abandoning the field and livestock wage concept entirely, this letter writer suggests using just the field workers' hourly average earnings. This field worker category was believed to be a very relevant comparison, more so than the diverse piece-rate-paid hired farmworker group.

Several employer representatives noted that the AEWR under the proposed methodology would, in effect, be a new minimum wage. This guaranteed wage, imposed by regulation rather than legislation, would be almost 50 percent higher than the federal minimum wage for agricultural workers. It would be derived from average wages, meaning some people earned more and others less, but would serve as a guaranteed floor for each agricultural worker in the H–2 program. For these reasons, a number of employer representatives recommended that the AEWR should simply be the federal minimum wage, or the highest of the federal or state minimum wage; some commentors suggested it be set at the federal minimum wage plus some percentage.

Worker representatives tended to view the AEWR as a ceiling rather than a minimum rate, however. To try to avoid placing an artificially low ceiling on wages in determining the availability of workers, the ceiling should be the highest prevailing wage rate in the nation for agricultural work, in the view of one commentor. Consequently, he favored the Department of Labor's regulation which states that if the prevailing wage rate in a given location were above the adverse effect wage rate, employers wishing to use H–2 workers should pay both domestic and foreign workers the prevailing wage rate.

Rather than applying the adverse effect wage rate to each worker, an employer representative suggested its application to an employer's workforce such that, on average, his employees earned a piece-rate equivalent to the adverse effect wage rate. The commentor recommended that the period for determining the average workforce wage should be long enough so that temporary crop factors do not require abnormally high make-up pay.

A worker representative proposed that greater than average earnings should form the basis of the adverse effect wage rate. For example, the AEWR might be derived from hourly earnings or piece rates in the peak season, i.e., the quarter of greatest agricultural employment in each state.

* * * * *

Issue: Impact on wage levels

A large number of letter-writers—293—commented on the impact of the proposed methodology on farmworkers' wage levels. As calculated by the Department of Labor, the 1980 AEWR under this new system would have been $4.51 per hour. Sixteen commentors took positions in favor of the methodology's impact on worker wage levels. The remaining 177—two-thirds of whom were Virginia employers—objected to the methodology's impact on wage levels. It should be noted that many of the negative comments being counted in this category were presented as objections to *any* increase in the AEWR and did not relate specifically to the methodology being proposed.

Arguments for

As would be expected, proponents of this aspect of the methodology were primarily worker representatives. The old AEWR was too low to encourage growers to recruit domestic workers or to attract U.S. workers to harvesting jobs, in their view. By increasing the AEWR, it was felt that employers would be given more incentive to seek U.S. rather than foreign workers. At the same time, U.S. workers would benefit from the improved wages. The increase was not deemed excessive; even at $4.51 an hour, it would give an average sugarcane farmworker in Louisiana less than $6,800 a year, according to one commentor (apparently assuming a full year's work cutting cane).

Supporters tried to anticipate opponents' arguments by asserting that the new AEWR would produce a negligible inflationary effect. One person stated that the proposed rate is less inflationary than the national average pay increases of farmworkers in recent years. No direct correlation exists between the farm labor price and prices paid by consumers, said a representative of a nonpartisan, private nonprofit organization. "As farmers have said for many years, their portion of the ultimate purchase price is minuscule compared to that part charged by middlemen," this commentor asserted. This, he said, is especially true of sugar prices, where the major influences are internationally controlled price fluctuations and the effect of U.S. government subsidies.

Some worker advocates expressed reservations about the impact on wages, although they considered this methodology an improvement over the existing one. "Any AEWR places an artificial ceiling on potential wages to farmworkers and inhibits the ability of farmworkers to negotiate the most optimum wage possible for their labor," one cautioned. The proposed methodology will still depress wages and reduce the number of U.S. workers available, another said. One supporter recommended that U.S. agricultural policy should recognize the rights of farmworkers to an adequate and decent living; compensate them for the variables inherent in agricultural work, such as the uncertainty of wages, hours, and working conditions; and recognize their contributions to the agriculture industry. These persons nevertheless supported the methodology as "a step in the right direction," as one put it.

Arguments against

Nearly all the negative comments concerning the impact on wage rates came from employers and employer representatives, with a few representatives of rural business joining in.

A large number of Virginia tobacco growers protested that the wage increase would exceed employers' ability to pay and would "put us out of business."

Many commentors expressed opposition to any increase over the federal minimum wage, or to any increase opposition over the existing AEWR level, but offered no criticisms of the specific methodology by which the rate was derived.

Numerous employers and their representatives viewed the proposed AEWR as inflationary. It would hurt farmers at a time when their costs would be passed on to consumers. Others said farmers are unable to pass on increased costs as other businesses can since tobacco companies and large growers dictate the crop prices.

Some employers objected to the "ripple effect" or "domino effect" of the higher wage. They expected the higher rate would cause other farm laborers to demand higher pay. The result, they

believed, would be that non-criteria employers would have to raise their wages to compete for workers. In addition, criteria employers would have to raise the wages of packers, office workers, and others in non-H–2 occupations. The area's minimum wage would effectively become the AEWR, $4.51.

A number of employer representatives believed the proposed AEWR would violate the guidelines of the Council on Wage and Price Stability. A representative of the Florida sugarcane growers stated that the $4.51 AEWR as proposed for 1980 would be creating wage increases ranging from a low of 19 percent in Florida to a high of 55.52 percent in Massachusetts and Rhode Island. This, he claimed, would violate the wage and price guidelines, which allow increases of just 7.5 to 9.5 percent.

Many employer representatives raised the issue of wage comparability with other workers. Free room and transportation (which H–2 employers must provide) plus the minimum wage "are already more than many U.S. workers are earning," one said. A Virginia grower commented that local factory workers in his area earn less than the proposed AEWR of $4.51; another said $4.51 would exceed the $3.01 rate of local farmworkers in the tobacco industry as well as the prevailing wage rate in rural Virginia.

The comparability issue was also a concern of two nonagricultural workers who commented on the proposed AEWR. "Why should an alien make more per hour than I do?" was one letter writer's comment.

Some employers raised the issue of productivity in objecting to the proposed wage level. The unskilled domestic workers being hired cannot work productively enough to earn the higher wage, in their view. Employers should be able to pay less during periods of lower productivity.

One employer felt the higher wage would contribute to "economic disruption and unemployment" by luring lower-paid nonagricultural workers away from their jobs to take seasonal farm jobs at $4.51 an hour; after the harvest ended, these workers would go on unemployment where their benefits would nearly equal their present earnings, he claimed.

* * * * *

Issue: Make-up pay

Of the five people who commented on the provisions for make-up pay, four supported the proposal and one objected to it.

Arguments for

Supporters embraced the make-up pay provisions as an endorsement of the concept of the adverse effect wage rate as a guaranteed earnings floor for the entire work force.

Some of the supporters urged that the make-up pay provisions be strictly enforced. Employers must also be monitored carefully to assure there are no firings of less productive workers.

Arguments Against

The employer who commented on make-up pay warned that if the difference between workers' piece-rate earnings and the AEWR is too great, employers will have to fire a greater percentage of workers.

* * * * *

Issue: Ease of Use, Comprehension

Six persons commented on the ease of use of the proposal methodology. One of these felt it would be readily comprehended by employers and workers. Five felt it would be too complicated or confusing to be easily understood.

Arguments for

A worker representative indicated that the single national rate would be less confusing than the present state-by-state methodology. It would be more easily understood, and hence, compliance would be more effectively assured, he stated.

Arguments Against

Several commentors called for a more complete explanation of the proposed formula for determining the AEWR. It is not enough, one employer representative declared, for the Labor Department simply to say "there is a relation between farm and nonfarm rates and that relationship generates an AEWR of $4.51 for 1980." He called for an explanation of that relationship. A worker representative urged that Section 655.207(b) of the proposed regulations "so vague that probably only the Department (of Labor) will ever know that figure was derived."

An employer representative recommended, instead of the regression equation, a simple averaging of the past five years' average wage data. The difference in results, he claimed, would be insignificant, but it would be comprehensible "to the regulators and to those being regulated."

One grower said the complexity of the methodology would frustrate small farmers' efforts to apply for H–2 certification; they would be forced to go out of business and "convert their land to development."

* * * * *

Issue: Administration and Enforcement

Six commentors addressed the issue of how the AEWR will be administered and enforced by the Labor Department. Three endorsed the methodology's provisions for enforcement; one opposed them; and two rejected them as inadequate.

Arguments for

Approval was expressed by worker representatives for paragraph (d) of the methodology, authorizing ETA audits for employers' piece rates. Workers groups emphasized the need for careful monitoring of employers regarding piece rates, make-up pay, and productivity firings. Without close monitoring, these commentors felt, it would be easy for employers to pay less than the required piece rate and to circumvent the make-up pay requirement by firing less productive workers.

Arguments Against

Both employer and worker representatives expressed concern about the capability of the Labor Department to operate, monitor, and enforce such a complex and large program. On the employer side, concern was voiced that the Employment and Training Administration has insufficient staff to undertake the administration of such a program, and objections were raised to the expanded bureaucracy its implementation would entail. With the proposed piece-rate adjustments, DOL will be forever mediating piece-rate disputes, one said. On the worker side, ETA's reliance on wage and productivity data supplied by growers was characterized by one commentor as "akin to relying on the fox to guard the chicken coop." This letter writer also noted that the transient nature of these farmworkers necessitates prompt enforcement; otherwise workers will have moved on and will not benefit from corrective action.

The following recommendations were proposed by a worker representative:

To assure that growers adjust their adverse effect piece rates in accordance with DOL's regulations.

1. Employers should be required to submit to DOL, within 20 days after DOL publishes the new AEWR, a written statement showing the employer's piece-rate adjustment. The statement would show:

a. The percentage change in the piece rate, based on the percentage in the hourly AEWR.

b. How the grower determined whether an initial adjustment was necessary to bring last season's average worker up to the AEWR without make-up pay.

2. DOL should review the employer's pay and productivity records to verify that the required piece rates have been made.

To assure that employers pay the proper piece rates and make-up pay:

1. Before beginning work, employers should be required to give workers a written statement explaining the adverse effect wage rate.

2. Employers should be required to keep daily records of hours and productivity for each worker. A copy would be given to each worker at the end of the day showing:

Hours worked
Producitivity
Piece-rate earnings
Make-up pay, if any
Gross earning
Deductions

3. Employers should be required to file the pay and productivity records with DOL at the end of each pay period. DOL would review the records, monitor employers on-site, and conduct audits to assure compliance. In their reports, employers would be required to make a statement as to whether make-up pay was or was not required and paid.

To insure against productivity firings:

1. H–2 growers should not be permitted to fire domestic workers without first giving notice in writing to the appropriate DOL representative.

2. DOL should review each situation to determine if the worker is making "reasonable efforts to produce."

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Issue: Timing of publication

Only one commentor directly addressed the issue of the timing of publication of the coming season's adverse effect wage rate. This representative of sugarcane growers recommended that the Labor Department should publish the AEWR no later than March 1, to be effective June 1 of each year. He noted that this would be early enough to prevent last minute confusion about wages in the sugar harvest, which begins in early August.

* * * * *

Issue: Methodologies for logging and sheepherding

Of the two individuals who remarked on the methodologies for logging and sheepherding, both were negative toward the proposal.

Arguments For

None.

Arguments Against

A representative of fruit growers objected to the unique treatment of logging and sheepherding compared with the rest of the agricultural sector. The letter writer contended that production workers' earnings should be used in calculating an adverse effect wage rate for logging and sheepherding if they were used for the remainder of agriculture. In addition, the Department of Labor violated its nationwide approach in the case of logging and sheepherding by limiting their adverse effect wage rate determination to the area of intended employment, according to the commentor.

A logging worker representative was opposed to continuing the use of the prevailing wage rate as it is currently calculated to set the logging AEWR. It was felt that the 40 and 51 percent rules which are used to establish prevailing rates tend to fix the prevailing wage rate in the mid-range of surveyed wages, enabling employers who paid in the upper ranges to offer lower wages the next year and still be eligible for foreign labor, as well as artificially inhibiting the normal rise in wage rates. In addition, the prevailing wage rate is a full year out-of-date even before being implemented. Consequently, the writer concluded that the current methodology "guarantees an adverse effect on domestic loggers' wages."

As an alternative to continuing the current methodology, the commentor made two suggestions. To determine the prevailing wage rate a 90 percent rule should be applied: that is, array the actual wage rates paid in ascending order along with the number of workers who received the corresponding rate; cumulate the number of workers starting at the lowest wage rates until 90 percent of the workers surveyed are reached; the corresponding rate at this point should be derived by way of "a percentage formula based upon the demonstrated historical relationship between the national average of wages paid in logging and those paid to production workers in the private nonfarm economy during the previous year."

The letter writer disputed the Department of Labor's contention that loggers' wages equal or exceed the "annual hourly earnings" of nonfarm production workers. Since loggers are paid a piece rate, they are not paid for down time due to equipment breakdown or traveling time between the camp and cutting location, for example. The equipment rental fee that loggers do receive rarely covers their equipment costs in full, and the fee is received only during the months the loggers can find work while their payments extend throughout the year.

The logging worker representative noted that the adverse effect wage rate should continue to be applied to an employer's entire workforce, as the new methodology would do. Permitting less than 100 percent of the workforce to be covered (a possibility the Labor Department raised for discussion at last year's regional hearings) would not comply with the intent of the law which was designed to protect all domestic workers. It would also add to the Department of Labor's monitoring workload to assure compliance, the commentor noted.

A final point made by the representative dealt with whether loggers were being denied an hourly adverse effect wage rate since the rate in logging is based upon the prevailing (piece) rate. If this is the case, the farmworker representative objected. An hourly adverse effect wage rate above the prevailing piece rate wage is needed for loggers "to protect them from frequent breakdown in their expensive equipment. Also, woodsmen working with Canadian H–2's are often placed in poor cutting areas while Canadians receive better chances. An hourly wage would be some hedge against this kind of discrimination." Lastly, the commentor wrote that without an hourly wage woodsmen would not be protected while they developed the requisite skills, thus, they would be discouraged from entering and remaining in the labor market which is contrary to the intent of the H–2 program.

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Note.—The remainder of the Ruttenberg summary discusses comments which were received on issues other than the substance of the proposed rule, and which were not material to this rulemaking proceeding.

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January 16, 1981

Part XVII

Department of Health and Human Services

Social Security Administration

Disability Insurance and Supplemental Security Income; Determinations of Disability

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

Disability Insurance and Supplemental Security Income; Determinations of Disability

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rule.

SUMMARY: These regulations for administering the disability determination function implement section 304 of Pub. L. 96–265 (the "Social Security Disability Amendments of 1980") which amends section 221 of the Social Security Act.

The disability determination function is now carried out by the States and the Federal Government under negotiated agreements between the Social Security Administration (SSA) and States. The law provides that, effective June 1, 1981, disability determinations will be made by the State agencies in compliance with regulations containing performance standards and other administrative requirements and procedures relating to the disability determination function. States will have the option of turning the function over to the Federal Government if they do not wish to make disability determinations and the Federal Government has the authority to partially or wholly assume the disability determination function of any State that does not meet the prescribed minimum performance standards.

The proposed regulations specify the responsibilities of the Secretary and the States in administering the disability program. They prescribe standards for accuracy of performance and processing time that State agencies must meet in making disability determinations, and provide the administrative requirements and procedures SSA and the State agencies will follow in carrying out the disability determination function. Provisions are included specifying how SSA or a State may terminate the State agency's performance of this function.

The primary purpose of these regulations is to improve the quality of State agency performance in following our adjudicative criteria and to improve the timeliness of disability determinations. These regulations will afford the States maximum practicable management flexibility in meeting objectives.

DATES: We will consider your comments if we receive them no later than March 17, 1981.

ADDRESSES: Send your written comments to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, Maryland 21203. You may see copies of all comments we receive at the Washington Inquiries Section, Office of Governmental Affairs, Social Security Administration, Department of Health and Human Services, Room 1212, Switzer Building, 330 C Street, S.W., Washington, D.C. 20201.

FOR FURTHER INFORMATION CONTACT: Harry J. Short or William J. Ziegler, Legal Assistants, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone 301–594–7337 or 301–594–7415.

SUPPLEMENTARY INFORMATION:

Federal-State Structure Before Public Law 96–265

The disability programs under title II and title XVI of the Social Security Act (The Act) are administered under a Federal-State mechanism having its origins in the disability freeze provisions of the 1954 Amendments to the Act. At that time, Congress specified that determinations of disability should be made by State agencies under agreement with the Secretary. Wherever possible the State rehabilitation agency was to be the contracting agency to encourage rehabilitation contacts by disabled persons and to take advantage of the medical and vocational expertise of those agencies.

Negotiated agreements are currently in effect for 54 State agencies for making disability determinations for claimants applying for disability benefits under title II and title XVI of the Act. The agreements cover all the States plus the District of Columbia, Puerto Rico, and Guam; in South Carolina there are separate agencies for the blind and the disabled.

Under these agreements the State agencies, on behalf of the Secretary of Health and Human Services, make determinations of disability on the basis of standards and guides issued by SSA. SSA pays 100 percent of the costs incurred by the States in performing this function. The State agency function includes obtaining medical and vocational evidence from the applicant and his or her medical treatment sources, and where necessary, arranging for one or more examinations of the applicant by a medical specialist. Each determination of disability is made by a team consisting of a lay disability examiner and a physician on the State agency staff.

Section 221(a) of the Act provided that the determination of whether a person was disabled, and when a disability began and ended, would be made by a State agency under an agreement between the State and the Secretary and that, for purposes of the Act, determinations by the State are determinations of the Secretary. Section 1633(a) of the Act authorized the Secretary to make the same arrangements for title XVI purposes. Section 221(c) provided that the Secretary, on her own motion, could reverse the State's determination that a person was disabled, or could determine that a disability began later or ended earlier than the State had determined. In other important respects, the Act generally limited the Secretary's authority to make disability determinations. By precluding the Secretary from reaching a more favorable finding on a disability issue in reviewed cases, it gave the State what amounted to final authority in many cases for determining which applicants were disabled and, consequently, to a large extent how the SSA program was administered.

In 1978, the General Accounting Office (GAO) at the request of the Honorable James A. Burke, Chairman, Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, studied the effectiveness of SSA's management of the disability determination process of State agencies. GAO issued a report criticizing the quality and uniformity of the disability determination process. GAO recommended that SSA adopt a stronger and more active management role and that SSA revise the Federal-State agreements to clearly define the responsibilities of each party consistent with a uniform disability determination process. Papers prepared by the staff of the Subcommittee on Social Security for the use of the Committee on Ways and Means also recommended stronger Federal control.

The Federal-State model agreement was therefore revised. The revised model agreement reflected SSA's intentions to administer the program through standards, to take a lead role in assuring uniform training of State agency personnel, and to deal with those State practices that over the years had become impediments to effective administration.

SSA tried to get all the States to enter into the new agreement during the summer and fall of 1978, but considerable resistance was encountered. The revisions in the agreement were viewed by various State

ficials and organizations as interfering ith traditional State prerogatives to nage their own affairs. This concern reflected in the fact that only 21 of 54 ate agencies signed the new reement.

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Congress amended the Act to increase e Secretary's ability to influence State rformance. The Secretary is required establish, by regulation, whatever ndards of performance and ministrative requirements and ocedures she considers necessary for e States to follow to insure effective d uniform administration of the SSA ability programs. Section 221(a), ended by Pub. L. 96-265, provides at beginning June 1981, disability terminations will be made by the ate unless it notifies the Secretary, in riting, of its wishes to no longer make e determinations, and if the Secretary s not found that the State has failed to ke determinations consistent with ndards to be prescribed by the cretary. Section 221(c) authorizes the cretary to review State terminations and, based on the view, to make findings as to whether a rson is or is not disabled and, if abled, whether the disability began an earlier or later date or ended on earlier or later date than that termined by the State.

The amendments also provide that a ate which wishes to discontinue king disability determinations or, is und to be failing to make disability terminations as prescribed by ndards, must continue to make the terminations for at least 180 more ys. The Secretary is required to make e disability determinations thereafter. e Secretary is further required to velop and initiate a plan for the rtial or complete assumption of a ate's disability determination function such a step becomes necessary. The an must provide for the continuation the disability determination function d for the protection of any affected ate employees. The Secretary must ve preference to capable State ployees in filling appropriate ployment positions, and may not sume a State's function until the State s made a fair and equitable rangement to protect the rights of splaced State personnel (with some nited exceptions) not utilized by the cretary. (The Secretary of Labor will termine if this has been done.) The cretary is directed to advise the ngress of any amendments of Federal law and regulations needed to carry out the plan.

The amendments also place responsibility upon the Secretary to provide for the continued effective operation of the disability program in the event of the non-participation of one or more States. This is to be done with only limited time to prepare for the State's non-participation and the need to assure protection of the employment rights of the displaced State personnel before the Secretary can assume the State's function.

Specific Provisions of the Law Subject to Regulations

Pub. L. 96-265 eliminates the system of negotiated agreements between the Secretary and the States and requires the Secretary to establish, through regulations, the procedures and performance standards for the State disability determination function in whatever detail appears appropriate.

The law gives the Secretary broad discretion to determine, for example, what matters to regulate, in how much detail to regulate them, and whether to regulate or to issue "other written guidelines." The Secreatary may regulate such matters as:

- The administrative structure and the relationship between various units of the State agency;
- The physical location of, and relationship among, agency staff units and other organizations performing tasks for the State agency;
- Standards for the availability to applicants and beneficiaries of facilities for making disability determinations;
- State agency performance criteria, including the rate of accuracy of decisions and the time periods within which determinations must be made;
- The procedures for and the scope of review by the Secretary and, as she finds appropriate, by the State, of its performance in individual cases and classes of cases;
- Rules governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function;
- Fiscal control procedures that the State agency may be required to adopt; and
- The submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination function.

Congressional Concerns

In its deliberation during the development of Pub. L. 96-265, Congress was aware of the problems in the existing Federal-State structure. It felt that significant improvement in Federal management and control was necessary and that the amendments would strengthen the Federal role in how disability determinations are made in the State agenices.

Congress recognized the possibility that under Pub. L. 96-265 some States may decide not to participate under the program, or that the Secretary may determine that a State is not complying with the regulatory requirements promulgated under this legislation. It was concerned that there be adequate procedures to establish Federal administration if State administration ended for either reason. Two issues were of particular concern: the potential disruption of the ongoing determination process which could create hardship for disability applicants, and the positions of the State employees involved.

Congress concluded that the Department did not appear to have any extensive planning for Federal assumption of the State agencies' functions. Therefore, to stimulate planning for such a contingency, Pub. L. 96-265 required that the Secretary submit to Congress a detailed plan of how the Secretary expects to assume the functions and operations of a State disability determination function should it become necessary. The plan is to assume the uninterrupted operation of the disability determination process, including the utilization of the best-qualified personnel to carry out this function. Congress also recommended that the Department give consideration to establishing conditions of employment so that the best-qualified State employees would not be substantially disadvantaged in transferring to Federal employment, in the event that a State quits or is terminated for poor performance.

Basic Considerations for Assuming State Functions

If a State chooses to stop making disability determinations, or if the Secretary finds it necessary to assume the function because a State fails to meet the standards, several legislated requirements and responsibilities will govern the Secretary's action.

A. *Requirements.*

Pub. L. 96-265 imposes four conditions on the Secretary's assumption of the disability determination function. These are:

1. The Secretary must assume the disability determination function no earlier than 180 days after a finding that the State is substantially failing to make disability determinations consistent with regulations or after receipt of a

State's notice of its intentions to stop making disability determinations;

2. The Secretary's assumption must be made without any interruption in services to the residents of the State;

3. The Secretary must (with some very limited exceptions) give hiring preference to State agency employees who are capable of performing duties in the disability determination process for the Secretary; and

4. The Secretary may not assume a State's function until after the Secretary of Labor has determined that the State has made fair an equitable arrangements under applicable law to protect the interests of those State agency employees who will be displaced from their employment on account of the Secretary's assumption and who will not be hired by the Secretary.

B. *Responsibilities.*

When the Secretary has determined that a State agency's function must be terminated or when a State decides to stop making disability determinations, the Secretary of HHS, the State, and the Secretary of Labor must fulfill certain responsibilities.

1. The Secretary of HHS's responsibilities are to:

a. Begin making disability determinations no sooner than 180 days after notice that a State agency's disability determination function will end;

b. Develop and initiate procedures to give hiring preference to State agency employees who are capable of performing duties in the disability determination process; and

c. Insure that the Secretary of Labor has determined that the State has made fair and equitable arrangements for any State agency employees who will be displaced by the assumption and who will not be hired by the Secretary.

2. The terminating State's responsibilities are to:

a. Continue making disability determinations for not less than 180 days after a termination notice, or until the Secretary has fulfilled his or her responsibilities; and

b. Make fair and equitable arrangements to protect the interests of State agency employees who will not be hired by SSA. Employees' interests must be protected in accordance with applicable Federal, State, and local statutes.

3. The Secretary of Labor's responsibility is to determine that the State has made fair and equitable arrangements for protecting State personnel.

State Involvement in Development of the Regulations

In January 1980, SSA convened a two-day work group meeting of SSA central and regional office and State personnel to give us their views on developing the performance standards required by the disability bill. This work group developed some tentative guides for such performance standards.

During the summer of 1980, SSA invited to the headquarters in Baltimore, all of the DDS administrators, and in a series of four meetings, plans for issuing regulations under Public Law 96-265 were discussed. These were meetings in which the DDS administrators had an opportunity to comment on the general direction of our plans and to offer specific suggestions for the scope of the regulation. The reactions of these State administrators were considered in developing the regulations, and a number of significant changes resulted from their recommendations.

Our Basic Implementation Approach

It is our intention to use these regulations and the statutory authority derived from Pub. L. 96-265 to improve the overall administration and delivery of the disability program. We will accomplish these improvements by:

1. Setting a targeted level of performance that we will work to attain in the future.

2. Creating a system of intermediate goals to serve as stepping stones to progress towards our targeted level of performance;

3. Establishing a threshold level clearly defining the lowest level of acceptable performance by a State agency;

4. Setting forth those actions that we will take to make sure unacceptable performance does not continue; and,

5. Establishing administrative requirements that will provide the States with management flexibility, establishing the framework for the Federal-State partnership, and at the same time, allow us to retain our program stewardship responsibilities.

The proposed regulations use standards as the mechanism to "drive" the disability determination process towards continued improvement.

We will specify the outcome expected. We will carefully monitor the States' disability determination process in terms of performance accuracy and processing time. The States will have control over management of their operation as long as performance is adequate under the standards which we set.

If a State's performance becomes unacceptable, these regulations provide for Federal involvement in the State's activities in making disability determinations for the purpose of improving the State's performance. We have a responsibility under the law for seeing that the disability programs are efficiently and equitably administered. If, even after our assistance, a State's performance is not adequate, we will take action to take over the disability program from the State.

While we are proposing regulations to establish national standards for performance accuracy and processing time, we will continue to assure the fiscal integrity of the States' operations through the budget process. Individual State budgets will continute to be negotiated on the regional level. The objective of negotiations is to determine a level of funding within available resources that will be perceived by Federal and State officials as sufficient to meet standards and stated goals. The negotiated budget is an integral part of the decision of setting goals. States will be expected to meet standards and goals within the negotiated budget.

The Target Level

We have developed target levels for State agency combined title II and title XVI initial accuracy, title II intitial processing time, and title XVI processing time. The values selected for the target levels represent a difficult challenge but are designed to reflect what we believe to be a level of performance and service delivery that we should constantly strive to attain.

Intermediate Goals for State Performance Between the Target and Threshold Levels

We will establish intermediate performance goals between the threshold standards and the target standards in order to assure continued movement towards our targeted level of performance. Our regional offices will annually negotiate a new set of individual State agency goals to help them move from the current levels of performance to target levels. Failure to meet these intermediate goals will not be cause for considering a State to be substantially failing to comply with the regulations. However, such failure will be a matter of concern to us and may result in our requesting the State to take corrective action and possibly offering technical assistance.

e Threshold Levels

We are also establishing threshold els for State agency performance curacy and processing time. These are nimum acceptable levels for mbined title II and title XVI initial formance accuracy, title II initial ocessing time, and title XVI initial ocessing time. We established the eshold levels for processing time and formance accuracy by using the tional mean and applying a asurement of one standard deviation m the mean. (A standard deviation is athematical way of measuring the riability of items around an average.) ta from the fiscal year ending ptember 30, 1979 was used to tablish the levels. Falling below these eshold levels will be unacceptable d will mandate appropriate action on r part to improve the situation. These tions are set forth in §§ 404.1650 and 6.1050

We will reexamine the threshold els annually, but we will not make nges or modifications automatically. tead, any decision to adjust the vailing threshold standards will be de based on current State formance, procedural changes, tems modifications and resources. In making any changes in the eshold levels we will continue to use mean and standard deviation proach. In §§ 404.1640 through 4.1650 and in §§ 416.1040 through 6.1050, we explain how the threshold ndards are used by us in evaluating te performance.

termining Performance Accuracy

"Performance accuracy" refers to the liability of State agency adjudication. determining a national standard for te agency performance accuracy for rposes of section 304, we consider not ly whether disability decisions are ht or wrong for payment, but also ether the claims have all the desired idence and whether all factors ntributing to a sound decision were nsidered. Accordingly, the percentage cases that can be processed without ing returned to the State agency for rther development or for correction of cisions based on evidence in the file presents the State agency's formance accuracy rate. The State ency's original decision is not anged in the majority of cases that are turned for additional development. rors in performance accuracy entified by the quality assurance stem should not be interpreted as clusively reflecting decisions that ther incorrectly deny or award benefit yments. Since the quality assurance system measures factors that have the potential for impacting decisions as well as the correctness of the decision, the rate of incorrect decisions is significantly lower than what is reflected in the standards cited in these regulations. Nevertheless, we believe we must measure accuracy using a higher standard than correct decisions.

Our most current data indicates that with a national level of performance accuracy of about 93 percent the rate of correct decisions is approximately 97 percent. Since decisional accuracy is tied to performance accuracy, the system we are establishing to use goals and standards to improve performance will also improve decisional accuracy. We estimate that our target level of 97 percent performance accuracy will yield a decisional accuracy rate of 99 percent.

Performance Accuracy Threshold Level

The national performance accuracy threshold level was established using fiscal year 1979 State-by-State title II and title XVI performance accuracy rates for disability determinations at the initial (first) level of adjudication. These data were obtained from the Disability Quality Assurance System. A combined title II and title XVI national mean and standard deviation were calculated together. Separate calculations were not made for each title as they were for processing time. The national mean was formulated using the individual State agency fiscal year 1979 performance accuracy rates. The title II initial performance accuracy rates and the title XVI initial performance accuracy rates were statistically weighted by workload size for each individual State agency. A national mean was then computed for combined title II and title XVI initial performance accuracy. The combined title II and title XVI initial performance accuracy national mean for fiscal year 1979 resulted in a rate of 92.5 percent. The standard deviation was calculated and resulted in a rate of 1.9 percent.

The threshold level for State agency performance accuracy has been established at one standard deviation below the national combined title II and title XVI initial performance accuracy mean. This threshold level was set after considering historical trends in State agency performance accuracy, past performance, and statistical theory. In addition, the selection of the threshold level was dependent upon our staffing and fiscal capacities for providing necessary technical and management assistance to State agencies whose performance is likely to fall below the threshold levels. Applying the one standard deviation measurement to the fiscal year 1979 national combined title II and title XVI performance accuracy mean, the threshold is 90.6 percent for combined title II and title XVI initial performance accuracy.

Determining Processing Time

State agency processing time for title II initial disability claims is the average number of days from the time the State agency receives the claim until the determination is put into the Social Security Administration Case Control System (SSACCS). Saturdays, Sundays, and holidays are counted.

State agency processing time for title XVI initial disability claims is the average number of days from release of the claim by the social security district office to the State agency until the determination by the State agency is put into the Supplemental Security Income Case Control System (SSICCS). Saturdays, Sundays and holidays are counted.

Determining Processing Time Threshold Levels

Processing time threshold levels were formulated using fiscal year 1979 State-aby-State title II and title XVI mean processing time data for disability determinations at the initial (first) level of adjudication.These data were obtained from the Social Security Administration Case Control System (SSACCS) for title II and the Supplemental Security Income Control System (SSICCS) for title XVI. National means and standard deviations were calculated separately for title II and title XVI from these data. The national means were calculated using two steps.

First, the fiscal year 1979 mean processing time was established for each State agency by taking the average of the 12 monthly State agency processing time means. Then, the average of the individual State agency means was calculated to produce the national mean. This two-step process was applied separately to title II data and on title XVI data and resulted in the following national means:

Title II initial processing time—43.2 days.

Title XVI initial processing time—54.3 days.

The standard deviations for initial title II and title XVI fiscal year 1979 processing time data were calculated using established statistical techniques and resulted in the following:

Title II initial processing time—6.3 days.

Title XVI initial processing time—7.6 days.

The threshold levels for State agency processing time have been set at 1 standard deviation above the fiscal year

1979 national mean processing time. This decision was based on past State agency processing time, historical trends in State agency processing time, and statistical theory. In addition to mathematical and statistical considerations, the 1 standard deviation level was established based on our fiscal and staffing capabilities for providing necessary technical and management assistance to State agencies whose performance is likely to fall below the threshold levels. Applying the 1 standard deviation measurement to the fiscal year 1979 national processing time means, the thresholds are as follows:

Title II initial procesing time—49.5 days.

Title XVI initial processing time—57.9 days.

The title XVI processing time threshold was reduced by 4 days to account for a computer systems modification which was activated in May 1979. This change stopped the measurement of State agency processing time when a State agency presumptive disability determination was put into SSICCS, rather than when the final decision was made. (A finding of presumptive disability is made before obtaining the evidence needed for a final determination when there is a high degree of probability of disability on the basis of the evidence available at the time.) After extensive study, it was determined that this modification lowered State agency title XVI initial mean processing time by 4 days on the average.

Target Levels and Intermediate Goals

Target levels represent the highest level of performance and service delivery presently achievable. They will, by their very nature, challenge nearly all agencies to improve. Each State each year is expected to make progress toward the target. The extent of progress will be negotiated annually on the regional level as part of the State agency budget process.

Other than the annually negotiated goal, there is no time frame for meeting the target. States will always be constrained by workloads, availability and competency of staff, and available money.

Technical and Management Assistance

We will do ongoing monitoring to evaluate State agency performance of combined title II and title XVI initial performance accuracy, of title II initial processing time, and title XVI initial processing time. The monitoring will allow us to determine whether a State agency will receive either mandatory or optional technical and management assistance. A State agency will receive mandatory assistance if it fails to meet two of three established threshold levels (one being accuracy) for two consecutive quarters. Failure to meet any one of the threshold levels for 2 consecutive quarters may result in mandated technical assistance.

A State agency will receive optional technical and management assistance when our regular monitoring reveals State agency performance has significantly declined although not so low as to require mandatory assistance. We will offer optional assistance at our discretion based on our available resources. The technical and management assistance we will give a State agency is explained in §§ 404.1661 and 416.1061.

"Substantial Failure"

If a State agency substantially fails to make disability determinations consistent with the Secretary's regulations and other written guidelines, Pub. L. 96–265 requires the Secretary (after giving the State notice and an opportunity for a hearing) to make the disability determinations.

Our approach will be to closely monitor and evaluate State agency performance of title II and XVI performance accuracy, title II processing time, and title XVI processing time. If a State agency is falling below 2 of the 3 threshold levels (one of which must be accuracy) for 2 consecutive quarters, we will provide technical and management assistance to the State agency for up to 12 months. After the assistance period, the State agency will have a 3-month adjustment period. After the adjustment period, if the State agency again falls below 2 of the 3 threshold levels (one being accuracy) in 2 consecutive quarters, during the next 12 months, we will notify the State that the State agency is in danger of being found to be in substantial failure and give the State an opportunity for a hearing. If it is found that the State substantially failed to comply with the regulations and written guidelines, the Secretary must take over the disability determination function. We explain "substantial failure" in more detail in §§ 404.1670 through 404.1675 and in §§ 416.1070 through 416.1075.

Right to Hearing

We will notify a State that we are proposing to terminate its performance of the disability determination function if it is substantially failing to make disability determinations consistent with our regulations. The State will have an opportunity for a hearing before any termination. The hearing will be conducted as described in §§ 404.1680 through 404.1682 and in §§ 416.1080 through 416.1082.

Administrative Requirements and Procedures

Basically, our implementation approach is to specify certain performance results and let the States perform through their best management procedures with minimum Federal involvement as long as their performance is acceptable.

Accordingly, we are regulating administrative areas only to the extent necessary to insure effective stewardship of the disability program. This is a significant shift in our administrative relationship with the States under the agreements. We explain administrative requirements and procedures in §§ 404.1620 and through 404.1633 and in §§ 416.1020 through 416.1033. Specifically, here is what we are proposing to do, and not do, in the regulations with respect to the various administrative areas that have to be addressed.

Adjudication

The State will make disability determinations in initial, reconsideration, and continuing eligibility cases under the various provisions of the Act.

A State disability examiner (lay) and physician team will make these determinations. However, we do not propose regulating the types of positions to be established beyond the adjudication team.

In making determinations, the State will use our forms and procedures and adhere to the policies we may require to insure uniform and effective administration of the disability program throughout the United States.

However, we are not proposing to regulate the internal case flow procedures except where they appear to contribute to unacceptable performance by a State.

Organization

The State will be expected to provide an organizational structure, sufficient qualified personnel, and medical consultative services that will result in timely processing and accurate decisionmaking of disability claims. We will not impose requirements, either through regulation or other directive, for a specific organizational structure unless State performance approaches unacceptable levels. We also do not propose to regulate the place in the State hierarchy of the State agency, or the relation of the State agency to other

components in State government. The State will be responsible for producing an accurate and timely disability decision.

Personnel

In general, the State will be responsible for establishing positions, recruitment, selection, tenure, compensation, and staff development policies. The State will insure an acceptable level of competency of all employees through selection, ongoing training and staff development. However, we will provide technical training materials. We will become further involved only when State performance approaches unacceptable levels, or where the State requires complex instructional or training materials or the capacity of the State to deliver adequate training is in doubt. The State will make personnel available to attend meetings or conferences as may be necessary for furthering the purpose of the disability programs. The State must comply with equal employment opportunity directives in making disability determinations as specified in executive orders or the Code of Federal Regulations.

To the extent that Federal funding is available, the State will contribute to the processing of disability claims by avoiding, to the extent feasible and permissible under State law, personnel freezes, restrictions against overtime work, or other curtailment of facilities or activities.

Facilities

To the extent that Federal funding is available, the State will provide space, equipment, supplies and other services as will contribute to the timely and accurate processing of disability claims. The State will determine the locations where disability determinations are to be made. However, the State will provide the Secretary with access to the premises for the purpose of inspecting the work and activities required by these regulations. We will always give the State reasonable notice of the times of our visits.

Medical and Other Purchased Services

The State will determine the rates of payment to be used in arranging for medical or other examinations necessary to make determinations of disability. These rates should be designed to aid in the procurement of needed services but may not exceed the highest rate paid by Federal or other agencies in the State for the same or a similar type of service. The State will maintain documentation to support the rates of payment it uses.

Records and Reports

The State will furnish schedules, financial and cost reports, and other reports relating to the administration of the disability program that we may require. Records relating to the work being performed under these regulations will be retained by the State for a period of time specified by us. We will have access to these records for purposes of monitoring, research and development and audit.

Research and Demonstration Projects

We will request State participation in federally funded research and demonstration projects to assess the effectiveness of the disability program and to ascertain the effect of program policy changes. Where we determine that participation is necessary for the project to be complete, e.g., to provide national uniformity in a claims process, State participation will be mandatory.

Fiscal

We will provide the State with funds in advance or by way of reimbursement for necessary costs incurred by the State in making disability determinations under these regulations. The State will submit estimates of anticipated costs for the periods, and at the time and in the manner we may request. After considering all pertinent information, we will notify the State of the amount which will be made available to it for the period, as well as what anticipated costs are being approved. The State will not incur or make expenditures for the period for items which we do not approve, or in excess of the amount we certify as available.

After the close of a period for which funds have been certified to the State, the State will submit a certified report of its actual expenditures. We will inform the State by audit whether expenditures were necessary and proper under standards in effect at the time expenditures were made or incurred. The standards may be found in subpart 1–15.7 of part 1–15 of the Federal Procurement Regulations (41 CFR 1–15.7) and in the Disability Insurance section of the Program Operations Manual System (POMS).

Any monies we pay to the State which are used for purposes not within the scope of these regulations will be paid back to the Treasury of the United States.

Considerations in Developing Standards

Performance Standards

Our primary considerations are related to fostering improvement in the adjudication process. In developing performance threshold levels, we took a middle of the road approach. We considered setting the threshold higher, but rejected it as imposing an unrealistic demand on States in the beginning stages of our changed relationship to the States. We also considered setting the threshold low, but dropped the option as doing little more than reinforcing the status quo. Our middle of the road approach will mean providing technical assistance to possibly 13 States with 2 of them likely to be in substantial failure.

Administrative Standards

Again our approach is moderate. We have elected to regulate only to the extent necessary to insure the Secretary's responsible stewardship and foster effective and uniform administration of the program. The proposed regulations on travel, training, access, records and reports, fiscal, and research and demonstration projects are examples in point.

We decided not to regulate specifically in more areas as inconsistent with our objective of giving the States management flexibility. On the other hand, we opted against regulating less specifically as failing to carry out our statutory mandate to assure effective and uniform administration of the disability insurance program throughout the United States.

Conclusion

We believe that these regulations will improve the quality of State agency performance and insure that claimants throughout the country are judged under national standards and procedures while preserving the basic Federal-State structure. However, we are publishing these amendments now only as proposals. They will not become effective as regulations unless they are adopted and published again in the **Federal Register** as final regulations. Although the policies, procedures, and rules which we are proposing have been developed over a long period of time with participation of the States and others, we are planning to continue an outreach effort during the comment period so as to obtain the widest practicable responses from the public, including the disabled.

The purpose of this notice is to give the public an opportunity to participate in the rulemaking process before the adoption of the final rules.

While we have already met with State agency administrators, certain agency directors, and representatives of other organizations, we would still like to get any additional views they may have.

We would also like to have the views of other people who are interested in the administration of the title II and title XVI disability programs. We welcome comments from State employees, especially other administrators, disability examiners, and medical consultants. We also believe that comments from employee unions, legal advocacy groups, and other organizations and associations concerned with the title II and title XVI disability programs will be most helpful to us. Since these proposed regulations are intended ultimately to benefit those members of the public who file disability claims, the general public has siginificant interest in regulations designed to serve it. Therefore, we will carefully consider any comments we receive from private citizens as well as from representatives of organizations.

The proposed amendments are issued under the authority contained in sections 205, 221, 1102, 1614 and 1631 of the Social Security Act, as amended; 53 Stat. 1368, as amended; 66 Stat. 1081, as amended; 49 Stat. 647, as amended; 86 Stat. 1471; 86 Stat. 1475; 42 U.S.C. 405, 421, 1302, 1382c, and 1383.

(Catalog of Federal Domestic Assistance, Program No. 13.802, Disability Insurance; No. 13.807, Supplemental Security Income Program.)

Dated: November 10, 1980.

William J. Driver,

Commissioner of Social Security.

Approved: January 9, 1981.

Patricia Roberts Harris,

Secretary of Health and Human Services.

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE (1950-)

Part 404 of Chapter 111 of Title 20 of the Code of Federal Regulations is amended as follows:

1. Section 404.1502 is revised to read as follows:

§ 404.1502 General definitions and terms for his subpart.

As used in the subpart—

"Secretary" means the Secretary of Health and Human Services.

"State agency" means that agency of a State which has been designated by the State to carry out the disability determination function.

"We" or "us" refers to either the Social Security Administration or the State agency making the disability or blindness determination.

"You" refers to the person who has applied for benefits or for a period of disability or is receiving benefits based on disability or blindness.

2. Section 404.1503 is revised to read as follows:

§ 404.1503 Who makes disability and blindness determinations.

(a) *State agencies.* State agencies make disability and blindness determinations for the Secretary for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function. States have the option of turning the function over to the Federal Government if they no longer want to make disability determinations. Also, the Secretary may take the function away from any State which has substantially failed to make disability and blindness determinations in accordance with these regulations. Subpart Q of this Part contains the rules the States must follow in making disability and blindness determinations.

(b) *Social Security Administration.* The Social Security Administration will make disability and blindness determinations for the Secretary for—

(1) Any person living in a State which is not making for the Secretary any disability and blindness determinations or which is not making those determinations for the class of claimants to which that person belongs; and

(2) Any person living outside the United States.

(c) *What determinations are authorized.* The Secretary has authorized the State agencies and the Social Security Administration to make determinations about—

(1) Whether you are disabled or blind;

(2) The date your disability or blindness began; and

(3) The date your disability or blindness stopped.

(d) *Review of State Agency determinations.* On review of a State agency determination or redetermination of disability or blindness we may find that—

(1) You are, or are not, disabled or blind, regardless of what the State agency found;

(2) Your disability or blindness began earlier or later than the date found by the State agency; and

(3) Your disability or blindness stopped earlier or later than the date found by the State agency.

§§ 404.1601–404.1610 (Subpart Q) [Redesignated as §§ 404.2001–404.2010 (Subpart U)]

3. The headings and text of §§ 404.1601–404.1610 (Subpart Q) are redesignated as §§ 404.2001—404.2010 (Subpart U) respectively. The heading for Subpart U is "Representative Payee". (A proposed revision of present Subpart Q has been published in the Federal Register. These regulations will be redesignated when adopted as final).

4. A new Subpart Q is added to Part 404 to read as follows:

Subpart Q—Determinations of Disability

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Authority: Issued under secs. 205, 221 and 1102 of the Social Security Act, as amended: 53 Stat. 1368, as amended; 68 Stat. 1081, as amended; 49 Stat. 647, as amended; 42 U.S.C. 405, 421 and 1302.

Subpart Q—Determinations of Disability

General Provision

§ 404.1601 Purpose and scope.

This subpart describes the standards of performance and administrative requirements and procedures for States making determinations of disability for the Secretary under title II of the Act. It also establishes the Secretary's responsibilities in carrying out the disability determination function.

(a) Sections 404.1601–404.1603 describe the purpose of the regulations and the meaning of terms frequently used in the regulations. They also briefly set forth the responsibilities of the Secretary and the States covered in detail in other sections.

(b) Sections 404.1610–404.1618 describe the Secretary's and the State's responsibilities in performing the disability determination function.

(c) Sections 404.1620–404.1633 describe the administrative responsibilities and requirements of the States. The corresponding role of the Secretary is also set out.

(d) Sections 404.1640–404.1650 describe the performance accuracy and processing time standards for measuring State agency performance.

(e) Sections 404.1660–404.1661 describe when and what kind of assistance the Secretary will provide State agencies to help them improve performance.

(f) Sections 404.1670–404.1675 describe the level of performance below which the Secretary will consider a State agency to be substantially failing to make disability determinations consistent with the regulations and other written guidelines and the resulting action the Secretary will take.

(g) Sections 404.1680–404.1682 describe the rules for resolving disputes concerning fiscal issues and providing hearings when we propose to find that a State is in substantial failure.

(h) Sections 404.1690–404.1694 describe when and what action the Secretary will take and what action the State will be expected to take if the Secretary assumes the disability determination function from a State agency.

§ 404.1602 Definitions.

For purposes of this subpart:

"Act" means the Social Security Act, as amended.

"Class or classes of cases" means the categories into which disability claims are divided according to their characteristics.

"Determination of disability" or "disability determination" means one or more of the following decisions:

(a) Whether or not a person is under a disability;

(b) The date a person's disability began; or

(c) The date a person's disability ended.

"Disability" means "disability" or "blindness" as defined in sections 216(i) and 223 of the Act or as defined in title IV of the Federal Mine Safety and Health Act of 1977, as amended.

"Disability determination function" means making determinations as to disability and carrying out related administrative and other responsibilities.

"Disability program" means, as appropriate, the Federal programs for providing disability insurance benefits under title II of the Act and disability benefits under title IV of the Federal Mine Safety and Health Act of 1977, as amended.

"Initial" means the first level of disability adjudication.

"Other written guidelines" means the policies, procedures, guides, and operating instructions in the Disability Insurance section of the Program Operations Manual System that are not designated as advisory or discretionary.

"Regulations" means regulations in this subpart issued under §§ 205(a), 221 and 1102 of the Act, unless otherwise indicated.

"Secretary" means the Secretary of the Department of Health and Human Services or the Secretary's delegate.

"State" means any of the 50 States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, or Guam. It includes the State agency.

"State agency" means that agency of a State which has been designated by the State to carry out the disability determination function.

"We", "us," and "our" refers to the Social Security Administration (SSA) or the Secretary, as appropriate.

§ 404.1603 Basic responsibilities for us and the State.

(a) *General.* We will work with the State to provide and maintain an effective system for processing claims of those who apply for and who are receiving benefits under the disability program. We will provide program standards, leadership, and oversight. We do not intend to become involved in the State's ongoing management of the program except as is necessary and in accordance with these regulations. The State will comply with our regulations and other written guidelines.

(b) *Our responsibilities.* We will:

(1) Periodically review the regulations and other written guidlines to determine whether they insure effective and uniform administration of the disability program. To the extent feasible, we will consult with and take into consideration the experience of the States in issuing regulations and guidelines necessary to insure effective and uniform administration of the disability program;

(2) Provide training materials or in some instances conduct or specify training, see § 404.1622;

(3) Provide funds to the State agency for the necessary cost of performing the disability determination function, see § 404.1626;

(4) Monitor and evaluate the performance of the State agency under the established standards, see §§404.1644 and 404.1645; and

(5) Maintain liaison with the medical profession nationally and with national organizations and agencies whose interests or activities may affect the disability program.

(c) *Responsibilities of the State.* The State will:

(1) Provide management needed to insure that the State agency carries out the disability determination function so that disability determinations are made accurately and promptly;

(2) Provide an organizational structure, adequate facilities, qualified personnel, and medical consultant services (§§ 404.1620–404.1624);

(3) Furnish reports and records relating to the administration of the disability program (§ 404.1625);

(4) Submit budgets (§ 404.1626);

(5) Cooperate with audits (§ 404.1627);

(6) Insure that all applicants for and recipients of disability benefits are treated equally and courteously;

(7) Be responsible for property used for disability program purposes (§ 404.1628);

(8) Take part in the research and demonstration projects (§ 404.1629);

(9) Coordinate with other agencies (§ 404.1630);

(10) Safeguard the records created by the State in performing the disability determination function (§ 404.1631);

(11) Comply with other provisions of the Federal law and regulations that apply to the State in performing the disability determination function;

(12) Comply with other written guidelines (§ 404.1633);

(13) Maintain liaison with the medical profession and organizations that may facilitate performing the disability determination function; and

(14) Assist us in other ways that we determine may promote the objectives of effective and uniform administration.

Responsibilities For Performing the Disability Determination Function

§ 404.1610 How a State notifies us that it wishes to perform the disability determination function.

(a) *Deemed notice.* Any State that has in effect as of June 1, 1981, an agreement with us to make disability determinations will be deemed to have given us notice that it wishes to perform the disability determination function, in lieu of continuing the agreement in effect after June 1, 1981.

(b) *Written notice.* After June 1, 1981, a State not making disability determinations that wishes to perform the disability determination function under these regulations must notify us in writing. The notice must be from an official authorized to act for the State for this purpose. The State will provide an opinion from the State's Attorney General verifying the authority of the official who sent the notice to act for the State.

§ 404.1611 How we notify a State whether it may perform the disability determination function.

(a) If a State notifies us in writing that it wishes to perform the disability determination function, we will notify the State in writing whether or not it may perform the function. The State will begin performing the disability determination function beginning with the month we and the State agree upon.

(b) If we have previously found that a State agency has substantially failed to make disability determinations in accordance with the law or these regulations and other written guidelines or if the State has previously notified us in writing that it does not wish to make disability determinations, the notice will advise the State whether the State agency may again make the disability determinations and, if so, the date and the conditions under which the State may again make them.

§ 404.1613 Disability determinations the State makes.

(a) *General rule.* A State agency will make determinations of disability with respect to all persons in the State except those individuals whose cases are in a class specifically excluded by our written guidelines. A determination of disability made by the State is the determination of the Secretary.

(b) *New classes of cases.* Where any new class or classes of cases arise requiring determinations of disability, we will determine the conditions under which a State may choose not to make the disability determinations. We will provide the State with the necessary funding to do the additional work.

(c) *Temporary transfer of classes of cases.* We will make disability determinations for classes of cases temporarily transferred to us by the State agency if the State agency asks us to do so and we agree. The State agency will make written arrangements with us which will specify the period of time and the class or classes of cases we will do.

§ 404.1614 Responsibilities for obtaining evidence to make disability determinations.

(a) The State agency will secure from the claimant or other sources any evidence it needs to make a disability determination.

(b) We will secure from the claimant or other special arrangement sources, any evidence we can obtain as adequately and more readily than the State agency. We will furnish the evidence to the State agency for use in making a disability determination.

(c) At our request, the State agency will obtain and furnish medical or other evidence and provide assistance as may be necessary for us to carry out our responsibilities—

(1) For making disability determinations in those classes of cases described in the written guidelines for which the State agency does not make the determination; or

(2) Under international agreements with respect to social security benefits payable under section 223 of the Act.

§ 404.1615 Making disability determinations.

(a) When making a disability determination, the State agency will apply subpart P, Part 404 of our regulations.

(b) The State agency will make disability determinations based only on the medical and nonmedical evidence in its files.

(c) Disability determinations will be made by a State agency medical consultant and another person qualified to interpret and evaluate medical reports and other evidence relating to the claimant's physical or mental impairments and as necessary to determine the capacities of the claimant to perform substantial gainful activity. (See § 404.1572 of this part for what we mean by "substantial gainful activity".)

(d) The State agency will certify each determination of disability to us on forms we provide.

(e) The State agency will furnish us with all the evidence it considered in making its determination.

§ 404.1618 Notifying claimants of the disability determination.

The State agency will prepare denial notices in accordance with subpart J of this Part whenever it makes a disability determination which is wholly or partly unfavorable to the claimant.

Administrative Responsibilities and Requirements

§ 404.1620 Organization.

(a) The State will provide the organizational structure, sufficient qualified personnel and medical consultant services to insure disability determinations are made accurately and promptly. We may impose specific organizational requirements on the State, but only if a State's performance approaches the threshold level described in §§ 404.1641–404.1650.

(b) The State is responsible for making accurate and prompt disability determinations.

§ 404.1621 Personnel.

(a) *Equal Employment Opportunity.* The State will comply with all applicable Federal statutes, executive orders and regulations concerned with equal employment opportunities.

(b) *Selection, tenure, and compensation.* The State agency will, except as may be inconsistent with paragraph (a) of this section, adhere to applicable State approved personnel standards in the selection, tenure, and compensation of any individual employed in the disability program.

(c) *Travel.* The State will make personnel available to attend meetings or workshops as may be sponsored or approved by us for furthering the purposes of the disability program.

(d) *Restrictions.* Subject to appropriate Federal funding, the State will, to the best of its ability, facilitate the processing of disability claims by avoiding personnel freezes, restrictions

ainst overtime work, or curtailment of cilities or activities.

04.1622 Training.

The State will insure that all mployees have an acceptable level of mpetence. We will provide training d other instructional materials to cilitate basic and advanced technical oficiency of disability staff in order to sure uniformity and effectiveness in e administration of the disability ogram. We will conduct or specify ining, as appropriate, but only if:

(a) a State agency's performance proaches unacceptable levels; or

(b) the material required for the ining is complex or the capacity of e State to deliver the training is in ubt and uniformity of the training is sential.

04.1623 Facilities.

(a) *Space, equipment, supplies, and her services.* Subject to appropriate deral funding, the State will provide equate space, equipment, supplies, d other services to facilitate making curate and prompt disability terminations.

(b) *Location of facilities.* Subject to propriate Federal funding, the State ll determine the location where the sability determination function is to be rformed so that disability terminations are made accurately and mptly.

(c) *Access.* The State will permit us ess to the premises where the sability determination function is rformed for the purposes of inspecting e work and activities required by the gulations and assuring compliance th pertinent Federal statutes and gulations. We will contact the State d give reasonable prior notice of the es and purposes of any visit.

04.1624 Medical and other purchased rvices.

The State will determine the rates of yment to be used for purchasing dical or other services necessary to ke determinations of disability. The es may not exceed the highest rate id by Federal or other agencies in the le for the same or similar type of rvice. The State will maintain cumentation to support the rates of yment it uses.

04.1625 Records and reports.

(a) The State will establish and intain the records and furnish the hedules, financial, cost, and other ports relating to the administration of disability programs as we may quire.

(b) The State will permit us and the mptroller General of the United States (including duly authorized representatives) access to and the right to examine records relating to the work which the State performs under these regulations. These records will be retained by the State for the periods of time specified for retention of records in the Federal Procurement Regulations (41 CFR Parts 1–20).

§ 404.1626 Fiscal.

(a) We will give the State funds, in advance or by way of reimbursement, for necessary costs in making disability determinations under these regulations. Necessary costs mean direct as well as indirect costs as defined in title 41 CFR subpart 1–15.7 and in Federal Management Circular 74–4, as amended or superseded.

(b) The State will submit estimates of anticipated costs in the form of a budget at the time and in the manner we require.

(c) We will notify the State of the amount which will be made available to it as well as what anticipated costs are being approved.

(d) The State may not incur or make expenditures for items of cost not approved by us or in excess of the amount we make available to the State.

(e) After the close of a period for which funds have been made available to the State, the State will submit a report of its actual expenditures. We will give the State an audit report showing whether the expenditures were consistent with cost principles described in subpart 1–15.7 of part 1–15 of the Federal Procurement Regulations (41 CFR 1–15.7) and in written guidelines in effect at the time the expenditures were made or incurred.

(f) Any monies paid to the State which are used for purposes not within the scope of these regulations will be paid back to the Treasury of the United States.

§ 404.1627 Audits.

As soon as practicable after the close of each budgetary period, or at other times as necessary, the books of account and records in each State pertaining to the administration of the disability program under the Act will be audited by our Inspector General's office. These audits are conducted to determine whether the expenditures were made for the purpose intended and in amounts necessary for the proper and efficient administration of the disability program. The State will make every effort to act upon and resolve any items questioned in an audit.

(a) *Questioned items.* Expenditures of State agencies will be audited on the basis of cost principles and written guidelines in effect at the time the expenditures were made or incurred. Both the State and the State agency will be informed and given a full explanation of any questioned items. They will be given reasonable time to explain questioned items or expenditures. Any explanation furnished by the State or State agency will be given full consideration before a final determination is made on questioned items in the audit report.

(b) *State appeal of audit determinations.* The appropriate SSA regional commissioner will notify the State of his or her determination on the audit report. If the State disagrees with that determination, the State may request reconsideration in writing within 30 days of the date of the regional commissioner's notice of the determination. The written request may be made, through the Associate Commissioner, Office of Operational Policy and Procedures, to the Commissioner of Social Security, Room 900 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235. The Commissioner will make a determination and notify the State of that decision in writing no later than 45 days from the date of the State's appeal. The decision by the Commissioner will be final and conclusive upon the State unless the State appeals that decision in writing within 30 days of the date of the decision by the Commissioner to the Department of Health and Human Services Departmental Grant Appeals Board (the Board). See § 404.1680.

§ 404.1628 Property.

The State will have title to equipment purchased for disability program purposes. The State will be responsible for maintaining all property it acquires or which we furnish to it for performing the disability determination function. The State will identify the equipment by labeling and by inventory and will credit the SSA account with the fair market value of disposed property.

§ 404.1629 Participation in research and demonstration projects.

We will invite State participation in federally funded research and demonstration projects to assess the effectiveness of the disability program and to ascertain the effect of program policy changes. Where we determine that State participation is necessary for the project to be complete, for example, to provide national uniformity in a claims process, State participation is mandatory.

§ 404.1630 Coordination with other agencies.

(a) The State will establish cooperative working relationships with other agencies concerned with serving the disabled and, insofar as practicable, use their services, facilities, and records to:

(1) Assist the State in developing evidence and making determinations of disability; and

(2) Insure that referral of disabled or blind persons for rehabilitation services will be carried out effectively.

(b) The State may pay these agencies for the services, facilities, or records they provide. The State will include these costs in its estimates of anticipated costs and reports of actual expenditures.

§ 404.1631 Confidentiality of information and records.

The State will comply with the confidentiality of information and records requirements described in 20 CFR Part 401 and pertinent written guidelines (see § 404.1633).

§ 404.1632 Other Fedral laws and regulations.

The State will comply with the provisions of other Federal laws and regulations that directly affect its responsibilities in carrying out the disability determination function; for example, Treasury Department regulations on letters of credit (31 CFR Part 205).

§ 404.1633 Policies and operating instructions.

(a) We will provide the State agency with written guidelines necessary for it to carry out its responsibilities in performing the disability determination function.

(b) The State agency making determinations of disability will comply with the written guidelines in the Disability Insurance section of the Program Operations Manual System. This manual will also include certain policies, procedures, guides and operating instructions designated as advisory or discretionary.

(c) A representative group of State agencies will be given an opportunity to participate in formulating disability program policies that have an affect on their role in carrying out the disability determination function. State agencies will also be given an opportunity to comment before changes are made in written guidelines unless delay in issuing a change may impair service to the public.

Performance Standards

§ 404.1640 General

The following sections provide the procedures and guidelines we use to determine whether the State agency meets established national performance standards. We use these performance standards to help assure effective and uniform administration of our disability programs throughout the United States and to measure whether each State agency's performance of the disability determination function is acceptable. Also, the standards are designed to improve overall State agency performance in the disability determination process. We measure the State agency performance in two areas—processing time and performance accuracy.

§ 404.1641 Standards of performance.

(a) *General.* The performance standards include both a target level of performance and a threshold level of performance for the State agency. The target level represents a level of performance that we and the States will work to attain in the future. The threshold level is the minimum acceptable level of performance. Performance below the threshold level will be the basis for the Secretary's taking from the State agency partial or complete responsibility for performing the disability determination function. intermediate State agency goals are designed to help each State agency move from its current performance levels to the target levels.

(b) *The target level.* The target level is the optimum level of performance. There are three targets—one for combined title II and title XVI initial performance accuracy, one for title II initial processing time, and one for title XVI initial processing time.

(c) *The threshold level.* The threshold level is the minimum acceptable level of performance. There are three thresholds—one for combined title II and title XVI initial performance accuracy, one for title II initial processing time, and for title XVI initial processing time.

(d) *Intermediate goals.* Intermediate goals are levels of performance between the threshold levels and the target levels established by negotiation between SSA's regional commissioner and each State agency. The intermediate goals are stepping stones designed to help the State agencies reach the target levels. Failure to meet these goals is not a cause for considering the State agency to be substantially failing to comply with the performance standards. However, failure to meet the intermediate goals may result in consultation and an offer of optional technical and management assistance depending on the availability of SSA resources.

§ 404.1642 Processing time standards.

(a) *General.* Title II processing time refers to the average number of days (including Saturday, Sunday and holidays) it takes a State agency to process an initial disability claim from the day it is received in the State agency until the day it is released by the State agency. Title XVI processing time refers to the average number of days (including Saturday, Sunday and holidays) from release of the initial disability claim by the SSA district office until systems input of the disability determination.

(b) *Target levels.* The processing time target levels are:

(1) 37 days for title II initial claims.

(2) 43 days for title XVI initial claims.

(c) *Threshold levels.* The processing time threshold levels are:

(1) 49.5 days for title II initial claims.

(2) 57.9 days for title XVI initial claims.

§ 404.1643 Performance accuracy standard.

(a) *General.* Performance accuracy refers to the percentage of cases that do not have to be returned to State agencies for further development or correction of decisions based on evidence in the files and as such represents the reliability of State agency adjudication. The definition of performance accuracy includes the measurement of factors that have a potential for affecting a decision, as well as the correctness of the decision. For example, if a particular item of medical evidence should have been in the file but was not included, even though its inclusion does not change the result in the case, that is a performance error. Performance accuracy, therefore, is a higher standard than decisional accuracy. As a result, the percentage of correct decisions is significantly higher than what is reflected in the error rate established by SSA's quality assurance system.

(b) *Target level.* The State agency initial performance accuracy target level for combined title II and title XVI cases is 97 percent with a corresponding decision accuracy rate of 99 percent.

(c) *Intermediate Goals.* These goals will be negotiated annually between SSA's regional commissioner and the State and should be used as stepping stones to progress towards our targeted level of performance.

(d) *Threshold levels.* The State agency ial performance accuracy threshold el for combined title II and title XVI es is 90.6 percent.

4.1644 How and when we determine ther the processing time standards are

(e) *How we determine processing es.* For all initial title II cases, we culate the mean number of days cluding Saturday, Sunday and days) from the time the case folder ceived in the State agency until it is ased to us by the State agency. For ial title XVI cases, we calculate a an number of days (including urday, Sunday and holidays) from release of the case folder by the ial security district office until tems input of the disability rmination.

(b) *Frequency of review.* Title II cessing times and title XVI cessing times are monitored arately on a quarterly basis. The rmination as to whether or not the cessing time thresholds have been is made at the end of each quarter h year. Quarterly State-by-State an processing times are compared h the threshold levels for both title II title XVI.

4.1645 How and when we determine ther the performance accuracy ndard is met.

(a) *How we determine performance uracy.* We determine a State ncy's performance accuracy rate on basis of decision and documentation ors identified in our review of the ple cases.

(b) *Frequency of review.* Title II and XVI initial performance accuracy monitored together on a quarterly s. The determinations as to whether performance accuracy threshold has n met is made at the end of each rter each year. Quarterly State-by- te combined initial performance uracy rates are compared to the blished threshold level.

4.1650 If a State agency is not eting the standards.

a State agency falls below 2 of the 3 blished threshold levels (one of ch must be performance accuracy) 2 or more consecutive quarters, we notify the State agency in writing it is not meeting the standards. lowing our notification we will as n as practicable provide the State ncy appropriate technical and agement assistance described in 404.1660 and 404.1661 of these ulations for a period of up to 12 nths.

Technical and Management Assistance

§ 404.1660 When we will provide assistance.

(a) *General.* We will maintain a regular monitoring program to evaluate State agency performance of combined title II and title XVI initial performance accuracy, title II initial processing time and title XVI initial processing time. This regular monitoring program will allow us to determine the type of technical and management assistance a State agency may need to improve its performance. In addition, the results of this monitoring will show whether we will give a State agency mandatory or optional technical and management assistance.

(b) *Mandatory assistance.* (1) We will provide a State agency mandatory technical and management assistance if it fails to meet two of three threshold levels (one being performance accuracy) for two consecutive quarters. These levels are—

(i) Combined title II and title XVI initial performance accuracy—90.6 percent

(ii) Title II initial processing time—49.5 days

(iii) Title XVI initial processing time—57.9 days

(2) Failure to meet any one of the threshold levels for two consecutive quarters may result in mandated technical assistance.

(c) *Optional assistance.* We may offer a State agency technical and management assistance when regular monitoring reveals that performance has significantly declined or that intermediate goals have not been met. We will offer this technical and management assistance at our discretion based on available resources.

§ 404.1661 What assistance we will provide.

We will initiate a program of technical and management assistance in order to improve performance in those State agencies where it has been determined that such help is necessary. This program will include any or all of the following—

(a) An onsite review of cases processed by the State agency emphasizing adherence to written guidelines.

(b) A fiscal and administrative management review (FAMR) to:

(1) Identify particular aspects of State agency operations which can receive immediate help and thus improve performance accuracy or processing time; and

(2) Develop a long-range plan based on the FAMR results to help the State agency prevent its performance from falling below the threshold levels in the future.

(c) A request that necessary administrative measures be implemented (e.g., filling staffing vacancies, using overtime, assisting with training activities, etc.).

(d) Provisions for Federal personnel to perform onsite reviews, conduct training, or perform other functions needed to improve performance.

(e) Provisions for fiscal aid to allow for overtime, temporary hiring of additional staff, etc., above the authorized budget.

Substantial Failure

§ 404.1670 General.

After a State agency falls below 2 of 3 established threshold levels, one being performance accuracy, for 2 consecutive quarters, and after the mandatory technical and management assistance period, we will give the State agency a 3-month adjustment period. During this 3-month period we will not require the State agency to meet the threshold levels. Following the adjustment period, if the State agency again falls below 2 of 3 threshold levels, one being performance accuracy, in 2 consecutive quarters during the next 12 months, we will notify the State that we proposed to find the State agency to be in substantial failure and advise it that it may request a hearing on that issue. After giving the State notice and an opportunity for a hearing, if we find that a State agency has substantially failed to make disability determinations consistent with the regulations and other written guidelines, we will assume partial or complete responsibility for performing the disability determination function after we have complied with § 404.1690 and § 404.1692.

§ 404.1671 Good cause for not meeting the established threshold levels.

If we find that a State agency did not meet the threshold levels because of factors beyond its control, we will not find the State agency to be in substantial failure. Some of the factors we will consider are:

(a) Disasters such as fire, flood, or civil disorder, that—

(1) Require the diversion of significant personnel normally assigned the disability determination function, or

(2) Destroyed or delayed access to significant records needed to make accurate disability determinations;

(b) Strikes of State agency staff or other government or private personnel necessary to the performance of the disability determination function; or

(c) Sudden and unanticipated workload changes which result from changes in Federal law, regulation, or written guidelines, systems modifications or systems malfunctions, or rapid, unpredictable caseload growth for a 6-month period or longer.

§ 404.1675 Finding of substantial failure.

A finding of substantial failure with respect to a State may not be made unless and until the State is afforded an opportunity for a hearing.

Hearings and Appeals

§ 404.1680 Notice of right to hearing on proposed finding of substantial failure.

If, following the mandatory technical and management assistance period and the 3-month adjustment period, a State agency again falls below 2 of 3 threshold levels (one being performance accuracy) in 2 consecutive quarters in the succeeding 12 months, we will notify the State in writing that we will find the State agency in substantial failure unless the State asks for a hearing within 30 days from the date of the notice. The notice will identify the threshold levels that were not met by the State agency, the period during which the thresholds were not met, and the accuracy and processing time levels attained by the State agency during this period. If a hearing is not requested, the State agency will be found in substantial failure and we will implement our plans to assume the disability determination function.

§ 404.1681 Disputes on fiscal matters.

Disputes concerning fiscal issues will be resolved in proceedings before the Grant Appeals Board if the issue cannot be resolved between us and the State. (See § 404.1627.)

§ 404.1682 Who conducts the hearings.

If a hearing is required, it will be conducted by the Health and Human Services Departmental Grant Appeals Board (the Board).

§ 404.1623 Hearings and appeals process.

The rules for hearings and appeals before the Board are provided in 45 CFR Part 16. The following terms used in those rules have the following meanings for purposes of this subpart:

(a) "Grantee" includes the State involved in making disability determinations.

(b) "Grant" includes the performance of the disability determination function by a State agency as provided in this subpart.

(c) "Termination" includes the assumption by us of the disability determination function from a State agency as provided in this subpart.

Assumption of Disability Determination Function

§ 404.1690 Assumption when we make a finding of substantial failure.

(a) *Notice to State.* When we find that substantial failure exists, we will notify the State in writing that we will assume reponsibility for performing the disability determination function from the State agency, whether the assumption will be partial or complete, and the date on which the assumption will be effective.

(b) *Effective date of assumption.* The date of any partial or complete assumption of the disability determination function from a State agency may not be earlier than 180 days after our finding of substantial failure, and not before compliance with the requirements of § 404.1692.

§ 404.1691 Assumption when State no longer wishes to perform the disability determination function.

(a) *Notice to the Secretary.* If a State no longer wishes to perform the disability determination function, it will notify us in writing. The notice must be from an official authorized to act for the State for this purpose. The State will provide an opinion from the State's Attorney General verifying the authority of the official who gave the notice.

(b) *Effective date of assumption.* The State agency will continue to perform whatever activities of the disability determination function it is performing at the time the notice referred to in paragraph (a) of this section is given for not less than 180 days or, if later, until we have complied with the requirements of § 404.1692. For example, if the State is not making disability determinations (because we previously assumed responsibility for making them) but is performing other activities related to the disability determination function at the time it gives notice, the State will continue to do these activities until the requirements of this paragraph are met. Thereafter, we will assume complete responsibility for peforming the disability determination function.

§ 404.1692. Protection of State employees.

(a) *Hiring preference.* We will develop and initiate procedures to implement a plan to partially or completely assume the disability determination function from the State agency under § 404.1690 or § 404.1691, as appropriate. Except for the State agency's administrator, deputy administrator, or assistant administrator (or his equivalent), we will give employees of the State agency who a capable of performing duties in the disability determination function preference over any other persons in filling positions with us for which the are qualified. We may also give a preference in hiring to the State agen administrator, deputy administrator, assistant administrator (or his equivalent). We will establish a syst for determining the hiring priority an the affected State agency employees those instances where we are not hir all of them.

(b) *Determination by Secretary of Labor.* We will not assume responsibility for performing the disability determination function fro State until the Secretary of Labor determines that the State has made fa and equitable arrangements under applicable Federal, State and local la to protect the interests of employees who will be displaced from their employment because of the assumpti and who we will not hire.

§ 404.1693 Limitation on State expenditures after notice.

The State agency may not, after it receives the notice referred to in § 404.1690, or gives the notice referre in § 404.1691, make any new commitments to spend funds allocate to it for performing the disability determination function without the approval of the appropriate SSA regional commissioner. The State will make every effort to close out as soo possible all existing commitments tha relate to performing the disability determination function.

§ 404.1694 Final accounting by the Stat

The State will submit its final claim to us as soon as possible, but in no event later than 1 year from the effect date of our assumption of the disabili determination function unless we gra an extension of time. When the final claim(s) is submitted, a final accounti will be made by the State of any fund paid to the State under § 404.1626 wh have not been spent or committed pri to the effective date of our assumptio of the disability determination functi

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Part 416 of Chapter 111 of Title 20 o the Code of Federal Regulations is amended as follows:

1. Section 416.902 is revised to read follows:

§ 416.902 General definitions and terms for this subpart.

As used in the subpart——

"Secretary" means the Secretary of Health and Human Services.

"State agency" means the agency of a State which has been designated by the State to carry out the disability determination function.

"We" or "us" refers to either the Social Security Administration or the State agency making the disability or blindness determination.

"You" refers to the person who has applied for or is receiving benefits based on disability or blindness.

2. Section 416.903 is revised to read as follows:

§ 416.903 Who makes disability and blindness determinations.

(a) *State agencies.* State agencies make disability and blindness determinations for the Secretary for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function. States have the option of turning the function over to the Federal Government if they no longer want to make disability determinations. Also, the Secretary may take the function away from any State which has substantially failed to make disability and blindness determinations in accordance with these regulations. Subpart J of this Part contains the rules the States must follow in making disability and blindness determinations.

(b) *Social Security Administration.* The Social Security Administration will make disability and blindness determinations for the Secretary for—

(1) Any person living in a State which is not making for the Secretary any disability and blindness determinations or which is not making those determinations for the class of claimants to which that person belongs; and

(2) Any person living outside the United States.

(c) *What determinations are authorized.* The Secretary has authorized the State agencies and the Social Security Administration to make determinations about—

(1) Whether you are disabled or blind;

(2) The date your disability or blindness began; and

(3) The date your disability or blindness stopped.

(d) *Review of State Agency determinations.* On review of a State agency determination or redetermination of disability or blindness we may find that—

(1) You are, or are not, disabled or blind, regardless of what the State agency found;

(2) Your disability or blindness began earlier or later than the date found by the State agency; and

(3) Your disability or blindness stoped earlier or later than the date found by the State agency.

§§ 416.1001–416.1078 [Redesignated as §§416.1801–416.1878 (Subpart R)]

3. The section headings and the text of §§ 416.1001–416.1078 are redesignated as §§ 416.1801–416.1878 (Subpart R). The title of Subpart R is "Relationship".

4. A new Subpart J is added to Part 416 to read as follows:

Subpart J—Determinations of Disability

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416.1002 Definitions.
416.1003 Basic responsibilities for us and the State.

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416.1011 How we notify a State whether it may perform the disability determination function.
416.1013 Disability determinations the State makes.
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416.1060 When we will provide assistance.
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416.1070 General.
416.1071 Good cause for not meeting the established threshold levels.
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416.1081 Disputes on fiscal matters.
416.1082 Who conducts the hearings.
416.1083 Hearings and appeals process.

Assumption of Disability Determination Function

416.1090 Assumption when we make a finding of substantial failure.
416.1091 Assumption when State no longer wishes to perform the disability determination function.
416.1092 Protection of State employees.
416.1093 Limitation on State expenditures after notice.
416.1094 Final accounting by the State.

Authority: Issued under secs. 1102, 1614, and 1631 of the Social Security Act, as amended; 49 Stat. 647, as amended; 86 Stat. 1471, as amended by 88 Stat. 52; 86 Stat. 1475; 42 U.S.C. 1302, 1382c, and 1383.

Subpart O—Determinations of Disability

General Provisions

§ 416.1001 Purpose and scope.

This subpart describes the standards of performance and administrative requirements and procedures for States making determinations of disability for the Secretary under title XVI of the Act. It also establishes the Secretary's responsibilities in carrying out the disability determination function.

(a) Sections 416.1001–416.1003 describe the purpose of the regulations and the meaning of terms frequently used in the regulations. They also briefly set forth the responsibilities of the Secretary and the States covered in detail in other sections.

(b) Sections 416.1010–416.1018 describe the Secretary's and the State's responsibilities in performing the disability determination function.

(c) Sections 416.1020–416.1033 describe the administrative responsibilities and requirements of the States. The corresponding role of the Secretary is also set out.

(d) Sections 416.1040–416.1050 describe the performance accuracy and processing time standards for measuring State agency performance.

(e) Sections 416.1060–416.1061 describe when and what kind of assistance the Secretary will provide State agencies to help them improve performance.

(f) Sections 416.1070–416.1075 describe the level of performance below which the Secretary will consider a State agency to be substantially failing to make disability determinations consistent with the regulations and other written guidelines and the resulting action the Secretary will take.

(g) Sections 416.1080–416.1082 describe the rules for resolving disputes concerning fiscal issues and providing hearings when we propose to find that a State is in substantial failure.

(h) Sections 416.1090–416.1094 describe when and what action the Secretary will take and what action the State will be expected to take if the Secretary assumes the disability determination function from a State agency.

§ 416.1002 Definitions.

For purposes of this subpart:

"Act" means the Social Security Act, as amended.

"Class or classes of cases" means the categories into which disability claims are divided according to their characteristics.

"Determination of disability" or "disability determination" means one or more of the following decisions:

(a) Whether or not a person is under a disability;

(b) The date a person's disability began; or

(c) The date a person's disability ended.

"Disability" means "disability" or "blindness" as defined in sections 1614(a) (2) and (3) of the Act.

"Disability determination function" means making determinations as to disability or blindness and carrying out related administrative and other responsibilities.

"Disability program" means the Federal program for providing supplemental security income benefits for the blind and disabled under title XVI of the Act, as amended.

"Initial" means the first level of disability or blindness adjudication.

"Other written guidelines" means the policies, procedures, guides, and operating instructions in the Disability Insurance section of the Program Operations Manual System that are not designated as advisory or discretionary.

"Regulations" means regulations in this subpart issued under §§ 1102, 1631(c) and 1633(a) of the Act, unless otherwise indicated.

"Secretary" means the Secretary of the Department of Health and Human Services or the Secretary's delegate.

"State" means any of the 50 States of the United States and the District of Columbia. It includes the State agency.

"State agency" means that agency of a State which has been designated by the State to carry out the disability determination function.

"We", "us," and "our" refers to the Social Security Administration (SSA) or the Secretary, as appropriate.

§ 416.1003 Basic responsibilities for us and the State.

(a) *General.* We will work with the State to provide and maintain an effective system for processing claims of those who apply for and who are receiving benefits under the disability program. We will provide program standards, leadership, and oversight. We do not intend to become involved in the State's ongoing management of the program except as is necessary and in accordance with these regulations. The State will comply with our regulations and other written guidelines.

(b) *Our responsibilities.* We will:

(1) Periodically review the regulations and other written guidelines to determine whether they insure effective and uniform administration of the disability program. To the extent feasible, we will consult with and take into consideration the experience of the States in issuing regulations and guidelines necessary to insure effective and uniform administration of the disability program;

(2) Provide training materials or in some instances conduct or specify training (see § 416.1022);

(3) Provide funds to the State agency for the necessary cost of performing the disability determination function, (see § 416.1026);

(4) Monitor and evaluate the performance of the State agency under the establishment standards (see §§ 416.1044 and 416.1045); and

(5) Maintain liaison with the medical profession nationally and with national organizations and agencies whose interests or activities may affect the disability program.

(c) *Responsibilities of the State.* The State will:

(1) Provide management needed to insure that the State agency carries out the disability determination function so that disability determinations are made accurately and promptly;

(2) Provide an organizational structure, adequate facilities, qualified personnel, and medical consultant services (§§ 416.1020–416.1024);

(3) Furnish reports and records relating to the administration of the disability program (§ 416.1025);

(4) Submit budgets (§ 416.1026);

(5) Cooperate with audits (§ 416.1027);

(6) Insure that all applicants for and recipients of disability benefits are treated equally and courteously;

(7) Be responsible for property used for disability program purposes (§ 416.1028);

(8) Take part in the research and demonstration projects (§ 416.1029);

(9) Coordinate with other agencies (§ 416.1030);

(10) Safeguard the records created by the State in performing the disability determination function (§ 416.1031);

(11) Comply with other provisions of the Federal law and regulations that apply to the State in performing the disability determination function;

(12) Comply with other written guidelines (§ 416.1033);

(13) Maintain liaison with the medical profession and organizations that may facilitate performing the disability determination function; and

(14) Assist us in other ways that we determine may promote the objectives of effective and uniform administration.

Responsibilities for Performing the Disability Determination Function

§ 416.1010 How a State notifies us that it wishes to perform the disability determination function.

(a) *Deemed notice.* Any State that has in effect as of June 1, 1981, an agreement with us to make disability determinations will be deemed to have given us notice that it wishes to perform the disability determination function, in lieu of continuing the agreement in effect after June 1, 1981.

(b) *Written notice.* After June 1, 1981, a State not making disability determinations that wishes to perform the disability determination function under these regulations must notify us in writing. The notice must be from an official authorized to act for the State for this purpose. The State will provide an opinion from the State's Attorney General verifying the authority of the official who sent the notice to act for the State.

§ 416.1011 How we notify a State whether it may perform the disability determination function.

(a) If a State notifies us in writing that it wishes to perform the disability determination function, we will notify the State in writing whether or not it may perform the function. The State will begin performing the disability determination function beginning with the month we and the State agree upon.

(b) If we have previously found that a State agency has substantially failed to make disability determinations in accordance with the law or these regulations and other written guidelines

or if the State has previously notified us in writing that it does not wish to make disability determinations, the notice will advise the State whether the State agency may again make the disability determinations and, if so, the date and the conditions under which the State may again make them.

§ 416.1013 Disability determinations the State makes.

(a) *General rule.* A State agency will make determinations of disability with respect to all persons in the State except those individuals whose cases are in a class specifically excluded by our written guidelines. A determination of disability made by the State is the determination of the Secretary.

(b) *New classes of cases.* Where any new class or classes of cases arise requiring determinations of disability, we will determine the conditions under which a State may choose not to make the disability determinations. We will provide the State with the necessary funding to do the additional work.

(c) *Temporary transfer of classes of cases.* We will make disability determinations for classes of cases temporarily transferred to us by the State agency if the State agency asks us to do so and we agree. The State agency will make written arrangements with us which will specify the period of time and the class or classes of cases we will do.

§ 416.1014 Responsibilities for obtaining evidence to make disability determinations.

(a) The State agency will secure from the claimant or other sources any evidence it needs to make a disability determination.

(b) We will secure from the claimant or other special arrangement sources, any evidence we can obtain as adequately and more readily than the State agency. We will furnish the evidence to the State agency for use in making a disability determination.

(c) At our request, the State agency will obtain and furnish medical or other evidence and provide assistance as may be necessary for us to carry out our responsibility for making disability determinations in those classes of cases described in the written guidelines for which the State agency does not make the determination.

§ 416.1015 Making disability determinations.

(a) When making a disability determination, the State agency will apply subpart I, Part 416 of our regulations.

(b) The State agency will make disability determinations based only on the medical and nonmedical evidence in its files.

(c) Disability determinations will be made by a State agency medical consultant and another person qualified to interpret and evaluate medical reports and other evidence relating to the claimant's physical or mental impairments and as necessary to determine the capacities of the claimant to perform substantial gainful activity. (See § 416.1072 of this part for what we mean by "substantial gainful activity".)

(d) The State agency will certify each determination of disability to us on forms we provide.

(e) The State agency will furnish us with all the evidence it considered in making its determination.

§ 416.1018 Notifying claimant of the disability determination.

The State agency will prepare denial notices in accordance with subpart N of this Part whenever it makes a disability determination which is wholly or partly unfavorable to the claimant.

Administrative Responsibilities and Requirements

§ 416.1020 Organization.

(a) The State will provide the organizational structure, sufficient qualified personnel and medical consultant services to insure disability determinations are made accurately and promptly. We may impose specific organizational requirements on the State, but only if a State's performance approaches the threshold level described in §§ 416.1041–416.1050.

(b) The State is responsible for making accurate and prompt disability determinations.

§ 416.1021 Personnel.

(a) *Equal Employment Opportunity.* The State will comply with all applicable Federal statutes, executive orders and regulations concerned with equal employment opportunities.

(b) *Selection, tenure, and compensation.* The State agency will, except as may be inconsistent with paragraph (a) of this section, adhere to applicable State approved personnel standards in the selection, tenure, and compensation of any individual employed in th disability program.

(c) *Travel.* The State will make personnel available to attend meetings or workshops as may be sponsored or approved by us for furthering the purposes of the disability program.

(d) *Restrictions.* Subject to appropriate Federal funding, the State will, to the best of its ability, facilitate the processing of disability claims by avoiding personnel freezes, restrictions against overtime work, or curtailment of facilities or activities.

§ 416.1022 Training.

The State will insure that all employees have an acceptable level of competence. We will provide training and other instructional materials to facilitate basic and advanced technical proficiency of disability staff in order to insure uniformity and effectiveness in the administration of the disability program. We will conduct or specify training, as appropriate but only if:

(a) a State agency's performance approaches unacceptable levels or

(b) the material required for the training is complex or the capacity of the State to deliver the training is in doubt and uniformity of the training is essential.

§ 416.1023 Facilities.

(a) *Space, equipment, supplies, and other services.* Subject to appropriate Federal funding, the State will provide adequate space, equipment, supplies, and other services to facilitate making accurate and prompt disability determinations.

(b) *Location of facilities.* Subject to appropriate Federal funding, the State will determine the location where the disability determination function is to be performed so that disability determinations are made accurately and promptly.

(c) *Access.* The State will permit us access to the premises where the disability determination function is performed for the purposes of inspecting the work and activities required by the regulations and assuring compliance with pertinent Federal statutes and regulations. We will contact the State and give reasonable prior notice of the times and purposes of any visit.

§ 416.1024 Medical and other purchased services.

The State will determine the rates of payment to be used for purchasing medical or other services necessary to make determinations of disability. The rates may not exceed the highest rate paid by Federal or other agencies in the State for the same or similar type of service. The State will maintain documentation to support the rates of payment it uses.

§ 416.1025 Records and reports.

(a) The State will establish and maintain the records and furnish the schedules, financial, cost, and other reports relating to the administration of the disability programs as we may require.

(b) The State will permit us and the Comptroller General of the United

States (including duly authorized representatives) access to and the right to examine records relating to the work which the State performs under these regulations. These records will be retained by the State for the periods of time specified for retention of records in the Federal Procurement Regulations (41 CFR parts 1–20).

§ 416.1026 Fiscal.

(a) We will give the State funds, in advance or by way of reimbursement, for necessary costs in making disability determinations under these regulations. Necessary costs mean direct as well as indirect costs as defined in title 41 CFR subpart 1–15.7 and in Federal Management Circular 74–4, as amended or superseded.

(b) The State will submit estimates of anticipated costs in the form of a budget at the time and in the manner we require.

(c) We will notice the State of the amount which will be made available to it as well as what anticipated costs are being approved.

(d) The State may not incur or make expenditures for items of cost not approved by us or in excess of the amount we make available to the State.

(e) After the close of a period for which funds have been made available to the State, the State will submit a report of its actual expenditures. We will give the State an audit report showing whether the expenditures were consistent with cost principles described in subpart 1–15.7 of part 1–15 of the Federal Procurement Regulations (41 CFR 1–15.7) and in written guidelines in effect at the time the expenditures were made or incurred.

(f) Any monies paid to the State which are used for purposes not within the scope of these regulations will be paid back to the Treasury of the United States.

§ 416.1027 Audits.

As soon as practicable after the close of each budgetary period, or at other times as necessary, the books of account and records in each State pertaining to the administration of the diability program under the Act will be audited by our Inspector General's office. There audits are conducted to determine whether the expenditures were made for the purposes intended and in amounts necessary for the proper and efficient administration of the disability program. The State will make every effort to act upon and resolve any items questioned in an audit.

(a) *Questioned items.* Expenditures of State agencies will be audited on the basis of cost principles and written guidelines in effect at the time the expenditures were made or incurred. Both the State and the State agency will be informed and given a full explanation of any questioned items. They will be given reasonable time to explain questioned items or expenditures. Any explanation furnished by the State or State agency will be given full consideration before a final determination is made on questioned items in the audit report.

(b) *State appeal of audit determinations.* The appropriate SSA regional commissioner will notify the State of his or her determination on the audit report. If the State disagrees with that determination, the State may request reconsideration in writing within 30 days of the date of the regional commissioner's notice of the determination. The written request may be made, through the Associate Commissioner, Office of Operational Policy and Procedures, to the Commissioner of Social Security, Room 900 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235. The Commissioner will make a determination and notify the State of that decision in writing no later that 45 days from the date of the State's appeal. The decision by the Commissioner will be final and conclusive upon the State unless the State appeals that decision in writing within 30 days of the date of the decision by the Commissioner to the Department of Health and Human Services Departmental Grant Appeals Board (the Board). See § 416.1080.

§ 416.1028 Property.

The State will have title to equipment purchased for disability program purposes. The State will be responsible for maintaining all property it acquires or which we furnish to it for performing the disability determination function. The State will identify the equipment by labeling and by inventory and will credit the SSA account with the fair market value of disposed property.

§ 416.1029 Participation in research and demonstration projects.

We will invite State participation in federally funded research and demonstration projects to assess the effectiveness of the disability program and to ascertain the effect of program policy changes. Where we determine that State participation is necessary for the project to be complete, for example, to provide national uniformity in a claims process, State participation is mandatory.

§ 416.1030 Coordination with other agencies.

(a) The State will establish cooperative working relationships with other agencies concerned with serving the disabled and, insofar as practicable, use their services, facilities, and records to:

(1) Assist the State in developing evidence and making determinations of disability; and

(2) Insure that referral of disabled or blind persons for rehabilitation services will be carried out effectively.

(b) The State may pay these agencies for the services, facilities, or records they provide. The State will include these costs in its estimates of anticipated costs and reports of actual expenditures.

§ 416.1031 Confidentiality of information and records.

The State will comply with the confidentiality of information and records requirements described in 20 CFR Part 401 and pertinent written guidelines (see § 416.1033).

§ 416.1032 Other Federal laws and regulations.

The State will comply with the provisions of other Federal laws and regulations that directly affect its responsibilities in carrying out the disability determination function; for example, Treasury Department regulations on letters of credit (31 CFR Part 205).

§ 416.1033 Policies and operating instructions.

(a) We will provide the State agency with written guidelines necessary for it to carry out its responsibilites in performing the disability determination function.

(b) The State agency making determinations of disability will comply with the written guidelines in the Disability Insurance section of the Program Operations Manual System. This manual will also include certain policies, procedures, guides and operating instructions designated as advisory or discretionary.

(c) A representative group of State agencies will be given an opportunity to particpate in formulating disability program policies that have an effect on their role in carrying out the disability determination function. State agencies will also be given an opportunity to comment before changes are made in written guidelines unless delay in issuing a change may impair service to the public.

Performance Standards

§ 416.1040 General

The following sections provide the procedures and guidelines we use to determine whether the State agency meets established national performance standards. We use these performance standards to help assure effective and uniform administration of our disability programs throughout the United States and to measure whether each State agency's performance of the disability determination function is acceptable. Also, the standards are designed to improve overall State agency performance in the disability determination process. We measure the State agency performance in two areas—processing time and performance accuracy.

§ 416.1041 Standards of performance.

(a) *General.* The performance standards include both a target level of performance and a threshold level of performance for the State agency. The target level represents a level of performance that we and the States will work to attain in the future. The threshold level is the minimum acceptable level of performance. Performance below the threshold level will be the basis for the Secretary's taking from the State agency partial or complete responsibility for performing the disability determination function. Intermediate State agency goals are designed to help each State agency move from its current performance levels to the target levels.

(b) *The target level.* The target level is the optimum level of performance. There are three targets—one for combined title II and title XVI initial performance accuracy, one for title II initial processing time, and for title XVI initial processing time.

(c) *The threshold level.* The threshold level is the minimum acceptable level of performance. There are three thresholds—one for combined title II and title XVI initial performance accuracy, one for title II initial processing time, and one for title XVI initial processing time.

(d) *Intermediate goals.* Intermediate goals are levels of performance between the threshold levels and the target levels established by negotiation between SSA's regional commissioner and each State agency. The intermediate goals are stepping stones designed to help the State agencies reach the target levels. Failure to meet these goals is not a cause for considering the State agency to be substantially failing to comply with the performance standards. However, failure to meet the intermediate goals may result in consultation and an offer of optional technical and management assistance depending on the availability of SSA resources.

§ 416.1042 Processing time standards.

(a) *General.* Title II processing time refers to the average number of days (including Saturday, Sunday and holidays) it takes a State agency to process an initial disability claim from the day it is received in the State agency until the day it is released by the State agency. Title XVI processing time refers to the average number of days (including Saturday, Sunday and holidays) from release of the initial disability claim by the SSA district office until systems input of the disability determination.

(b) *Target levels.* The processing time target levels are:

(1) 37 days for title II initial claims.

(2) 43 days for title XVI initial claims.

(c) *Threshold levels.* The processing time threshold levels are:

(1) 49.5 days for title II initial claims.

(2) 57.9 days for title XVI initial claims.

§ 416.1043 Performance accuracy standard.

(a) *General.* Performance accuracy refers to the percentage of cases that do not have to be returned to State agencies for further development or correction of decisions based on evidence in the files and as such represents the reliability of State agency adjudication. The definition of performance accuracy includes the measurement of factors that have a potential for affecting a decision, as well as the correctness of the decision. For example, if a particular item of medical evidence should have been in the file but was not included, even though its inclusion does not change the result in the case, that is a performance error. Performance accuracy, therefore, is a higher standard than decisional accuracy. As a result, the percentage of correct decisions is significantly higher than what is reflected in the error rate established by SSA's quality assurance system.

(b) *Target level.* The State agency initial performance accuracy target level for combined title II and title XVI cases is 97 percent with a corresponding decision accuracy rate of 99 percent.

(c) *Intermediate Goals.* These goals will be negotiated annually between SSA's regional commissioner and the State and should be used as stepping stones to progress towards our targeted level of performance.

(d) *Threshold levels.* The State agency initial performance accuracy threshold level for combined title II and title XVI cases is 90.6 percent.

§ 416.1044 How and when we determine whether the processing time standards are met.

(a) *How we determine processing times.* For all initial title II cases, we calculate the mean number of days (including Saturday, Sunday and holidays) from the time the case folder is received in the State agency until it is released to us by the State agency. For initial title XVI cases, we calculate a mean number of days (including Saturday, Sunday and holidays) from the release of the case folder by the social security district office until systems input of the disability determination.

(b) *Frequency of review.* Title II processing times and title XVI processing times are monitored separately on a quarterly basis. The determination as to whether or not the processing time thresholds have been met is made at the end of each quarter each year. Quarterly State-by-State mean processing times are compared with the threshold levels for both title II and title XVI.

§ 416.1045 How and when we determine whether the performance accuracy standard is met.

(a) *How we determine performance accuracy.* We determine a State agency's performance accuracy rate on the basis of decision and documentation errors identified in our review of the sample cases.

(b) *Frequency of review.* Title II and title XVI initial performance accuracy are monitored together on a quarterly basis. The determinations as to whether the performance accuracy threshold has been met is made at the end of each quarter each year. Quarterly State-by-State combined initial performance accuracy rates are compared to the established threshold level.

§ 416.1050 If a State agency is not meeting the standards.

If a State agency falls below 2 of the 3 established threshold levels (one of which must be performance accuracy) for 2 or more consecutive quarters, we will notify the State agency in writing that it is not meeting the standards. Following our notification we will as soon as practicable provide the State agency appropriate technical and management assistance described in §§ 416.1060 and 416.1061 of these regulations for a period of up to 12 months.

Technical and Management Assistance

§ 416.1060 When we will provide assistance.

(a) *General.* We will maintain a regular monitoring program to evaluate State agency performance of combined title II and title XVI initial performance accuracy, title II initial processing time and title XVI initial processing time. This regular monitoring program will allow us to determine the type of technical and management assistance a State agency may need to improve its performance. In addition, the results of this monitoring will show whether we will give a State agency mandatory or optional technical and management assistance.

(b) *Mandatory assistance.* (1) We will provide a State agency mandatory technical and management assistance if it fails to meet two of three threshold levels (one being performance accuracy) for two consecutive quarters. These levels are—

(i) Combined title II and title XVI initial performance accuracy—90.6 percent.

(ii) Title II initial processing time—49.5 days.

(iii) Title XVI initial processing time—57.9 days.

(2) Failure to meet any one of the threshold levels for two consecutive quarters may result in mandated technical assistance.

(c) *Optional assistance.* We may offer a State agency technical and management assistance when regular monitoring reveals that performance has significantly declined or that intermediate goals have not been met. We will offer this technical and management assistance at our discretion based on available resources.

§ 416.1061 What assistance we will provide.

We will initiate a program of technical and management assistance in order to improve performance in those State agencies where it has been determined that such help is necessary. This program will include any or all of the following—

(a) An onsite review of cases processed by the State agency emphasizing adherence to written guidelines.

(b) A fiscal and administrative management review (FAMR) to:

(1) Identify particular aspects of State agency operations which can receive immediate help and thus improve performance accuracy or processing time; and

(2) Develop a long-range plan based on the FAMR results to help the State agency prevent its performance from falling below the threshold levels in the future.

(c) A request that necessary administrative measures be implemented (e.g., filling staffing vacancies, using overtime, assisting with training activities, etc.).

(d) Provisions for Federal personnel to perform onsite reviews, conduct training, or perform other functions needed to improve performance.

(e) Provisions for fiscal aid to allow for overtime, temporary hiring of additional staff, etc., above the authorized budget.

Substantial Failure

§ 416.1070 General.

After a State agency falls below 2 of 3 established threshold levels, one being performance accuracy, for 2 consecutive quarters, and after the mandatory technical and management assistance period, we will give the State agency a 3-month adjustment period. During this 3-month period we will not require the State agency to meet the threshold levels. Following the adjustment period, if the State agency again falls below 2 of 3 threshold levels, one being performance accuracy, in 2 consecutive quarters during the next 12 months, we will notify the State that we propose to find the State agency to be in substantial failure and advise it that it may request a hearing of that issue. After giving the State notice and an opportunity for a hearing, if we find that a State agency has substantially failed to make disability determinations consistent with the regulations and other written guidelines, we will assume partial or complete responsibility for performing the disability determination function after we have complied with § 416.1090 and § 416.1092

§ 416.1071 Good cause for not meeting the established threshold levels.

If we find that a State agency did not meet the threshold levels because of factors beyond its control, we will not find the State agency to be in substantial failure. Some of the factors we will consider are:

(a) Disasters such as fire, flood, or civil disorder, that—

(1) Require the diversion of significant personnel normally assigned the disability determination function, or

(2) Destroyed or delayed access to significant records needed to make accurate disability determinations;

(b) Strikes of State agency staff or other government or private personnel necessary to the performance of the disability determination function; or

(c) Sudden and unanticipated workload changes which result from changes in Federal law, regulation, or written guidelines, systems modifications or systems malfunctions, or rapid, unpredictable caseload growth for a 6-month period or longer.

§ 416.1075 Finding of substantial failure.

A finding of substantial failure with respect to a State may not be made unless and until the State is afforded an opportunity for a hearing.

Hearings and Appeals

§ 416.1080 Notice of right to hearing on proposed finding of substantial failure.

If, following the mandatory technical and management assistance period and the 3-month adjustment period, a State agency again falls below 2 of 3 threshold levels (one being performance accuracy) in 2 consecutive quarters in the succeeding 12 months, we will notify the State in writing that we will find the State agency in substantial failure unless the State asks for a hearing within 30 days from the date of the notice. The notice will identify the threshold levels that were not met by the State agency, the period during which the thresholds were not met, and the accuracy and processing time levels attained by the State agency during this period. If a hearing is not requested, the State agency will be found in substantial failure and we will implement our plans to assume the disability determination function.

§ 416.1081 Disputes on fiscal matters.

Disputes concerning fiscal issues will be resolved in proceedings before the Grant Appeals Board if the issue cannot be resolved between us and the State. (See § 416.1027.)

§ 416.1082 Who conducts the hearings.

If a hearing is required, it will be conducted by the Health and Human Services Departmental Grant Appeals Board (the Board).

§ 416.1083 Hearings and appeals process.

The rules for hearings and appeals before the Board are provided in 45 CFR Part 16. The following terms used in those rules have the following meanings for purposes of this subpart:

(a) "Grantee" includes the State involved in making disability determinations.

(b) "Grant" includes the performance of the disability determination function by a State agency as provided in this subpart.

(c) "Termination" includes the assumption by us of the disability

determination function from a State agency as provided in this subpart.

Assumption of Disability Determination Function

§ 416.1090 Assumption when we make a finding of substantial failure.

(a) *Notice to State.* When we find that substantial failure exists, we will notify the State in writing that we will assume responsibility for performing the disability determination function from the State agency, whether the assumption will be partial or complete, and the date on which the assumption will be effective.

(b) *Effective date of assumption.* The date of any partial or complete assumption of the disability determination function from a State agency may not be earlier than 180 days after our finding of substantial failure, and not before compliance with the requirements of § 416.1092.

§ 416.1091 Assumption when State no longer wishes to perform the disability determination function.

(a) *Notice to the Secretary.* If a State no longer wishes to perform the disability determination function, it will notify us in writing. The notice must be from an official authorized to act for the State for this purpose. The State will provide an opinion from the State's Attorney General verifying the authority of the official who gave the notice.

(b) *Effective date of assumption.* The State agency will continue to perform whatever activities of the disability determination function it is performing at the time the notice referred to in paragraph (a) of this section is given for not less than 180 days or, if later, until we have complied with the requirements of § 416.1092. For example, if the State is not making disability determinations (because we previously assumed responsibility for making them) but is performing other activities related to the disability determination function at the time it gives notice, the State will continue to do these activities until the requirements of this paragraph are met. Thereafter, we will assume complete responsibility for performing the disability determination function.

§ 416.1092 Protection of State employees.

(a) *Hiring preference.* We will develop and initiate procedures to implement a plan to partially or completely assume the disability determination function from the State agency under § 416.1090 or § 416.1091, as appropriate. Except for the State agency's administrator, deputy administrator, or assistant administrator (or his equivalent), we will give employees of the State agency who are capable of performing duties in the disability determination function preference over any other persons in filling positions with us for which they are qualified. We may also give a preference in hiring to the State agency's administrator, deputy administrator, or assistant administrator (or his equivalent). We will establish a system for determining the hiring priority among the affected State agency employees in those instances where we are not hiring all of them.

(b) *Determination by Secretary of Labor.* We will not assume responsibility for performing the disability determination function from a State until the Secretary of Labor determines that the State has made fair and equitable arrangements under applicable Federal, State and local law to protect the interests of employees who will be displaced from their employment because of the assumption and who we will not hire.

§ 416.1093 Limitation on State expenditures after notice.

The State agency may not, after it receives the notice referred to in § 416.1090, or gives the notice referred to in § 416.1091, make any new commitments to spend funds allocated to it for performing the disability determination function without the approval of the appropriate SSA regional commissioner. The State will make every effort to close out as soon as possible all existing commitments that relate to performing the disability determination function.

§ 416.1094 Final accounting by the State.

The State will submit its final claims to us as soon as possible, but in no event later than 1 year from the effective date of our assumption of the disability determination function unless we grant an extension of time. When the final claim(s) is submitted, a final accounting will be made by the State of any funds paid to the State under § 416.1026 which have not been spent or committed prior to the effective date of our assumption of the disability determination function.

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Friday
January 16, 1981

Part XVIII

Department of Education

Arts in Education Program; Final Regulations Announcement of Applications for Noncompeting Continuation Award

DEPARTMENT OF EDUCATION

34 CFR Part 753

Arts in Education Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education issues final regulations for the Arts in Education Act of 1978. These regulations replace the final regulations that were issued for the Act on April 3, 1980. They delete requirements that each project include cost sharing by the grantee, address at least four art forms, and have an advisory committee representative of community resources. Other changes are also made. These revised regulations are substantially shorter and less prescriptive than the earlier regulations. These regulations are redesignated from 45 CFR Part 161c to 34 CFR Part 753, and all section numbers are renumbered accordingly.

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if Congress takes certain adjournments. If you wish to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Harold Arberg, Director, of Arts and Humanities Staff, U.S. Department of Education, Room 3728 Donohoe Building, Washington, D.C. 20202. Telephone: (202) 472–7793.

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking (NPRM) for the Arts in Education Act, published in the Federal Register on September 22, 1980 (45 FR 62856) contained background information on policy changes in the program and how the regulations are intended to work and invited public comment. The NPRM proposed to replace the final regulations issued on April 3, 1980 (45 FR 22742) as the result of the Secretary's conclusion that the purposes of the Act could be best achieved by shortening and simplifying the program regulations in response to the concerns raised. Most of the public responses support the proposed changes that have been made in these regulations. Some commenters requested clarification of allowable expenses. Several suggested specific changes in the regulations. A majority of the respondents commented on the three major changes proposed—deletion of the cost-sharing, "four arts," and advisory committee requirements. Many addressed the Secretary's discretionary authority to assign points to specific funding priorities. Several commented on the proposed inclusion of geographic and programmatic diversity, and a number expressed a desire that the evaluation process include separate points for the States' review of local applications. Several of the commenters expressed the desire to return to former programmatic policy, i.e., "seed money" for SEAs and LEAs. Comments that resulted in alterations to the proposed regulations are discussed in paragraph A below; other comments requiring clarification or explanation follow in paragraph B.

A. Comments Resulting in Changes

§ 753.4 Definition of "rural or small community."

Comment. Several respondents expressed a concern that the proposed definition might exclude a typical applicant who may not fall within either the rural or the urban category under the proposed definitions.

Response. The definition has been modified to cover any applicant not included in the State or urban categories.

§ 753.11 What are the requirements regarding cooperation?

Comment. Several respondents opposed the requirement for intensive collaboration on the basis that they believed fewer programs would be funded and less money would be available directly to the SEAs and LEAs. Others favored this approach, which they felt would lead to more local involvement of resources and talent and would have more lasting impact. One commenter felt the regulations should be more specific on how the collaboration among agencies should be accomplished. Another commenter noted that the authorizing statute does not specifically require such arrangements.

Response. Section 753.11 has been deleted in order to remove any requirement concerning collaboration. However, collaboration is considered an important factor bearing on the quality of an application. The criterion in § 753.31(g) addresses it. School-community cooperation encourages maximum use of community resources and reduction of competing applications for scarce funds from the same community. This has been an important element of the Arts in Education Program since its inception. The issue of the number and size of awards is not addressed in these regulations but it may be addressed in the annual application notice in the light of available appropriations.

§ 753.22 What are the requirements for State review of local applications?

Comment. One commenter expressed concern that § 753.22(a) and former § 753.22(b) could be interpreted as requiring States to have a State advisory council, when this is not required by the authorizing statute. Several commenters felt that the State Alliance for Arts Education Committee should serve this function. Many expressed a need for a governing body of some type.

Response. Section 753.22(a) has been amended to specify the Alliance for Arts Education Committee as an example of a State advisory council. Section 753.22(b) has been deleted to clarify that a State is not required to establish or designate an advisory council.

§ 753.30 How does the Secretary evaluate an application?

Comment. One commenter questioned the scope and rationale of § 753.30 (§ 161c.32(c) of the NPRM) concerning projects within the priorities of other agencies.

Response. The provision has been amended to clarify that the Secretary may decline to fund a project that comes within the priority of another Federal agency. The rationale is to avoid duplication and promote coordination with other Federal activities that support related purposes, so that taxpayers' funds are spent most efficiently.

§ 753.31 What selection criteria does the Secretary use?

Comment. One commenter stated that the law does not specify that projects must be innovative or new, nor does it require that they be comprehensive or that material be disseminated.

Response. The criterion related to new or innovative approaches, methods, and materials is necessary to comply with the purpose of title III, section 301 of the Education Amendments of 1978. The Arts in Education program will carry out projects that emphasize new or innovative approaches, methods, or materials. There is no longer a specific criterion on dissemination. The criterion regarding "comprehensive" projects has been modified to allow for more flexibility. As amended, it allows the Secretary, in judging the quality of an application, to consider whether the major arts are integrated into the curriculum. Dance, music, theater, and the visual arts are mentioned only as examples of the major arts. The criterion reflects research that shows that the

combination of multiple arts in an integrated program has the most effective impact on the overall elementary and secondary school curriculum.

§ 753.32 Are priorities for funding established?

Comment. Many respondents wanted to know how the Secretary will decide which of the designated funding areas should receive priority and how the public would be notified of priority decisions. One commenter asked what the rationale was for selecting these areas. Several expressed concern that the Secretary could override reviewers' or States' evaluations. Two States, one city, and one public school system favored the discretionary authority if it were used to make their agencies the priority for bonus points.

Response. These provisions have been amended to clarify how the funding categories would work, in accordance with the concerns expressed in the comments. The categories collectively encompass all eligible projects at the State or local level. They are designed to insure a fair competition between State-level, urban, and rural applications.

§ 753.33 What is the length of a project period?

Comment. Several respondents were interested in the regulations as they pertain to continuation awards. One expressed concern that school-community cooperation was a determining factor.

Response. The subject criterion on school-community collaboration with regard to continuation awards has been deleted. Coordination and cooperation are a criterion for all new awards, and it is unnecessary to have a separate criterion on this subject related to continuation awards.

§ 753.40 What are the limitations on costs?

Comment. One commenter asked if stipends to teachers for in-service training would be allowed.

Response. The word, "stipends," is misleading and has been deleted. Payments are allowable to teachers for in-service training.

Comment. One commenter asked why equipment is limited to 5% of the project costs.

Response. The 5% limitation has been deleted in the interest of greater program flexibility.

B. Response to Other Comments

The following comments did not result in changes in the regulations, either because the comments requested provisions beyond the authority of the Act or concerned matters already addressed in the regulations. Commenters are referred to the proposed regulations, which present the basis and rationale for changes from previous regulations. Only comments considered to raise regulatory issues are discussed below.

§ 753.10 What are the required elements of an arts in education project?

Comment. One commenter felt that the language in § 753.10(a) should include vocation-oriented institutions.

Response. While the Act contains no limit on non-profit institutions that are eligible, the purpose of the Act is to integrate the arts into elementary and secondary school curricula. The regulations reflect these statutory provisions.

Comment. One-third of the respondents desired modification of § 753.10(b). Many felt that at least two of the arts should be required to avoid dependence on one teacher or administrator and to strengthen the curriculum as an aid to learning.

Response. Section 753.31(h) provides that in making a judgment as to the best applications, the Secretary may consider the degree to which the major arts are integrated into the regular curriculum. However, § 753.10 has not been amended to require a particular number of the arts in a project. The statute does not contain this requirement, and Congress objected to the provision in previous regulations requiring four major art forms in each project.

§ 753.22 What are the requirements for State review of local applications?

Comment. Several respondents wanted separate points to be assigned in the award process to State comments or rankings of local applications.

Response. State comments bearing on the published criteria will be carefully considered by the Secretary. However, the Secretary does not wish to prejudice or exclude an applicant from a State that may not have a specific mechanism in place to evaluate these applications, or that may choose not to evaluate them. No specific procedure is prescribed for State review.

§ 753.31 What selection criteria does the Secretary use?

Comment. One commenter argued that the geographic distribution criterion pits State against local applicants from the same State.

Response. The regulations contain no specific limit on the number of applications that may be funded in a particular State. However, it is appropriate for the Secretary to consider geographic distribution in awarding limited funds. If a disproportionate number of applications were funded in particular States or regions, to the neglect of other parts of the country, this could detract from the national purposes of the Act.

Comment. Some commenters argued that deletion of the cost-sharing requirement may weaken local support of the project and result in increased competition for funds.

Response. Section 753.31(i) contains a criterion that allows the Secretary, in selecting the best applications, to consider the strength of local commitment and stability of the program following the Federal funding period. However, to avoid being overly prescriptive, the cost-sharing requirement has been deleted.

Comment. Many respondents believed that the deletion of the advisory committee requirement might weaken the project, make it less responsive to community needs and resources, and provide less collaboration among organizations involved. One believed that collaboration can weaken or dilute as well as strengthen.

Response. Section 753.31(g)(1) includes a criterion that allows the Secretary, in selecting the best applications, to consider coordination and collaboration. A specific method or strategy is not prescribed. § 753.11 has been deleted, and § 753.31(g) no longer provides for an advisory committee.

Comment. One respondent requested that the regulations clarify how the elderly are to be included in the project (§ 753.31 (a) and (b)). Another commenter applauded the spirit of equal opportunity in the proposed regulations.

Response. These provisions are derived from Department-wide criteria contained in the Education Department General Administrative Regulations (EDGAR). They would apply to the extent appropriate to a particular project. In elementary and secondary projects, the elderly might be included, for example, in in-service training or technical assistance activities.

Comment. One commenter urged that Congress intended private school children to be included in all programs for public school children under Title III of the Elementary and Secondary Education Act, and not only those controlled by SEAs and LEAs.

Response. These comments pertain to Department-wide provisions derived from EDGAR. The comments will be considered in any future amendments to EDGAR.

§ 753.32 Are priorities for funding established?

Comment. One respondent wanted a special category of grants to small urban systems.

Response. The change in the definition of "rural or small community" under § 753.4 clarifies that small urban systems are eligible to apply under the rural or small community category. See Subpart D, § 753.32, for how the Secretary will establish categories for funding.

§ 753.40 What are the limitations on cost?

Comment. One commenter asked that the regulations clarify the wording in § 753.40(a)(2) on unallowable expenses.

Response. The wording, "Salaries of regular, full-time instructional personnel" refers to teachers' salaries for regular classroom instruction. Payments may be made to part-time or substitute teachers or to regular teachers on released time to attend in-service training or to perform other project-related functions.

Citation of Legal Authority

A citation of statutory or other legal authority has been placed in parentheses on the line following each provision.

Dated: January 12, 1981.

Shirley M. Hufstedler,

Secretary of Education.

(Catalog of Federal Domestic Assistance No. 84.084, Arts Education Program)

The Secretary of Education amends Title 34 of the Code of Federal Regulations by adding a new Part 753 reading as follows:

PART 753—ARTS IN EDUCATION PROGRAM

Subpart A—General

Sec.

753.1 Arts in Education Program.
753.2 Eligible parties.
753.3 Regulations that apply to this program.
753.4 Definitions.

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

753.10 What are the required elements of an arts in education project?

Subpart C—How Does One Apply for a Grant?

753.20 What limitations apply to applicants?
753.21 What are the application requirements?
753.22 What are the requirements for State review of local applications?

Subpart D—How Is a Grant Made?

753.30 How does the Secretary evaluate an application?
753.31 What selection criteria does the Secretary use?
753.32 Are priorities for funding established?
753.33 What is the length of a project period?

Subpart E—What Conditions Must Be Met by a Grantee?

753.40 What are the limitations on costs?

Authority: Part C, Title III of the Elementary and Secondary Education Act of 1965, as amended by the Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2212 (20 U.S.C. 2961).

Subpart A—General

§ 753.1 Arts in education program.

The Arts in Education Program assists in establishing, conducting or improving programs in which the arts are an integral part of elementary and secondary school curricula.

(20 U.S.C. 2962)

§ 753.2 Eligible parties.

(a) State educational agencies (SEAs), local educational agencies (LEAs), and public or private nonprofit agencies, organizations, and institutions are eligible to apply for grants.

(b) Agencies, organizations, and institutions may include, but are not limited to, libraries, museums, theaters, arts councils and centers, colleges and universities, performing arts groups, and parent, youth, and civic organizations.

(20 U.S.C. 2942, 2962)

§ 753.3 Regulations that apply to this program.

The following regulations apply to grants under the Arts in Education Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs) and 34 CFR Part 77 (General); and

(b) The regulations in this Part 753.

(20 U.S.C. 1221e-3, 2962)

§ 753.4 Definitions.

In addition to the definitions in 34 CFR Part 77 of EDGAR, the following definitions apply in these regulations:

"Arts" includes, but is not limited to, music, dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, and tape and sound recording; the presentation, performance, execution, and exhibition of these art forms; and the study and application of the arts to the human environment.

(20 U.S.C. 2961, 952(b), Pub. L. 89–209)

"Rural or small community" means a geographic area other than a State.

"Urban or large community" means a standard metropolitan statistical area (the area in and around a city of fifty thousand inhabitants or more as defined by the Office of Management and Budget).

(20 U.S.C. 2962, 3207)

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 753.10 What are the required elements of an arts in education project?

The Secretary assists an arts in education project only if it is designed to—

(a) Integrate one or more of the arts into the regular educational curricula of the schools served; and

(b) Provide opportunities for all students in the schools served to acquire skills and understanding in and through arts media.

(20 U.S.C. 2961, 2962)

Subpart C—How Does One Apply for a Grant?

§ 753.20 What limitations apply to applicants?

The Secretary approves no more than one project application from an applicant in a fiscal year, whether or not the application is filed jointly with that of other applicants.

(20 U.S.C. 1221e-3, 2962)

§ 753.21 What are the application requirements?

An applicant must demonstrate, on the application form furnished by the Secretary, that the proposed project meets the requirements of the Act and applicable regulations. An applicant should address each funding criterion.

Cross references:
EDGAR § 75.127–129 (Group applications).
EDGAR § 75.138–141 (Open meeting).
§ 302(b) of the ESEA, EDGAR § 75.650 (Participation of students in private schools).

(20 U.S.C. 1221e-3, 2962)

§ 753.22 What are the requirements for State review of local applications?

(a) The SEA, working with the State arts education advisory committee (such as the Alliance for Arts Education Committee), if any, may review and comment on local applications.

(b) The local applicant must send a copy of its application to the SEA, at the same time it sends the application to the Secretary. The application must show that a copy was sent to the SEA.

(c) To ensure that its comments are considered in the application review, an

SEA should send its comments to the Secretary no later than 30 days after the closing date for receipt of applications.

(20 U.S.C. 1221e-3, 2962)

Subpart D—How Is a Grant Made?

§ 753.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 753.31.

(b) The Secretary awards up to 100 possible points for these criteria.

(c) The maximum possible score for each complete criterion is indicated in parentheses.

(d) The Secretary may decline to approve applications that are within the funding priorities of other Federal agencies.

(20 U.S.C. 2962)

§ 753.31 What selection criteria does the Secretary use?

(a) *Plan of Operation.* (10 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective;

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as members of racial or ethnic minority groups, women, handicapped persons, and the elderly.

(vi) If the applicant is a State or local educational agency, how the applicant will provide an opportunity for the participation of children in private schools.

(b) *Quality of key personnel.* (7 points)

(1) The Secretary reviews each application for information that shows the quality of key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (b)(2)(i) and (ii) of this section plans to commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as members of racial or ethnic minority groups, women, handicapped persons, and the elderly.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training, in fields related to the objectives of the project, as well as other information that the applicant provides.

(c) *Budget and cost effectiveness.* (5 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (5 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. (See 34 CFR 75.590—Evaluation by the grantee.)

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (3 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(f) *Needs assessment.* (5 points)

The Secretary reviews each application for information that shows the extent to which the applicant—

(1) Identifies and analyzes, objectively and comprehensively, the need for arts education programs in the area to be served; and

(2) Establishes clear and measurable objectives that relate to the identified needs.

(g) *Coordination and collaboration.* (15 points)

(1) The quality of the applicant's plan to mobilize and coordinate activities of all agencies, organizations, and institutions involved. In judging this criterion, the Secretary considers the applicant's description of how and why each entity is cooperating in the project.

(2) The consistency with plans and activities previously carried out in arts education including the State plan for arts education, if any.

(3) The extent to which the applicant has developed and will employ effective methods, throughout the project period, for continuing consultation with the groups involved.

(h) *Arts integration.* (10 points)

The extent to which the project is designed to integrate the major arts (for example, dance, music, theater, and the visual arts) into the regular educational program of the schools served.

(i) *Commitment.* (15 points)

The extent to which the applicant's activities to make the arts an integral part of the elementary and secondary school curricula are likely to continue and expand when Federal assistance for the project ends.

(j) *Results.* (15 points)

(1) The extent to which the project is likely to result in new or innovative approaches, methods, or materials designed to achieve the purpose of the Act; and

(2) The likelihood that the materials to be developed by the project would be useful and effective for other potential users.

(k) *Special needs.* (10 points)

The extent to which the project is designed to serve the special needs of the handicapped, gifted, and underprivileged.

(l) *Diversity—geographic and programmatic.* To ensure geographic and programmatic diversity, the Secretary may add up to 10 points to the score of an application that will contribute to—

(1) An equitable geographic distribution of arts education programs throughout the United States in both urban and rural areas; and

(2) A variety in types of projects funded that collectively demonstrate diverse approaches to arts education.

(20 U.S.C. 2962)

§ 753.32 Are priorities for funding established?

(a) The Secretary funds projects in the following categories:

(1) State-wide projects;

(2) Urban or large community projects; and

(3) Rural or small community projects.

(b)(1) The Secretary decides annually how many grants to award in each category based on:

(i) The number of applications in each category;

(ii) The relative quality of the applications; and

(iii) The Secretary's goal to achieve a reasonable balance among projects funded in these categories.

(2) Through advance notice in the **Federal Register**, the Secretary may announce the distribution by category of previously funded projects eligible for non-competing continuation and its effect on new awards under paragraph (b)(1)(iii) of this section.

(20 U.S.C. 2962)

§ 753.33 What is the length of a project period?

(a) The Secretary usually approves a project for a maximum of three years. The budget period is twelve months.

(b) In deciding whether or not to make a continuation award within the approved project period, the Secretary considers the factors in § 75.253 of EDGAR.

(20 U.S.C. 1221e–3, 2962)

Subpart E—What Conditions Must Be Met by a Grantee?

§ 753.40 What are the limitations on costs?

(a) A grantee may not use federal funds for—

(1) Direct student financial aid; or

(2) Salaries for regular, full-time instructional personnel.

(b) A grantee may use up to ten percent of total project costs for outside evaluation of the project.

(20 U.S.C. 2962)

[FR Doc. 81-1685 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION

Arts in Education Program

AGENCY: Department of Education.

ACTION: Application notice.

Applications are invited for noncompeting continuation projects under the Arts in Education Program.

Authority for this program is contained in Part C of Title III of the Elementary and Secondary Education Act of 1965, as amended by Pub. L. 95–561.

(20 U.S.C. 2961)

This program awards grants to State educational agencies (SEAs), local educational agencies (LEAs) and other public or private nonprofit agencies, organizations, and institutions.

The purpose of the awards is to establish or conduct programs in which the arts are an integral part of elementary and secondary school curricula.

Closing Date for Transmittal of Applications: To be assured of consideration for continued funding, an application for a noncompeting continuation award should be mailed or hand delivered by April 1, 1981.

Applications Delivered by Mail: An application for a noncompeting continuation award sent by mail must be addressed to the U.S. Department of Education, Application Control Center, Attention: 84.084, Washington, D.C. 20202.

An applicant must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier."

(4) Any other proof of mailing acceptable to the Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

An applicant is encouraged to use registered or at least first class mail. Each late applicant will be notified that its application will not be considered.

Applications Delivered by Hand: An application that is hand-delivered must be taken to the U.S. Department of Education, Application Control Center, Room 5673, Regional Office Building 3, 7th and D Streets, SW., Washington, D.C.

The Application Control Center will accept a hand-delivered application between 8:00 a.m. and 4:30 p.m. (Washington, D.C. time) daily, except Saturdays, Sundays, and Federal holidays.

Available Funds: It is estimated that $750,000 of FY 1981 funds will be available for continuation of 15 projects at the continuation level requested in the initial application. This estimate does not bind the U.S. Department of Education except as may be required by the applicable statute and regulations.

Application Forms: Application forms and program information packages may be obtained by writing to the Arts and Humanities Staff, U.S. Department of Education (Room 3728, Donohoe Building), 400 Maryland Avenue, SW., Washington, D.C. 20202.

Applications must be prepared and submitted in accordane with the regulations, instructions, and forms included in the program information package. The Secretary urges that applicants not submit information that is not requested.

Applicable Regulations: The following regulations apply under this program.

(a) Final regulations governing the Arts Education Program (34 CFR Part 753) published in this issue of the **Federal Register**.

(b) The Education Department General Administrative Regulations (EDGAR) redesignated in the **Federal Register** as 34 CFR Parts 75 (Direct Grant Programs) and 77 (General) on November 21, 1980 (45 FR 77368).

(c) The Administration of Grants Regulations in 34 CFR 74 published in the **Federal Register** on May 9, 1980 (45 FR 30856).

Further Information: For further information, contact the Arts and Humanities Staff, U.S. Department of Education (Room 3728, Donohoe Building), 400 Maryland Avenue, SW., Washington, D.C. 20202. Telephone (202) 472–7793.

(20 U.S.C. 2961)

(Catalog of Federal Domestic Assistance Program No. 80.084, Arts Education Program)

Dated: January 12, 1981.

F. James Rutherford,

Assistant Secretary for Educational Research and Improvement

[FR Doc. 81-1686 Filed 1-15-81; 8:45 am]

BILLING CODE 4000-01-M

federal register

Friday
January 16, 1981

Part XIX

Environmental Protection Agency

Identification and Listing of Hazardous Waste; Final Rule and Temporary Suspension of Interim Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SWH-FRL 1627-3]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule and temporary suspension of interim final rule.

SUMMARY: In response to public comment, the Environmental Protection Agency (EPA) today is finalizing the listings of thirteen hazardous wastes from specific sources that were proposed or promulgated in interim final form in the **Federal Register** on July 16, 1980 (45 FR 47832–47836). In addition EPA is deleting two wastes from its interim final hazardous waste list, and is deferring action on and suspending the effectiveness of nine wastes listed in interim final form on July 16, 1980, as well as deferring action on one waste that was proposed on that date.

EPA is also amending Appendix VII of this Part by finalizing the toxic constituents of concern for each listed waste promulgated today.

DATES: Effective dates: Waste listings promulgated in interim final form on July 16, 1980, which are finalized today, become effective on January 16, 1981. Waste listings which were proposed on July 16, 1980, and which are finalized today, become effective on July 16, 1981.

See supplementary information for further details.

ADDRESSES: The public docket for this regulation is located in Room 2711, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Judith S. Bellin, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 755-9187.

SUPPLEMENTARY INFORMATION: Before discussing the substance of today's action, the Agency wishes to state clearly the regulatory obligations which result from it.

I. Compliance Dates for Regulatory Obligations

A. Notification

1. Finalized Waste Listings Promulgated in Interim Final Form on July 16, 1980.

Persons who generate, transport, treat, store, or dispose of any hazardous waste listed in interim final form on July 16, 1980 which waste listing is now being finalized, are not required to notify EPA as a result of today's action. Wastes in this category are hazardous wastes K071, K073, K083, K084, K085, K086, and K087. We do not consider today's action to be a revision of the Section 3001 regulations within the meaning of Section 3010(b). All such persons, of course, should have already notified EPA by or before October 16, 1980.

2. Finalized Waste Listings Which Were Proposed on July 16, 1980.

Persons who generate, transport, treat, store, or dispose of wastes which were proposed for listing on July 16, 1980 which are being finalized today—hazardous wastes K101–K106—are not required to notify so long as they previously have notified the Agency that they handle a hazardous waste and have received an I.D. number. Persons who have not previously notified EPA and who generate or handle these wastes must now notify EPA of their activities under Section 3010 no later than April 16, 1981. Notification instructions are set forth in 45 FR 12746 (February 26, 1980).[1]

B. Other Compliance Dates

Beginning on January 16, 1981, persons handling wastes listed in final form in § 261.32, which listings were promulgated in interim final form on July 16, 1980, must comply with all applicable standards for hazardous waste generators, transporters, and owners or operators of hazardous waste management facilities set forth in 40 CFR Parts 262 through 266 and 122 through 124.

Beginning on July 16, 1981, persons handling wastes listed in final form in § 261.32 which were proposed for inclusion on July 16, 1980, must comply with all applicable standards for hazardous waste generators, transporters, and owners or operators of hazardous waste management facilities set forth in 40 CFR Parts 262 through 266 and 122 through 124.

The owners or operators of all existing hazardous waste management facilities which treat, store or dispose of wastes listed in these regulations which were proposed for inclusion on July 16, 1980, and who wish to qualify for interim status under Section 3005(e) of RCRA, must file a notification by April 16, 1981 unless they have notified previously (as described in A. 2. above), and must file a permit application by July 16, 1981 (see 40 CFR 122.23(a) (1) and (2)).

Owners or operators of facilities who have qualified for interim status and wish to manage wastes listed in the final regulations which were proposed for listing on July 16, 1980 must submit an amended permit application by July 16, 1981 (see 40 CFR 122.23(c)(1)). Owners or operators of facilities with interim status who do not comply with these requirements are precluded from managing these wastes after July 16, 1981.

Table I summarizes the Agency's action on each waste stream discussed in the July 16 **Federal Register** notice, and gives the effective date of each final regulation.

[1] Our authority for this action is the recent amendment to Section 3010(a) of RCRA contained in the Solid Waste Disposal Act Amendments of 1980 (Pub. L. 96-452 (October 21, 1980)), which amendment leaves the requirement for notification following revision of the Section 3001 regulations to the discretion of the Administrator.

Table I.—*Summary of the Agency's Disposition of Each Waste Stream Listed in Interim Final Form or Proposed for Listing on July 16, 1980*

EPA hazardous waste No.	Hazardous waste	Effective date and disposition
	§ 261.31 Hazardous Waste From Nonspecific Sources	
F017	Paint residues or sludges from industrial painting in the mechanical and electrical products industry.	Suspended temporarily.
F018	Wastewater treatment sludge from industrial painting in the mechancial and electrical products industry.	Suspended temporarily.

Table I.—*Summary of the Agency's Disposition of Each Waste Stream Listed in Interim Final Form or Proposed for Listing on July 16, 1980* —**Continued**

EPA hazardous waste No.	Hazardous waste	Effective date and disposition
	§ 261.32 Hazardous Waste From Specific Sources	
K071	Brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used.	Jan. 16, 1981.
K106	Wastewater treatment sludge from the mercury cell process in chlorine production.	(6 months after publication.)
K073	Chlorinated hydrocarbon wastes from the purification step of the diaphragm cell process using graphite anodes in chlorine production.	Jan. 16, 1981.
K074	Wastewater treatment sludges from the production of TiO_2 pigment using chromium bearing ores by the chloride process.	Deleted (see 45 FR 72034, Oct. 30, 1980).
K078	Solvent cleaning wastes from equipment and tank cleaning from paint manufacturing.	Suspended temporarily.
K079	Water or caustic cleaning wastes from equipment and tank cleaning from paint manufacturing.	Suspended temporarily.
K081	Wastewater treatment sludges from paint manufacturing	Suspended temporarily.
K082	Emission control dust or sludge from paint manufacturing	Suspended temporarily.
K083	Distillation bottoms from aniline production	Jan. 16, 1981.
K103	Process residues from aniline extraction from the production of aniline.	(6 months after publication.)
K104	Combined wastewater streams generated from nitrobenzene/aniline production.	(6 months after publication.)
K084	Wastewater treatment sludges generated during the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.	Jan. 16, 1981.
K101	Distillation tar residues from the distillation of aniline compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.	(6 months after publication.)
K102	Residue from the use of activated carbon for decolorization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.	(6 months after publication.)
K085	Distillation or fractionation column bottoms from the production of chlorobenzenes.	Jan. 16, 1981.
K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzenes.	(6 months after publication.)
K086	Solvent washes and sludges, caustic washes and sludges, or water washes and sludges from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps, and stabilizers containing chromium and lead.	Jan. 16, 1981.
K087	Decanter tank tar sludge from coking operations	Jan. 16, 1981.
K088	Spent potliners from primary aluminum production	Suspended temporarily.
K090	Emission control dust or sludge from ferrochromium-silicon production.	Suspended temporarily.
K091	Emission control dust or sludge from ferrochromium production	Suspended temporarily.
K092	Emission control dust or sludge from ferromanganese production	Deleted.
(Proposed)	Emission control dust from gray and ductile iron foundry cupola furnaces.	Deferred.

II. Finalization of §§ 261.31 and 261.32 Hazardous Waste Lists

On July 16, 1980, EPA amended Subpart D of Part 261 by adding eighteen wastes to EPA's hazardous waste list (§§ 261.31 and 261.32, 45 FR 47833–47834). These lists were published in interim final form to allow the public an opportunity to comment on additional data the Agency had collected on these wastes since the close of the initial public comment period on the proposed Subtitle C regulations (43 FR 58957–58959, December 18, 1978).

At the same time, the Agency also proposed for comment seven additional hazardous waste listings (45 FR 47835–47836, July 16, 1980). All of these wastes were identified by the Agency in the course of developing the necessary technical data to support the July 16, 1980, interim final hazardous waste list.

The Agency received a number of comments on both the interim final and proposed hazardous waste listings. We have evaluated these comments carefully and responded in detail in the respective listing background documents. We are setting forth in this preamble our disposition of the listings published in interim final and proposed form on July 16, 1980, summarizing the basis for our actions as to each of these listings. We also are responding to comments criticizing the Agency's decision to defer temporarily the listing of wastes from the woven fabric dyeing and finishing industry.

A. Wastes for Which No Comments Were Received and No Changes Were Made to the Hazardous Waste Listings or to the Respective Background Documents

No comments were received on four of the hazardous waste listings published on July 16, 1980. In addition, the Agency is not making any substantive changes to either the hazardous waste listings or to the respective background documents as a result of its evaluation of these listings. Included in this category are certain wastes from the production of veterinary pharmaceuticals (EPA Hazardous Waste Nos. K084, K101 and K102), and wastes from ink formulation (EPA Hazardous Waste No. K086). We therefore are promulgating all of these listings as final regulations.

B. Waste for Which No Comments Were Received and No Changes Were Made to the Hazardous Waste Listing or Respective Background Document, But Final Implementation Has Been Temporarily Suspended

The Agency also received no comment on the hazardous waste listing of "spent potliners from primary aluminum production" (EPA Hazardous Waste No. K088). The Agency has no doubt that this waste should be listed as a hazardous waste, since it contains high concentrations of cyanide and has been involved in damage incidents. The lack of comment on the listing reflects further consensus that these wastes are indeed hazardous. However, the waste is excluded temporarily from control under Subtitle C under § 261.4(b) of the regulations. This provision implements Section 7 of the recently enacted Solid Waste Disposal Act Amendments of 1980 (Pub. L. 94–482, October 21, 1980), and states that solid wastes from the extraction, beneficiation and processing of ores and minerals (including coal) are excluded from regulation under Subtitle C of RCRA. For the time being, the Agency interprets the language of this exclusion to include solid wastes generated during the smelting and refining of ores and minerals, and so would exclude the waste streams from primary aluminum production. (See 45 FR 76618–76620 (November 19, 1980)). After reviewing the applicable legislative history and receiving public comment, the Agency may amend this exclusion to bring this waste (and others already promulgated) back under Subtitle C control.

C. Wastes for Which Comments Were Received But No Changes Were Made to the Hazardous Waste Listings

The Agency received comments disputing the hazardousness of, or challenging aspects of the Agency's rationale for listing, certain wastes from the production of chlorine (EPA Hazardous Waste No. K073), aniline/nitrobenzene (EPA Hazardous Waste Nos. K083, K103 and K104), and coking operations (EPA Hazardous Waste No. K087). In evaluating these comments, the Agency did not agree with the substantive criticisms, and did not modify the listing descriptions or the

constituents which form the basis for listing the waste. The applicable background documents have been revised to respond to each comment.

D. Wastes for Which Comments Were Received Which Resulted in Modifications to the Hazardous Waste Listing Descriptions, or to the Applicable Background Documents

Comments were also submitted on hazardous wastes K085 and K105 (chlorobenzene production), and K071 and K106 (wastes from chlorine production by the mercury cell process). EPA has carefully reviewed these comments and has concluded that the listing description or the basis for listing should be changed, or the respective background document should be changed. The amended hazardous waste listings or background documents are discussed below, together with the reason for EPA's determination. More detailed discussion of the reasons underlying the respective dispositions is contained in the applicable background documents.

(1) *Wastes from the Production of Chlorobenzenes (EPA Hazardous Waste Nos. K085 and K105).*

(a) In listing the separate aqueous stream from the reactor product washing step in the production of chlorobenzenes, (K085) phenol, 2-chlorophenol and 2,4-dichlorophenol were included as toxic constituents of concern. After reviewing the comments, we believe that these constituents should not be so listed because they do not occur in this waste stream in concentrations sufficient to cause concern, even if the wastes were mismanaged. The background document has been changed, and Appendix VII has been revised to reflect this determination. However, we believe the waste stream to be hazardous because it contains benzene (a carcinogen), certain chlorinated benzenes, and the carcinogen 2,4,6-trichlorophenol in potentially harmful concentrations, as explained more fully in the listing background document.

(b) In response to a comment received from one manufacturer of chlorobenzenes, we have changed the listing description for the aqueous waste (K105) to indicate that the listed aqueous waste stream may result from some continuous processes, as well as from batch processes.

(c) One comment questioned whether distillation residues from chlorobenzene production (in this case, hexachlorobenzene production) were still intended to be listed when the hexachlorobenzene was then used as a reactant in the production of pentachloronitrobenzene, rather than sold as a product. The distillation residues are indeed a listed hazardous waste in this case. The end usage of the hexachlorobenzene is irrelevant to the potential of the listed waste stream to cause harm. Therefore, any waste stream meeting the listing description contained in § 261.31 or § 261.32 is covered by the listing regardless of the end disposition of the material being produced.

(2) Wastes from Chlorine Production via the Mercury Cell Process (EPA Hazardous Waste Nos. K071 and K106).

Several commenters argued that data used by the Agency in support of the listings was outdated and therefore did not accurately reflect the hazardousness of the wastes listed. In reviewing the data submitted by the commenters, the Agency agrees that the data was old, and therefore has revised the background document to reflect the more recent information. The background document was revised in order to reflect new data on siting, production capacity, source of raw materials, concentration of mercury in these wastes and volume of wastes generated. The new data still indicates, however, that these wastes contain significant concentrations of mercury (a very toxic constituent), and are generated in substantial quantities. Furthermore, these wastes are reliably believed to have caused substantial damage in actual waste management practice, and therefore should be listed as hazardous wastes. A more detailed discussion of the comments received are available in the listing background document.

E. Wastes for Which Comments Were Received Which Resulted in the Deletion of the Wastes from the Hazardous Waste List

Two of the wastes listed in interim final form on July 16, 1980, were deleted from the list as a result of industry comment. Our basis for removing these wastes are discussed below. It must be emphasized, however, that it is still the responsibility of all generators of these wastes to determine whether they exhibit any of the characteristics of hazardous waste in Subpart C of Part 261.

(1) Emission control dust/sludge from the production of ferromanganese (EPA Hazardous Waste No. K092).

The Ferroalloys Association submitted EP leachate analyses from these ferromanganese production wastes which indicate that the extracts from these wastes do not contain significant concentrations of either chromium or lead, the waste constituents of concern. The Agency has, therefore, determined that emission control dust/sludge from ferromanganese production should not be listed as a hazardous waste.

(2) *Wastewater treatment sludges from the production of TiO_2 pigment using chromium-bearing ores by the chloride process (EPA Hazardous Waste No. K074).*

On October 30, 1980 (45 FR 72037), the Agency published as a final rule an amendment to § 261.32 which removed this waste stream from the list of hazardous wastes since it derives from a trivalent chromium-based process and contains trivalent chromium exclusively or nearly exclusively.

F. Wastes for Which Comments were Received and a Final Determination was Deferred

(1) *Emission control dust or sludge from ferrochrome and ferrochrome-silicon production (EPA Hazardous Waste Nos. K090 and K091).*

These wastes are presently excluded from Subtitle C coverage due to the mining waste exclusion contained in § 261.4. However, the Agency also has some substantive doubts about whether these waste streams should be listed.

The Ferroalloys Association submitted extensive data which indicates that the EP extract from these wastes contains insignificant concentrations of lead. The Agency has therefore determined that lead should be deleted as a toxic constituent of concern in these wastes. In this same set of comments, however, the concentration of total chromium in the extracts of many of the sampled wastes was well above the limit set in § 261.24 (5 mg/l). There is real uncertainty, however, as to the valence state of the chromium in these wastes. Since the Agency has indicated that hexavalent chromium is the species of regulatory concern (45 FR 72029, October 30, 1980), we believe that additional data is needed. The Ferroalloys Association has agreed to conduct a sampling and analysis effort to determine whether significant levels of total chromium, hexavalent chromium, and manganese appear in the extract from ferrochrome and ferrochromium-silicon wastes. Manganese is of concern because its presence can result in the oxidation of trivalent chromium. After this data is received, the Agency will make a final decision on whether to list these wastes. This decision is expected to be made in the Spring of 1981.

(2) *Wastes from Gray and Ductile Iron Foundries (proposed listings).*

Over the past eighteen months the Agency has proposed for listing a

number of wastes from both gray and ductile iron foundries, namely lead bearing wastewater treatment sludges from gray iron foundries, and emission control dust from gray and ductile iron foundry cupola furnaces (see discussion in 45 FR 47835, July 16, 1980). These wastes were proposed for listing since they were shown in certain cases to contain or release significant concentrations of the toxic metals lead or cadmium. However, as a result of industry comment, the Agency undertook further study of these wastes, beginning last summer, to determine their hazardousness. The report of this study is expected to be available for public comment in the near future. After evaluating this data and the public comments received, the Agency will consider the hazards posed by various wastes from foundry operations. We are, accordingly, deferring final action on these wastes. (All of these wastes are hazardous, of course, if they exhibit any of the characteristics of hazardous waste, and generators of these wastes are obligated to make this determination.)

(3) *Wastes From the Use and Manufacture of Paints (EPA Hazardous Waste Nos. F017, F018, K078, K079, K081, and K082).*

Many comments were received from various trade organizations and interested individuals, who objected to the listing of these paint wastes.

In general, most commenters criticized the waste listings as overly broad, resulting in regulation of both hazardous and non-hazardous paint wastes. In re-evaluating the data, the Agency agrees that further study of these wastes is needed before a final listing can be promulgated. We anticipate that our re-examination of paint wastes will be completed by the Spring of 1981. The Agency therefore has decided to suspend temporarily the interim final listings of these paint wastes. Paint wastes which exhibit any of the hazardous waste characteristics remain subject to Subtitle C controls.

G. Response to Comments Criticising the Agency's Decision to Defer Temporarily Listings of Waste Streams from the Woven Fabric Dyeing and Finishing Industry

The Agency indicated in the preamble to the July 16, interim final regulations that it was deferring temporarily listing of wastewater treatment sludges from the woven fabric dyeing and finishing industry (45 FR at 47832–47833).

One commenter objected to this decision, arguing that the Agency had improperly relied on EP protocol test data to evaluate the migratory potential of organic contaminants in these wastes. The commenter further stated that there is no documentation for the Agency's determination that chromium (which had been cited as a waste constituent of concern) is used in the manufacturing process in insignificant amounts. The commenter also felt that data submitted by industry sufficiently supports listing of these wastes as hazardous.

The Agency agrees with the commenter that the EP test may not be an appropriate measure of the potential for migration of all organic contaminants. Therefore, in evaluating the potential mobility of organic contaminants in textile waste, the Agency did not nor will it rely on the EP test to determine the potential mobility of possible organic waste constituents. In evaluating all the data currently in its possession, the Agency believes that it does not have sufficient data to assess the potential hazard to human health and the environment that would be presented by these wastes if improperly managed. The Agency, however, is still very concerned with the potential hazards that may be presented by these wastes, and therefore still intends to study further the wastes generated by the textile industry, paying particular attention to the many toxic organic constituents used in the production process such as dyes and pigments derived from benzidine, *o*-dianisidine, *o*-tolidine, and 3,3'-dichlorobenzidine, as well as acrylonitrile, trichlorobenzene, bis-(2-ethyl hexylphthalate), flame retardants and other additives.

With respect to the commenter's concern as to the lack of documentation on the use of chromium compounds in the textiles industry, the Agency not only was provided this information by industry, but possessed corroborating data in its own files. However, the Agency will reevaluate this information when further studying these wastes.

III. Finalization of Appendix VII to Part 261

Appendix VII to Part 261 sets forth the hazardous constituents for which each of the wastes in §§ 261.31 and 261.32 are listed. This appendix has been amended to reflect changes made in the underlying listings, and is being finalized in this revised form.

IV. Economic, Environmental and Regulatory Impacts

In accordance with Executive Order 11821, as amended by Executive Order 11949 and Executive Order 12044, EPA has prepared an Economic Impact Analysis of the hazardous waste program promulgated on May 19, 1980. The net effect of today's action reduces the overall cost, economic impact, and reporting and recording impact of EPA's hazardous waste management regulations, since the overall scope of Subtitle C jurisdiction is being reduced. Since this action will decrease the regulatory impact of the Subtitle C regulatory program, we have not prepared a new Economic Impact Analysis or Regulatory Analysis. The Agency has also voluntarily prepared an Environmental Impact Statement on the program under the National Environmental Policy Act, 42 U.S.C. 4321 et seq.

(Sec. 3001 of the Resource Conservation and Recovery Act)

Dated: January 13, 1981.

Douglas M. Costle,

Administrator.

For the reasons and as set out in the preamble, 40 CFR Part 261 is amended as follows:

1. The authority citation for Part 261 reads 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, 6921 and 6922).

2. Revise § 261.31 to read as follows:

§ 261.31 Hazardous waste from nonspecific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
Generic:		
F001	The following spent halogenated solvents used in degreasing: tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride, and chlorinated fluorocarbons; and sludges from the recovery of these solvents in degreasing operations.	(T)
F002	The following spent halogenated solvents: tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, and trichlorofluoromethane; and the still bottoms from the recovery of these solvents.	(T)
F003	The following spent non-halogenated solvents: xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, methyl isobutyl ketone, n-butyl alcohol, cyclohexanone, and methanol; and the still bottoms from the recovery of these solvents.	(I)
F004	The following spent non-halogenated solvents: cresols and cresylic acid, and nitrobenzene; and the still bottoms from the recovery of these solvents.	(T)

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
F005	The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulfide, isobutanol, and pyridine; and the still bottoms from the recovery of these solvents.	(I, T)
F006	Wastewater treatment sludges from electroplating operations except from the following processes: (1) sulfuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (segregated basis) on carbon steel; (4) aluminum or zinc-aluminum plating on carbon steel; (5) cleaning/stripping associated with tin, zinc and aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.	(T)
F019	Wastewater treatment sludges from the chemical conversion coating of aluminum	(T)
F007	Spent cyanide plating bath solutions from electroplating operations (except for precious metals electroplating spent cyanide plating bath solutions).	(R, T)
F008	Plating bath sludges from the bottom of plating baths from electroplating operations where cyanides are used in the process (except for precious metals electroplating plating bath sludges).	(R, T)
F009	Spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process (except for precious metals electroplating spent stripping and cleaning bath solutions).	(R, T)
F010	Quenching bath sludge from oil baths from metal heat treating operations where cyanides are used in the process (except for precious metals heat-treating quenching bath sludges).	(R, T)
F011	Spent cyanide solutions from salt bath pot cleaning from metal heat treating operations (except for precious metals heat treating spent cyanide solutions from salt bath pot cleaning).	(R, T)
F012	Quenching wastewater treatment sludges from metal heat treating operations where cyanides are used in the process (except for precious metals heat treating quenching wastewater treatment sludges).	(T)
F014	Cyanidation wastewater treatment tailing pond sediment from mineral metals recovery operations	(T)
F015	Spent cyanide bath solutions from mineral metals recovery operations	(R, T)

3. Revise § 261.32 to read as follows:

§ 261.32 Hazardous waste from specific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
Wood Preservation:		
K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol	(T)
Inorganic Pigments:		
K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments	(T)
K003	Wastewater treatment sludge from the production of molybdate orange pigments	(T)
K004	Wastewater treatment sludge from the production of zinc yellow pigments	(T)
K005	Wastewater treatment sludge from the production of chrome green pigments	(T)
K006	Wastewater treatment sludge from the production of chrome oxide green pigments (anhydrous and hydrated)	(T)
K007	Wastewater treatment sludge from the production of iron blue pigments	(T)
K008	Oven residue from the production of chrome oxide green pigments	(T)
Organic Chemicals:		
K009	Distillation bottoms from the production of acetaldehyde from ethylene	(T)
K010	Distillation side cuts from the production of acetaldehyde from ethylene	(T)
K011	Bottom stream from the wastewater stripper in the production of acrylonitrile	(R, T)
K013	Bottom stream from the acetonitrile column in the production of acrylonitrile	(R, T)
K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile	(T)
K015	Still bottoms from the distillation of benzyl chloride	(T)
K016	Heavy ends or distillation residues from the production of carbon tetrachloride	(T)
K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin	(T)
K018	Heavy ends from the fractionation column in ethyl chloride production	(T)
K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production	(T)
K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production	(T)
K021	Aqueous spent antimony catalyst waste from fluoromethanes production	(T)
K022	Distillation bottom tars from the production of phenol/acetone from cumene	(T)
K023	Distillation light ends from the production of phthalic anhydride from naphthalene	(T)
K024	Distillation bottoms from the production of phthalic anhydride from naphthalene	(T)
K093	Distillation light ends from the production of phthalic anhydride from ortho-xylene	(T)
K094	Distillation bottoms from the production of phthalic anhydride from ortho-xylene	(T)
K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene	(T)
K026	Stripping still tails from the production of methy ethyl pyridines	(T)
K027	Centrifuge and distillation residues from toluene diisocyanate production	(R, T)
K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane	(T)
K029	Waste from the product steam stripper in the production of 1,1,1-trichloroethane	(T)
K095	Distillation bottoms from the production of 1,1,1-trichloroethane	(T)
K096	Heavy ends from the heavy ends column from the production of 1,1,1-trichloroethane	(T)
K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene	(T)
K083	Distillation bottoms from aniline production	(T)
K103	Process residues from aniline extraction from the production of aniline	(T)
K104	Combined wastewater streams generated from nitrobenzene/aniline production	(T)
K085	Distillation or fractionation column bottoms from the production of chlorobenzenes	(T)
K105	Separated aqueous stream from the reactor product washing step in the production of chlorobenzenes	(T)
Inorganic Chemicals:		
K071	Brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used	(T)
K073	Chlorinated hydrocarbon waste from the purification step of the diaphragm cell process using graphite anodes in chlorine production	(T)
K106	Wastewater treatment sludge from the mercury cell process in chlorine production	(T)
Pesticides:		
K031	By-product salts generated in the production of MSMA and cacodylic acid	(T)
K032	Wastewater treatment sludge from the production of chlordane	(T)
K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane	(T)
K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane	(T)
K097	Vacuum stripper discharge from the chlordane chlorinator in the production of chlordane	(T)
K035	Wastewater treatment sludges generated in the production of creosote	(T)
K036	Still bottoms from toluene reclamation distillation in the production of disulfoton	(T)
K037	Wastewater treatment sludges from the production of disulfoton	(T)
K038	Wastewater from the washing and stripping of phorate production	(T)
K039	Filter cake from the filtration of diethylphosphorodithioic acid in the production of phorate	(T)
K040	Wastewater treatment sludge from the production of phorate	(T)

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
K041	Wastewater treatment sludge from the production of toxaphene	(T)
K098	Untreated process wastewater from the production of toxaphene	(T)
K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T	(T)
K043	2,6-Dichlorophenol waste from the production of 2,4-D	(T)
K099	Untreated wastewater from the production of 2,4-D	(T)
Explosives:		
K044	Wastewater treatment sludges from the manufacturing and processing of explosives	(R)
K045	Spent carbon from the treatment of wastewater containing explosives	(R)
K046	Wastewater treatment sludges from the manufacturing, formulation and loading of lead-based initiating compounds	(T)
K047	Pink/red water from TNT operations	(R)
Petroleum Refining:		
K048	Dissolved air flotation (DAF) float from the petroleum refining industry	(T)
K049	Slop oil emulsion solids from the petroleum refining industry	(T)
K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry	(T)
K051	API separator sludge from the petroleum refining industry	(T)
K052	Tank bottoms (leaded) from the petroleum refining industry	(T)
Iron and Steel:		
K061	Emission control dust/sludge from the primary production of steel in electric furnaces	(T)
K062	Spent pickle liquor from steel finishing operations	(C, T)
Primary Copper:		
K064	Acid plant blowdown slurry/sludge resulting from the thickening of blowdown slurry from primary copper production	(T)
Primary Lead:		
K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities	(T)
Primary Zinc:		
K066	Sludge from treatment of process wastewater and/or acid plant blowdown from primary zinc production	(T)
K067	Electrolytic anode slimes/sludges from primary zinc production	(T)
K068	Cadmium plant leachate residue (iron oxide) from primary zinc production	(T)
Secondary Lead:		
K069	Emission control dust/sludge from secondary lead smelting	(T)
K100	Waste leaching solution from acid leaching of emission control dust/sludge from secondary lead smelting	(T)
Veterinary Pharmaceuticals:		
K084	Wastewater treatment sludges generated during the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds	(T)
K101	Distillation tar residues from the distillation of aniline-based compounds in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.	(T)
K102	Residue from the use of activated carbon for decolorization in the production of veterinary pharmaceuticals from arsenic or organo-arsenic compounds.	(T)
Ink Formulation:		
K086	Solvent washes and sludges, caustic washes and sludges, or water washes and sludges from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps, and stabilizers containing chromium and lead.	(T)
Coking:		
K060	Ammonia still lime sludge from coking operations	(T)
K087	Decanter tank tar sluge from coking operations	(T)

Part 261, Appendix [Amended]

4. Revise Appendix VII to Part 261 to read as follows:

Appendix VII—Basis for Listing Hazardous Waste

EPA hazardous waste No.	Hazardous constituents for which listed
F001	Tetrachloroethylene, methylene chloride trichloroethylene, 1,1,1-trichloroethane, carbon tetrachloride, chlorinated fluorocarbons.
F002	Tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, ortho-dichlorobenzene, trichlorofluoromethane.
F003	N.A.
F004	Cresols and cresylic acid, nitrobenzene.
F005	Toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine.
F006	Cadmium, hexavalent chromium, nickel, cyanide (complexed).
F007	Cyanide (salts).
F008	Cyanide (salts).
F009	Cyanide (salts).
F010	Cyanide (salts).
F011	Cyanide (salts).
F012	Cyanide (complexed).
F014	Cyanide (complexed).
F015	Cyanide (salts).
F019	Hexavalent chromium, cyanide (complexed).
K001	Pentachlorophenol, phenol, 2-chlorophenol, p-chloro-m-cresol, 2,4-dimethylphenyl, 2,4-dinitrophenol, trichlorophenols, tetrachlorophenols, 2,4-dinitrophenol, creosote, chrysene, naphthalene, fluoranthene, benzo(b)fluoranthene, benzo(a)pyrene, indeno(1,2,3-cd)pyrene, benz(a)anthracene, dibenz(a)anthracene, acenaphthalene.
K002	Hexavalent chromium, lead
K003	Hexavalent chromium, lead.
K004	Hexavalent chromium.
K005	Hexavalent chromium, lead.
K006	Hexavalent chromium.
K007	Cyanide (complexed), hexavalent chromium.
K008	Hexavalent chromium.
K009	Chloroform, formaldehyde, methylene chloride, methyl chloride, paraldehyde, formic acid.
K010	Chloroform, formaldehyde, methylene chloride, methyl chloride, paraldehyde, formic acid, chloroacetaldehyde.
K011	Acrylonitrile, acetonitrile, hydrocyanic acid.
K013	Hydrocyanic acid, acrylonitrile, acetonitrile.
K014	Acetonitrile, acrylamide.
K015	Benzyl chloride, chlorobenzene, toluene, benzotrichloride.
K016	Hexachlorobenzene, hexachlorobutadiene, carbon tetrachloride, hexachloroethane, perchloroethylene.
K017	Epichlorohydrin, chloroethers [bis(chloromethyl) ether and bis (2-chloroethyl) ethers], trichloropropane, dichloropropanols.
K018	1,2-dichloroethane, trichloroethylene, hexachlorobutadiene, hexachlorobenzene.
K019	Ethylene dichloride, 1,1,1-trichloroethane, 1,1,2-trichloroethane, tetrachloroethanes (1,1,2,2-tetrachloroethane and 1,1,1,2-tetrachloroethane), trichloroethylene, tetrachloroethylene, carbon tetrachloride, chloroform, vinyl chloride, vinylidene chloride.
K020	Ethylene dichloride, 1,1,1-trichloroethane, 1,1,2-trichloroethane, tetrachloroethanes (1,1,2,2-tetrachloroethane and 1,1,1,2-tetrachloroethane), trichloroethylene, tetrachloroethylene, carbon tetrachloride, chloroform, vinyl chloride, vinylidene chloride.
K021	Antimony, carbon tetrachloride, chloroform.
K022	Phenol, tars (polycyclic aromatic hydrocarbons).
K023	Phthalic anhydride, maleic anhydride.
K024	Phthalic anhydride, 1,4-naphthoquinone.
K025	Meta-dinitrobenzene, 2,4-dinitrotoluene.
K026	Paraldehyde, pyridines, 2-picoline.
K027	Toluene diisocyanate, toluene-2, 4-diamine.
K028	1,1,1--trichloroethane, vinyl chloride.
K029	1,2-dichloroethane, 1,1,1-trichloroethane, vinyl chloride, vinylidene chloride, chloroform.
K030	Hexachlorobenzene, hexachlorobutadiene, hexachloroethane, 1,1,1,2-tetrachloroethane, 1,1,2,2-tetrachloroethane, ethylene dichloride.
K031	Arsenic.
K032	Hexachlorocyclopentadiene.
K033	Hexachlorocyclopentadiene.
K034	Hexachlorocyclopentadiene.
K035	Creosote, chrysene, naphthalene, fluoranthene benzo(b) fluoranthene, benzo(a)pyrene, indeno(1,2,3-cd) pyrene, benzo(a)anthrecene, dibenzo(a)anthracene, acenaphthalene.
K036	Toluene, phosphorodithioic and phosphoro-thioic acid esters.
K037	Toluene, phosphorodithioic and phosphoro-thioic acid esters.
K038	Phorate, formaldehyde, phosphorodithioic and phosphorothioic acid esters.
K039	Phosphorodithioic and phosphorothioic acid esters.
K040	Phorate, formaldehyde, phosphorodithioic and phosphorothioic acid esters.
K041	Toxaphene.
K042	Hexachlorobenzene, ortho-dichlorobenzene.
K043	2,4-dichlorophenol, 2,6-dichlorophenol, 2,4,6-trichlorophenol.
K044	N.A.
K045	N.A.
K046	Lead.

Appendix VII—Basis for Listing Hazardous Waste—Continued

EPA hazardous waste No.	Hazardous constituents for which listed
K047	N.A.
K048	Hexavalent chromium, lead.
K049	Hexavalent chromium, lead.
K050	Hexavalent chromium.
K051	Hexavalent chromium, lead.
K052	Lead.
K060	Cyanide, napthalene, phenolic compounds, arsenic.
K061	Hexavalent chromium, lead, cadmium.
K062	Hexavalent chromium, lead.
K064	Lead, cadmium.
K065	Lead, cadmium.
K066	Lead, cadmium.
K067	Lead, cadmium.
K068	Lead, cadmium.
K069	Hexavalent chromium, lead, cadmium.
K071	Mercury.
K073	Chloroform, carbon tetrachloride, hexachloroethane, trichloroethane, tetrachloroethylene, dichloroethylene, 1,1,2,2-tetrachloroethane.
K083	Aniline, diphenylamine, nitrobenzene, phenylenediamine.
K084	Arsenic.
K085	Benzene, dichlorobenzenes, trichlorobenzenes, tetrachlorobenzenes, pentachlorobenzene, hexachlorobenzene, benzyl chloride.
K086	Lead, hexavalent chromium.
K087	Phenol, naphthalene.
K093	Phthalic anhydride, maleic anhydride.
K094	Phthalic anhydride.
K095	1,1,2-trichloroethane, 1,1,1,2-tetrachloroethane, 1,1,2,2-tetrachloroethane.
K096	1,2-dichloroethane, 1,1,1-trichloroethane, 1,1,2-trichloroethane.
K097	Chlordane, heptachlor.
K098	Toxaphene.
K099	2,4-dichlorophenol, 2,4,6-trichlorophenol.
K100	Hexavalent chromium, lead, cadmium.
K101	Arsenic.
K102	Arsenic.
K103	Aniline, nitrobenzene, phenylenediamine.
K104	Aniline, benzene, diphenylamine, nitrobenzene, phenylenediamine.
K105	Benzene, monochlorobenzene, dichlorobenzenes, 2,4,6-trichlorophenol.
K106	Mercury.

N.A.—Waste is hazardous because it fails the test for the characteristic of ignitability, corrosivity, or reactivity.

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federal register

Friday
January 16, 1981

Part XX

Department of Agriculture

Food and Nutrition Service

Department of Labor

Office of the Secretary

Food Stamp Program; Work Registration and Job Search

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

DEPARTMENT OF LABOR

Office of Secretary

7 CFR Parts 272 and 273

[Amdt. No. 165]

Food Stamp Program; Work Registration and Job Search

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Stamp Act of 1977 requires that those food stamp participants who must register for employment must also search for employment on their own. This final rule provides procedures for participants to actively search for employment. Also, this final rule clearly delineates the roles of State welfare agencies, State employment security agencies (SESAs), and food stamp participants alike in order to effect a work registration/job search system that will aid in carrying out the intent of the Act that able-bodied participants seek and find gainful employment. The Department of Agriculture (USDA) proposed regulations on this subject in the **Federal Register** of August 8, 1980 (45 FR 53067). Since the Act requires these rules to be jointly issued with the Department of Labor (DOL), the provisions of this final rule, as well as current work registration provisions, will be published at a later date by the Department of Labor.

EFFECTIVE DATE: January 16, 1981 to be fully implemented no later than the first of the month following 120 days from date of publication.

FOR FURTHER INFORMATION CONTACT: Larry R. Carnes, Chief, Policy and Regulations Section, Program Standards Branch, Program Development Division, Family Nutrition Programs, Food and Nutrition Service, USDA, Washington, D.C. 20250; telephone (202) 447–9075; or Michele Casey, Chief, Food Stamp Unit, Office of Work Incentive Programs, Employment and Training Administration, U.S. Department of Labor, Washington, D.C. 20313; telephone (202) 376–7589. The Final Impact Statement describing the options considered in developing this final rule and the impact of implementing each option is available on request from Mr. Carnes.

SUPPLEMENTARY INFORMATION:

Classification

This final action has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and has been classified not significant.

Introduction

The Food Stamp Act of 1977 (Pub. L. 95–113, 91 Stat. 958, September 29, 1977) authorized the Secretary of Agriculture to require certain members of food stamp households to register for work, inquire about employment, and report the results of that inquiry (Section 6(d)(1) of the Act). On August 8, 1980 the Departments of Agriculture and Labor published in the **Federal Register** a proposed rule on this subject inviting comments from the public (45 FR 53066). The Departments received 166 comment letters. The majority of the commenters were public interest groups, State employment agencies, and State and local welfare agencies. Six FNS Regional Offices, two DOL Regional Offices, one Indian Tribal organization, one Federal Government office, and several individual citizens also commented. This preamble discusses changes made as a result of those comments. Also discussed are provisions which were of major concern to the commenters, but which have not been changed. Therefore, it may be necessary for the reader to refer to the August 8, 1980 proposed rulemaking for a complete understanding of the basis and purpose of this final rule.

Forty-two of the commenters expressed general support for the rule and for the idea of job search (27 individuals, 7 State agencies, 5 local agencies, and 3 public interest groups). Twenty-five commenters opposed the rule as being vague, cumbersome, punitive or insufficiently sensitive to local conditions (8 individuals, 2 State agencies, 2 local agencies, 9 public interest groups, and 4 State employment agencies). Almost all commenters addressed specific provisions in the rulemaking. In revising the proposed regulations to take these commenters into account, the Department has somewhat restructured the final rule.

Work Registration

Persons required to register. The Departments received few comments on § 273.7(a). The comments received indicated some confusion over whether each household member must personally register for work. Current regulations (§ 273.1(f)) provide a means by which another household member or an authorized representative designated by the household can make application for the program on behalf of the household head (or spouse). Since application for the program includes completion of work registration forms, the current provisions governing "authorized representatives" in the application process shall also apply in the case of making registration for work. Paragraphs (a) and (f) of § 273.1 have been amended to clarify that a household member or authorized representative may complete work registration forms for other household members. Clarification is also added that registrants who move from the area and enter a new SESA jurisdiction must reregister. (If the registrant moves but remains within the SESA office jurisdiction, the State agency would notify SESA of the change of address, but deregistration and reregistration would not occur.)

Other commenters requested changes in the procedures of registration, such as requiring only certified participants to register or allowing up to one month for reregistration. The Food Stamp Act does not permit these changes. Work registration, under Section 6(d) of the Act, is a prerequisite of participation.

Exemptions from work registration. Many commenters requested additions to the proposed list of persons exempted from registration in § 273.7(b)—e.g., all applicants for unemployment insurance (UI) benefits, pregnant women, migrants, and persons not likely to be placed in jobs, among others. The list of people exempt from work registration cannot be expanded. Doing this would counter Congressional intent that all able-bodied Food Stamp Program participants, except those specified in the 1977 Act, be subject to work requirements. Therefore, no additional exemptions have been granted.

Substitutions for food stamp work registration. Current rules (§ 273.7(k)) allow State agencies to substitute State or local work requirements imposed on GA households, and those PA households not subject to WIN work requirements, for food stamp work registration in certain instances. If work requirements in these other programs are at least equivalent to the food stamp work requirements, then an additional food stamp work registration is not required. However, if a recipient fails, without good cause, to comply with a work requirement in one of these other programs that is equivalent to a food stamp work requirement, then the recipient's household is disqualified from the Food Stamp Program just as when the food stamp work requirements are not complied with.

Section 273.7(k) has been revised to apply this same approach to participants

enrolled in refugee resettlement programs, such as the Indochinese Refugee Assistance Program (IRAP), which have work registration requirements at least equivalent to Food Stamp Program requirements and which FNS approves as substitutable. These refugee programs provide special services designed to enhance employment opportunities, and are especially suited to merging refugees into the work force and minimizing their need for public assistance.

This provision will avoid the need for duplicate work registration under the refugee program and the Food Stamp Program, thereby increasing efficiency and avoiding unnecessary paperwork and administrative costs. This substitution of IRAP registration for food stamp registration will be allowed only to the extent that the IRAP requirements are comparable to those of the Food Stamp Program. For instance, individuals will not necessarily be exempt from food stamp work registration because they are exempt under IRAP. Different rules concerning age, language, medical or social characteristics may cause a person to be exempt under IRAP. Unless that person were also exempt under current food stamp regulations, food stamp work registration would be required.

Verification of work registration exemptions. Upon the recommendation of numerous commenters, the proposed procedures for verifying exemptions from work registration have been revised. The proposed regulations called for verification of WIN participation through the SESA. It was pointed out that such verification would likely be available from a participant's PA file. When this is the case, a food stamp worker would have either direct access to the file or access to the participant's PA caseworkers. Therefore, the final rule (§ 273.7(b)(1)) has been changed to allow the State agency to verify WIN participation through whatever means the State agency finds most advantageous. Section 273.7(b)(1) has also been revised to clarify the student exemption for the few students remaining eligible for food stamps.

Reporting loss of an exemption for work registration. The proposed rule specified conditions for reporting the loss of a work registration exemption to the food stamp office (§ 273.7(b)(2)). Participating households had to report their changed circumstances (other than loss of an exemption due to a change in age), in person, by mail, by telephone, or via another household member. Household members who reported a change in person had to register when they visited the food stamp office. Others had ten days in which to register. The comments included allowing thirty days to report these changes; allowing the participant to register at recertification; allowing all participants to mail in the work registration forms, and allowing no participants to register by mail.

This provision has been rewritten in the final rule. A participant must report the loss of exemption when it results from any change that must already be reported under current provisions noted in 7 CFR 273.12(a). Examples are loss of employment that produces a change in income of more than $25 a month, or departure of a household member who is the sole dependent child of an otherwise nonexempt household member. These persons must register for work unless they are otherwise exempt. Others who lose their exemptions for reasons not required to be reported between certifications, such as a change in age or physical condition, will register at recertification. This is in keeping with current policy on work registration and does not add to reporting requirements. At the same time, it ensures that those who leave employment will register promptly.

State Agency Responsibilities

Comments on this topic, primarily from State agencies and SESA's, discussed the role of the State agency in developing the State Work Registration Plan and the requirements of the work registration form. Issues regarding the work registration form are discussed below. Issues addressed in the plan are discussed under the State Employment Agency Responsibilities portion of this preamble. With regard to the registration form, § 273.7(c) of the proposed rule did not define "identifiable work registration form." Many definitions were suggested. A common element of the comments was that an identifiable form should require only limited information. Many commenters also asked that food stamp caseworkers annotate the forms to identify participants who would be exempt from job search (See 7 CFR 273.7(f)(1)(ii)(c) of this rulemaking and the discussion of job search categorization in this preamble).

These comments have been taken into account in re-writing paragraph 273.7(c). The final rule stipulates that an identifiable form need include only the following: the household member's name, address, telephone number, Social Security number (or other identifying number), the expiration date of the certification period, an indication of exemption from job search, and any other information that is agreed to by the State agency and SESA.

The commenters varied widely in their suggestions about when the State agency should report information to the SESA. The proposed rule required the State agency to send the work registration form to the SESA within five days of the date of certification. Alternate time limits ranged from same-day forwarding to transmitting the form within ninety days. The longer periods of time were to be used to avoid the processing of participants who were in the program for only a short period of time.

The five day time limit for submitting work registration forms to the SESA has been retained. If the work registration and job search provisions are to be as effective as possible, it is necessary that contact between SESA and the participant take place at the earliest possible time. Therefore, there should be no undue delay in the submission of the form.

The proposed regulation also provided for the State agency to notify the SESA within five days when work registrants become exempt or are no longer certified for food stamps. Two changes have been made in this provision, § 273.7(c)(3). Some commenters pointed out that requiring a report to SESA within five days would result in the de-registration of persons who failed to timely reapply for food stamps, but who evidently do reapply. Such persons would then have to be re-registered for work. This would create added work for State agencies and for SESA, as persons were de-registered and re-registered. Other State agencies commented that the maximum 5-day time limit was administratively impossible for them to meet. One State agency commented that it could not quickly distinguish between those households that had left the Program and those that simply submitted late applications for recertification. The final rule (§ 273.7(c)) has been amended to provide that a reasonable timeframe shall be established through mutual agreement of the State agency and SESA's. In no event, however, shall the time limit established exceed thirty days from the date the change becomes known to the State agency.

Those two time limits, five days to submit work registration forms and up to thirty days to de-register household members, should not be construed as a means of improperly prolonging an individual's status as a work registrant. Persons who become exempt or leave the Program are no longer subject to the work registration requirement. Any delay in submitting the paperwork for

de-registration does not affect an individual's entitlement to an exemption. Permitting the time limit to be as long as thirty days should help to reduce the need for re-registration.

Paragraph 273.7(c)(3) has also been revised to require the State agency to inform the SESA when a household moves from the project area. As discussed under the heading *persons required to register*, moving to a new project area that is in a new SESA jurisdiction requires a new registration. To avoid confusion and duplication, it is necessary that the names of those who move be taken off the SESA's Employment Service Automated Reporting System (ESARS) until they register again. The paragraph also states when a registrant moves (either within the project area or to a new project area) but remains within the same SESA jurisdiction, the State agency shall notify SESA of the registrant's change of address.

State Employment Security Agency (SESA) Responsibilities

The majority of comments received on this portion of the proposed rule (§ 273.7(d)) were from State Employment Security Agencies. The commenters expressed concern regarding whether sufficient funds will be available to enable them to carry out the provisions of these regulations. Some commenters suggested that the regulations be more specific on the way funds will be allocated.

The requirements of these regulations are issued on the assumption that sufficient funds will be provided to the Department of Labor. Specific funding levels are dependent upon appropriations; arrangements are handled through an interagency letter of agreement. The Interagency Agreement will make clear that the responsibility of the Department of Labor to perform work registration and job search activities pursuant to the Food Stamp Act of 1977 does not extend beyond the funds made available for such purposes. Section 273.7(d) has been revised in the final rule to clarify the funding process.

Work Registration Plan. Many commenters addressed the matter of the Work Registration Plan. Questions were raised regarding the contents of the plan; responsibility for writing, reviewing and approving it; where the plan will be available for public inspection and monitoring the State agency's compliance with the plan. Paragraph (d) of § 273.7 has been rewritten to clarify that the SESA will have the primary responsibility for drafting the plan, although the State agency is a full partner in it. Part of the plan will be the agreements between the State agency and SESA at the State and local levels as to how each party will fulfill its respective requirements. This agreement will contain the specific procedures the agencies will use to deal with one another.

Although the Department of Labor's regional office will have primary responsibility for approval of the Plan, the Plan will be submitted to the FNS Regional office for review and comment. The final rule also contains a provision that the State agency and the SESA will review their plan yearly and make any necessary changes. This is seen as an appropriate way to take into account changes in the resources each agency has to meet its requirements. The yearly review will also be a means of correcting any problems that have arisen due to changes in the labor market, conflicting demands on the two agencies, and changes in the Food Stamp Program. In addition, the Plan will be available for public inspection at State agency headquarters.

There were many comments on the interviewing responsibilities and procedures of the SESA. The paragraph dealing with scheduling interviews (§ 273.7(d)(2)(ii)) has been clarified to allow the State agency to schedule a participant's appointment with the SESA, subject to the SESA's approval. The proposed rule called for the SESA to conduct the initial assessment interview within two weeks of the date it receives a participant's work registration form. While we continue to expect that the two week standard will be met in most cases, we do recognize that SESA's may not always be able to meet the standard. SESA's are responsible for providing employment services to a variety of clients, including WIN participants and UI claimants. In the event a local area were hit by a strike, a layoff, or the closing of a major factory, the SESA could not be expected to meet both that emergency and the normal requirements of its regular work. Therefore, the final rule states that the initial assessment interview will normally take place within two weeks.

There was some confusion over what services the SESA would provide to work registrants. The proposed rule listed a number of these services: referrals, counseling, testing and training. In addition, the SESA would provide job market information to registrants. We did not intend to imply that all registrants will receive all these services. Rather, registrants will receive the services which are most appropriate for them, as would any persons seeking the SESA's assistance in finding a job.

Many commenters opposed the automatic entry of registrants into the ESARS (§ 273.7(d)(2)). These commenters wanted certain households excluded from ESARS: registrants who have requested fair hearings, registrants whose nonexempt status is being questioned by SESA, and all registrants until the initial assessment interview is held. These suggestions have not been adopted, since ESARS is the main recordkeeping instrument of work registration. SESA's will be reimbursed by the Department of Labor according to the number of household members registered and the number placed in jobs. ESARS will maintain the records necessary to justify these reimbursements. It is ESARS which will maintain information on all work registrants for purposes of referral to jobs, something separate from the job search provision's assessment interview. Even a household member who requests a fair hearing must be retained in ESARS, since that household member will remain registered and subject to the work registration requirements.

Because the Food Stamp Program has specific standards for providing bilingual services there were many comments received on this subject. The final rules do not apply the food stamp bilingual standards to SESA's. The food stamp standards (7 CFR 272.4) were designed specifically for food stamp offices to provide services to households that are eligible for food stamps. The SESA's, which serve a broader target population and have different service areas, have their own bilingual standards. These standards are based upon the needs of SESA clients, and should provide bilingual services to a large number of food stamp participants in need of these services. In any event, no households will be penalized for their inability to speak English.

Job Search Provisions

The majority of interested parties commenting on this portion of the proposed regulations (§ 273.7(e)) were public interest groups and SESA's (Section 273.3(e) of the proposed rule is redesignated as § 273.7(f) in the final rule.)

Public interest groups mainly recommended exemptions from job search for certain individuals, or groups of individuals. State employment agencies wanted more flexibility in handling job searches. State welfare agencies and State employment agencies alike expressed a general concern of the applicability of the job search regulations when the registrant's

household was certified for short periods of time (one and two months).

Length of Job Search Period, Number of Job Contacts, and Number of Follow-up Interviews. Under the Food Stamp Act of 1977, persons required to register for work must do so every six months. The proposed regulations specified that within the six-month registration period persons considered job-ready would search for employment for 8 weeks.

Two principal issues arose regarding the job search period. Several commenters recommended that the job search period be changed to eight weeks in a year to conform with Public Law 96-258 (the 1980 amendments to the Social Security Act). The provisions of Public Law 96-258 were signed into law only shortly before publication of the proposed rules in the **Federal Register**, and had not been considered in developing the proposed rules. P.L. 96-258 represented the first time Congress has spoken to what it regards as an appropriate duration for job search in a public assistance program.

Public Law 96-258 amended the Social Security Act to provide that persons must search for employment as a condition of eligibility for benefits under the Aid to Families With Dependent Children (AFDC) Program. The length of the job search period for AFDC's Work Incentive Program (WIN) was mandated in that law to be no more than eight weeks in a year.

This law is particularly significant to the development of these final rules because of the requirement in section 6 of the Food Stamp Act of 1977 that food stamp work requirements be patterned on WIN requirements "to the maximum extent practicable."

A second issue that arose concerned how to handle work registrants who either become exempt from work registration for a period of time or leave the Food Stamp Program altogether for a period, but who subsequently become food stamp work registrants again several months later. Persons who have intermittent employment can easily fit into such a category. Under the proposed rules, the SESA would have had to monitor and keep records on the exact portions of the eight week requirement served each time such a person was a work registrant to determine how much of the requirement still existed if the person became a registrant again within the six month period. Given that large numbers of work registrants have short food stamp certification periods, and that a number of these persons may go on and off the program as short-term employment ends and then begins again, the tracking requirements could prove a significant problem for SESAs.

The final rules address both of these issues. The rules specify that registrants shall be subject to the eight week job search requirement each time they are newly added to ESARS (which occurs after losing a work registration exemption or reentering the Food Stamp Program after a period of absence), or each twelve months, whichever occurs first. This modification both reduces paperwork and administrative burdens on SESA's while providing for consistency with the WIN requirements to the degree practicable.

This approach can result in more job search activity for persons who, during the course of a year, leave and then return to the Food Stamp Program due to periods of intermittent employment. Such persons are generally job-ready and may resume employnent more quickly if active job search activity is undertaken. On the other hand, the SESA may determine that an immediate resumption of job search activity may not be productive and can modify the job search requirements accordingly. In order to maintain a maximum level of cost effectiveness and to target SESA resources where they will be most productive, the rules allow the SESA to take into account the amount of job search a registrant has already undertaken during the year, and the likely impact of additional job search activity, in assigning new job search requirements.

Persons who remain continuously on the program (and remain continuously in ESARS) would not be subject to a new eight week job search requirement at the time of their routine semi-annual reregistration. Such persons could, of course, have some or all of their annual eight week job search requirement still to serve at the time of their reregistration.

The final rules also allow the SESA some flexibility in determining how the eight week job search period would be applied. A single continuous eight week period would be simple to administer, but might not always expose participants to the labor market at the time that jobs are most readily available. Accordingly, the final rules allow SESA to divide the eight week job search into two separate blocks of time. For example, if the SESA determined that two one month job search periods spaced six months apart were most appropriate for a particular registrant, the SESA could implement the requirement in this fashion. In addition, the SESA could suspend a job search period and then resume it later if factory closings or other circumstances made it likely that the job search period would be more productive at a subsequent point in time.

Some State employment agencies raised concerns about requiring from 8 to 24 job contacts, as had been proposed. These agencies preferred more flexibility in these areas. Some employment agencies commented that in some small towns and rural areas, there were an insufficient number of employers to justify the number of job contacts. These agencies stated that if employers who list jobs with SESA's were flooded with contacts by large numbers of recipients rather than by a smaller number of applicants carefully screened by SESA, that these employers might cease listing jobs with SESA. If that occurred, fewer recipients would end up being placed and the purpose of the work requirements would be thwarted.

The rules were not intended to subject employers to an unnecessary stream of applicants. At the same time, this problem should generally be limited to rural areas with few employers. These areas also contain only a small portion of the food stamp caseload. The final rules resolve this problem by removing the requirement for a minimum number of contacts, so that the SESA can take into account local employment conditions. The upper limit of 24 contacts has been retained.

Some commenters asked that the number of required contacts be derived through a mathematical formula based on the local unemployment rate. This would be administratively impractical since unemployment rates fluctuate frequently. It would not account for registrants' varying circumstances and would not necessarily guarantee equity. This suggestion has not been adopted.

Job Search Categorization. Comments received on this section of the proposed job search provisions were mainly from public interest groups. One concern was that the proposed language specifying what circumstances would result in a registrant being determined non-job ready (Category II) was too vague. These commenters asked for more precise definitions of "transportation difficulties", "family problems", "intermittent medical problems", etc. The commenters also recommended that lack of education or training, language difficulties, and mental or emotional problems should be added to the general criteria for determining Category II registrants.

With the exception of problems posed when registrants do not speak English, the Departments determined that these additional circumstances should not be added as criteria resulting in a

classification as "non-job ready." These additional circumstances do not warrant an across-the-board (as opposed to a case-by-case) application that necessarily results in a non-job ready classification.

The final rules do, however, include language difficulties among the criteria used to determine a registrant's job search categorization. This does not mean that non-English speaking persons are necessarily placed in Category II or III. There are many areas of the country in which a non-English speaking person can readily communicate with potential employers. This criterion only applies where language actually is a barrier to gaining employment.

Several organizations working with migrant farmworkers, as well as some State employment agencies and a religious organization, recommended including migrant and seasonal farmworkers in Category III. The final rules adopt this recommendation, but only for those households away from their home base and moving with the work stream. Persons traveling hundreds or thousands of miles with the migrant stream are clearly engaging in a job search of their own. A requirement for formal contact and reporting to SESA would burden both these households and SESA offices while not serving to increase chances of employment. Lack of transportation and long distances in the rural areas where instream migrants reside would often, in themselves, qualify these persons for Category III status.

Searching for other work could also adversely affect a migrant family's housing situation, if the family is living in housing provided by a grower during a slow work period.

In order to implement this provision efficiently, the final rules require State agencies to note migrant status on the work registration form before forwarding it to the SESA office. This will avoid placing burdens on both SESA and migrants that would result if migrants were called in for an assessment interview just to classify them in Category III.

The work registration section of the final rules also provides clarification sought by some commenters on when migrants must register for work. The rules specify that migrants who are under contract or similar agreement to begin full-time employment within 30 days are considered exempt from work registration, while migrants who do not have such a work agreement and are not otherwise exempt must register.

Many commenters also sought an exemption for persons where the unemployment rate is above a specified percentage or above the national average. This recommendation has not been accepted. Its adoption could mean exemption of a significant number of persons in high unemployment areas, even though there may be some potential employers in the areas. In addition, this recommendation would be difficult to administer as the formula would have to be adjusted when unemployment rates fluctuated.

Failure to Comply

A number of commenters urged that the noncomplying member, rather than the entire household, be disqualified if the work registration or job search requirements are not complied with. The Food Stamp Act of 1977 is explicit in its disqualification of the entire household and this provision remains in the final rule.

Some public interest organizations commented that a representative from the State employment agency should be required to attend fair hearings involving a SESA determination of noncompliance with work requirements.

The Departments agree that SESA should be represented at fair hearings. However, § 273.7(g)(1) clarifies that such representation normally need not be in person. The regulations permit representation of SESA by phone. The number of food stamp offices in many areas are greater than the number of SESA offices. A requirement for a SESA representative to appear in person could require SESA officials to travel long distances at some expense. There may be unusual circumstances where the hearing official determines at the hearing, after examining the case and pursuant to a request by the household for SESA to be represented in person, that a proper decision cannot be reached unless a SESA representative is present in person at the hearing. In such circumstances, the hearing would be adjourned and rescheduled for a later time at which SESA could be represented in person. The number of cases in which a hearing official finds it necessary to make such a determination should be very small, and there should be no appreciable impact on SESA's from this provision.

The Program's general fair hearing regulations provide recipients the right to confront and cross-examine adverse witnesses. The purpose of the new provision is to maintain this important procedural right where the recipient believes its use to be necessary in the presentation of its case, and the hearing official determines that a factual issue exists regarding matters peculiarly within the knowledge of SESA and that fairness requires that the recipient be given the right to confront the SESA representative face to face. At the same time, the rule will minimize unnecessary expenditures of time and funds where the presence of a SESA representative at the hearing would serve no useful purpose.

Some commenters asked for clarification on whether a household could appeal any action by SESA through the State agency fair hearing process. A number of commenters sought assurance that any action affecting a household's participation in the program could be appealed.

The Food Stamp Act of 1977 and regulations issued to implement it specify that a household is entitled to a fair hearing to appeal any action by the State agency that may adversely affect a household's participation. This is a basic due process right. Therefore, any action by SESA that results in a State agency action which the household wishes to contest may be appealed through a fair hearing.

However, the appeal is taken in response to the State agency action. The fair hearing cannot be requested prior to notification to the State agency by SESA of a registrant's failure to comply, because the State agency has not itself acted at that point. When SESA informs the State agency of a failure to comply and the State agency acts to disqualify the household, the household may request a fair hearing. The decision of the hearing official would be binding on both the State agency and SESA. It could result in a reversal of a SESA determination in some cases (such as a SESA decision to place a registrant in a particular job search category or a SESA determinaton that a registrant had not made the requisite number of job contacts).

Registrants may secure more rapid action through a SESA review of a SESA determination such as a job search classification. This may serve to resolve some disputes quickly and reduce the number of instances in which formal fair hearing are needed.

Determining Good Cause

Commenters generally supported this portion of the proposed rule (§ 273.7(h)), and it remains essentially unchanged. Clarification is added to indicate that inability to speak or write English could in certain instances constitute good cause if such inability was responsible for the noncompliance. (Section 273.7(h) of the proposed rule is redesignated as § 273.7(m) in this final rule.)

Ending Disqualification

The proposed rules (§ 273.7(i)) specified that if a household member

fails to appear at SESA for an assessment or follow-up interview or fails to make the required number of job search contacts, the entire household is disqualified. The proposed rules maintained the disqualification regardless of whether the noncomplying household member subsequently took the action he or she had failed to take before. In other words, no "cure" provision was provided under which the disqualification would end if the noncomplaint member appeared for an interview or completed the required job search contacts.

A number of commenters objected to this policy, arguing that a "cure" provision should be provided, especially since the entire household and not just the noncomplying member is disqualified. However, the Departments believe that lack of a cure provision makes these requirements more effective and gives them more enforcement power.

Therefore, these comments have not been adopted. Households containing a member who fails to comply with the requirements of appearing for an interview or completing the requisite number of job contacts shall be barred from the program for the full duration of the disqualification period unless the noncompliant member becomes exempt from the work requirements during this time.

A number of commenters also suggested modification of procedues governing disqualification of a household containing a member who has voluntarily quit a job. The Commenters felt that if the household member who quit the job subsequently resumed employment during the disqualification period, the disqualification should end at that point. However, the Departments believe that Congress intended that the voluntary quit disqualification period not be subject to being shortened for any reason and have not made this change.

The final rules do clarify what happens if the composition of a disqualified household changes. (Section 273.7(i) of the proposed rule is redesignatd as § 273.7(h) in this final rule.)

Accordingly 7 CFR Parts 272 and 273 are amended as follows:

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

7 CFR Part 272 is being amended as follows:

1. In § 272.1, a new paragraph (26) is added to paragraph (g) in numerical order to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

* * * * *

(26) *Amendment No. 165.* State welfare agencies and State employment agencies shall implement the provisions of amendment 165 no later than the first of the month following 120 days from publication of amendment 165 in the **Federal Register** as follows:

(i) Both agencies shall begin immediately to develop the work registration plan and agreements discussed in § 273.7(c) and (d) of amendment 165. The plan and agreements must be approved and implemented within the 120 day timeframe established for implementation of all provisions of the final rule.

(ii) The provisions of amendment 165 shall be applied to households at the time of initial application, recertification, or reregistration, beginning no later than the first of the month following 120 days from publication of the amendment.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

7 CFR Part 273 is being amended as follows:

2. In § 273.1(f), paragraph (1)(i) is revised as follows:

§ 273.1 Application processing.

* * * * *

(f) * * *

(1) * * *

(i) *Making application for the program.* When the head of the household or the spouse cannot make application, another household member may apply or an adult nonhousehold member may be designated as the authorized representative for that purpose. The head of the household or the spouse should prepare or review the application whenever possible, even though another household member or the authorized representative will actually be interviewed. In conjunction with these provisions, another household member, or the household's authorized representative, may complete work registration forms for those household members required to register for work. The State agency shall inform the household that the household will be held liable for any overissuance which results from erroneous information given by the authorized representative, except as provided in § 273.11(e)(6). Adults who are non-household members may be designated as authorized representatives for certification purposes only under the following conditions:

(A) The authorized representative has been designated in writing by the head of the household, or the spouse, or another responsible member of the household; and

(B) The authorized representative is an adult who is sufficiently aware of relevant household circumstances.

* * * * *

3. In § 273.7, paragraph (a) is revised to read as follows:

§ 273.7 Work registration requirements.

(a) *Persons required to register.* The State agency shall determine which household members are required to register for employment. Each household member who is not exempt by paragraph (b)(1) of this section shall be registered for employment at the time of application, and once every six months after initial registration, as a condition of eligibility. Registrants who move out of a project area shall reregister at their new location unless the registrant's new address is within the same SESA jurisdiction (in which case the State agency shall notify SESA of the registrant's change in address). Under the provisions of § 273.1(f)(1), the registration form need not be completed by the member required to register.

* * * * *

4. In § 273.7(b), the number "(1)" is added after the word *"registration"*, in the heading, and before the word "The". Paragraphs (b)(1) through (b)(9) are redesignated as paragraphs (b)(1)(i) through (b)(1)(ix), respectively. Newly redesignated paragraphs (b)(1)(iii), (b)(1)(vi), (b)(1)(viii) and (b)(1)(ix) are revised, and a new paragraph (b)(2) is added. The revisions and addition read as follows:

* * * * *

(b) *Exemptions from work registration.*

(1) * * *

(iii) A household member subject to and participating in the work incentive program (WIN) under Title IV of the Social Security Act. If the exemption claimed is questionable, the State agency shall be responsible for verifying the exemption.

* * * * *

(vi) A person is in receipt of unemployment compensation. A person who has applied for, but has not yet begun to receive, unemployment compensation shall also be exempt if that person was required to register for work with the SESA as part of the unemployment compensation application process. If the exemption claimed is questionable, the State

agency shall be responsible for verifying the exemption with the appropriate office of the SESA.

* * * * *

(viii) A person who is employed or self-employed and working a minimum of 30 hours weekly or receiving weekly earnings at least equal to the Federal minimum wage multiplied by 30 hours. This shall include migrant and seasonal farmworkers who are under contract or similar agreement with an employer or crew chief to begin employment within 30 days (although this shall not prevent individuals from seeking additional services from SESA). For work registration purposes, a person residing in certain designated areas of Alaska, as specified in § 274.10(e), who subsistence hunts and/or fishes a minimum of 30 hours weekly shall be considered exempt as self-employed.

(ix) A student enrolled at least half time in any recognized school, training program, or institution of higher education. A student enrolled in a school, training program or institution of higher education shall remain exempt during normal periods of class attendance, vacation and recess, unless the student graduates, is suspended or expelled, drops out, or does not intend to register for the next normal school term (excluding summer school). Persons who are not enrolled at least half time or who experience a break in enrollment status due to graduation, expulsion, or suspension, or who drop out or otherwise do not intend to return to school, shall not be considered students for the purpose of qualifying for this exemption.

(2)(i) Persons losing exemption status due to any change in circumstances that is subject to the reporting requirements of § 273.12 (such as a loss of employment that also results in a loss in income of more than $25 a month, or departure from the household of the sole dependent child for whom an otherwise nonexempt household member was caring) shall register for employment when the change is reported. If the change is reported in person by the household member required to register, the person shall complete the work registration form at the time the change is reported, unless this is not possible, in which case the household member shall return the form to the State agency within 10 days. If the change is reported in person by a household member other than the member required to register, the person reporting the change may complete the form at the time the change is being reported or deliver the form to the member required to register. If the change is reported by phone or through the mail, the State agency shall be responsible for providing the participant with a work registration form. Participants shall be responsible for returning the form to the State agency within 10 calendar days from either the date the form was handed to the household member reporting the change in person, or the date the State agency mailed the form. If the household fails to return the form, the State agency shall issue a notice of adverse action stating that the household is being terminated, but that the household can avoid termination by returning the form.

(ii) Those persons who lose their exemption due to a change in circumstances that is not subject to the reporting requirements of § 273.12 shall register for employment at their household's next recertification.

* * * * *

5. In § 273.7, paragraph (c), Voluntary quit, is redesignated as (n) and a new paragraph (c) is added. Additionally, in the newly designated paragraph (n)(3), the reference to § 273.7(g) is changed to refer to § 273.7(m). The addition reads as follows:

* * * * *

(c) *State agency responsibilities.* (1) The State agency shall participate with the SESA in the development of a State Work Registration Plan and in annually reviewing and updating the plan, as prescribed under paragraph (d) of this section. The Plan/agreements (including annual updates) shall be submitted to the FNS Regional Office for review and comment. The Plan and agreements shall be available for public inspection at the State agency headquarters.

(2) Upon reaching a determination that an applicant or a member of the applicant's household is required to register, the State agency shall explain to the applicant the work registration and job search requirements, his or her rights and responsibilities, and the consequences of failure to comply. The State agency shall provide work registration forms to the applicant for each household member required to register for employment, and permit the applicant to complete the form for those members in accordance with paragraph (a) of this section. Household members are considered to have registered when an identifiable work registration form is submitted to the State agency. An identifiable form shall contain those items necessary for partial entry into the Employment Service Automated Reporting System (ESARS): the applicant's name, address, phone number, social security number (or some other identifying number when a social security number is not available), the expiration date of the household's certification period, an indication of exemption from job search, and any other information agreed upon by the State agency and SESA in their operating agreements. The State agency and SESA must agree before any information in the last category can be specifically required. If the registrant is an instream migrant and seasonal farmworker, or if the State agency knows that the registrant would otherwise be exempt from job search under the provisions of paragraph (f)(1)(ii)(c) of this section, the State agency shall also indicate this on the registration form. The State agency shall not forward work registration forms to SESA until the household is certified, so that SESA will not have to expend unnecessary efforts on applicants who are subsequently denied rather than certified for food stamps. No later than five days after the date of household certification, the State agency shall forward the completed work registration form to the SESA having jurisdiction over the area where the registrant resides.

(3) The State agency shall be responsible for notifying the appropriate SESA of those work registrants who become exempt from the work registration requirement subsequent to registration, are no longer certified for participation in the Program, or move from the area. Such notification shall be provided to the SESA within a reasonable timeframe established and agreed on by both agencies, but not to exceed 30 days from the date the change becomes known to the State agency. The State agency shall also notify SESA promptly of a change in address if the State agency becomes aware that a work registrant has moved from one location to another within the same SESA jurisdiction.

* * * * *

6. In § 273.7, paragraph (d), which was previously reserved for *Job Search*, is used for a new paragraph, *State Employment Security Agency (SESA) responsibilities*, to read as follows:

* * * * *

(d) *State Employment Security Agency (SESA) responsibilities.* (1) *Funding.* Each SESA shall participate in the work registration and job search activities for food stamp registrants to the extent that the funds necessary for proper and efficient administration are made available. Each year the Employment and Training Administration of the Department of Labor and FNS will negotiate funding levels based on available appropriations and on agreed upon projections of

workload levels and the types of services to be provided. These funding levels will be included in an interagency agreement between the U.S. Department of Agriculture and the Department of Labor regarding the administration and operation of the work registration provisions of the Food Stamp Act of 1977.

(2) *Development of Plans/agreements.* The SESA shall have primary responsibility for developing with the State agency a Work Registration Plan. The Plan shall set forth workload projections, staffing, and other information requested by the Departments. It shall also include the specific operational agreements developed by the State agency and the SESA at the State and local levels in meeting the requirements of this section. Such plan and agreements shall be annually reviewed by the State agency and the SESA and updated as appropriate. Additionally, the Plans/agreements (including annual updates) shall be submitted to the DOL Regional Office for review and approval.

(3) *Other responsibilities.* Following receipt of the work registration form from the State agency the SESA shall be responsible for taking the following actions:

(i) Entering the information from the work registration form into the Employment Service Automated Reporting System (ESARS).

(ii) Scheduling work registrants for interview appointments with the exception that those persons who would be exempt from job search, as defined in § 273.7(f)(1)(ii)(c) of this section, shall not be required to report for such an interview. The SESA shall send the registrant a letter informing the registrant of the date of the interview, that appearance for an interview at SESA is a condition of participation in the food stamp program, and how the registrant can contact SESA to reschedule the interview if necessary. Such interview shall normally be scheduled to occur within 2 weeks of the date the work registration form reaches the SESA. If the work registrant fails to appear for the first interview and has not contacted SESA in advance to reschedule the initial interview, the SESA shall send a second letter scheduling another interview to occur within the next two weeks. This letter shall inform the registrant of the date of the rescheduled interview, explain to the registrant that this is SESA's last attempt to schedule the interview and the consequences of failing to appear for the rescheduled interview appointment without good cause, and the procedures for the household to contact the SESA if the rescheduled interview cannot be attended by the work registrant for good cause. SESA and the State agency may establish alternative methods for scheduling or rescheduling interviews (such as allowing the State agency to schedule a participant's appointment with the SESA) so long as the registrant is contacted and afforded an opportunity to reschedule a missed interview and the time frames established above are met.

(iii) Interviewing work registrants for potential job placement. At the time of the interview, the SESA will complete the work registration form if needed information on the work registrant's past experience or skills is missing. The SESA shall attempt to match the work registrant with an available job opening. If the work registrant has specific counselling or testing needs, the services shall be provided in the same manner in which they are provided to all persons seeking employment assistance through the SESA. If the SESA finds that the work registrant has training needs, and knows of services such as CETA or the Job Corps which could meet these needs, the work registrant shall be directed to those services, if available. SESA will provide the work registrant with job market information (such as a list of available job opportunities) and referrals to available employment in the same manner that such services are provided to all persons seeking employment assistance through the SESA.

(iv) If the State agency has required an individual to register for work and the SESA disagrees, the SESA shall request the State agency to reconsider its determination. The State agency's response will be accepted by the SESA as final. If the State agency reverses its decision or does not respond to the request within 30 days, the SESA shall inactivate the registrant from ESARS.

(v) Establishing and maintaining the job search requirements established in § 273.7(f) of this section, administering the job search requirement, and assisting the work registrant in conducting his or her job search.

(vi) Attempting to match work registrants with available job openings at the time of the work registrant's initial and subsequent visits to the SESA and on a continuing basis.

(vii) Reporting to the State agency both on work registrants who fail to comply, without good cause, with either the job search requirements established in § 273.8(f) or the additional work requirements established in § 273.7(e), and on those registrants who obtain employment. The SESA shall notify the State agency within five working days of the date such information becomes known to the SESA.

7. In § 273.7, paragraph (g) is redesignated as paragraph (m); paragraph (f), Failure to comply, is redesignated as paragraph (g) and is revised. A new paragraph (f), *Job Search*, is added. The revision and addition read as follows:

* * * * *

(f) *Job Search.* Persons required to register for work shall be subject to the appropriate job search requirements discussed below. The appropriate requirement shall be established at the time of the initial assessment interview with SESA and at each subsequent interview. If it is known, or the SESA determines from available information that the work registrant would be exempt from actively engaging in a job search based on the criteria established in paragraph (f)(1) (ii)(c) of this section, no assessment interview will be required. Failure to comply with the job search requirements, without good cause, shall result in household disqualification as established in paragraph (g) of this section.

(1) *Job Search Assignment.* (i) During the initial assessment interview, the SESA shall determine the job search category of each work registrant. The SESA shall provide to each registrant written notification regarding his or her job search requirements, procedures to be followed, and the consequences of failure to comply.

(ii) Based on the capabilities and characteristics of the participant, including his or her age, physical condition, ability or inability to speak English, current enrollment in job training programs, and recent employment history, as well as the job market situation in the area, the SESA shall put each work registrant into one of the followng categories:

(A) *Category I—Job ready.* Those work registrants that have no apparent substantial barriers to employment.

(B) *Category II—Non-job ready.* Those work registrants with substantial barriers to employment, e.g., medical, transportation, language, or family problems, that alone or in conjunction with adverse labor market conditions, would make them difficult to place. Transportation problems shall include the unavailability on a regular basis of either private or public transportation or the minimum financial resources necessary to obtain available public transportation. Job attached persons, e.g., those on temporary layoff or those expecting to return to work within 60 day, shall be placed in this category for 60 days from the date of initial

registration. At the end of the 60 days period, job attached persons, if still unemployed, may be recategorized as appropriate.

(C) *Category III—Exempt.* Those work registrants for whom a job search is determined to be impractical, specifically including those individuals residing an unreasonable distance from the appropriate SESA office or potential employers (a distance shall be considered unreasonable if the round trip exceeds 2 hours by reasonably available public or private transportation), and migrant and seasonal farmworkers away from their home base and following the work stream. SESA's must insure that migrant and seasonal farmworkers are offered all services described in Subpart B of 20 CFR Part 653. The SESA determination of exempt status shall be made at the time the work registration form is received from the State agency to preclude the need of such persons to travel to the SESA for an assessment interview, unless it is impossible for the SESA to determine exempt status from the form for a particular registrant. The SESA office should be able to determine from the form those work registrants who are exempt because of distance, as the registrant's address is contained on the form. In addition, State agencies are required to note the status of instream migrant or seasonal farmworkers on the form, and also to indicate on the form whenever the State agency knows that an exemption would apply for any other reason. FNS and the Department of Labor may also jointly establish general exemptions for residents of certain areas or certain groups if, due to geographic or economic characteristics or similar reasons, application of the job search requirements is determined impracticable. For example, exemptions could be provided for residents of all or part of an Indian reservation where there are few job opportunities within reasonable distance, or for an area with an extremely high unemployment rate and a virtual absence of employment opportunities. Requests for such general exemptions may originate with the local or State level SESA or State agency, or from other knowledgeable sources (such as an Indian tribal organization).

(2) *Requirements.* (i) Persons classified as Category I shall be subject to and must comply with the job search requirements discussed below for a period of eight weeks each time they are entered into ESARS (which occurs after losing a work registration exemption or reentering the food stamp program after a period of absence), or each twelve months, whichever occurs sooner. The SESA office may require either that the eight week period be one continuous period, or that it be divided into two separate job search periods that total eight weeks. For example, the SESA office might require a registrant to undertake two four-week job searches, with the second period following six months after the first. The SESA may schedule the job search period(s) at the time(s) it believes the job search would be most effective, taking into account job market conditions and the registrant's skills and experience. SESA may shorten or suspend the job search period if economic or personal circumstances warrant. The SESA could suspend a job search period and then resume it later if factory closings or other circumstances made it likely that the job search period would be more productive at a subsequent time. Registrants who remain continuously on the program are not subject to a new job search requirement at the time of semi-annual routine re-registration. These requirements are effective for 12 months starting with the month of initial registration and remain in effect until a registrant's information is removed from ESARS (inactivated), or the 12 months expire, whichever occurs first. Once a registrant is removed from ESARS, any new entry for that registrant into ESARS constitutes a new 12 month timeframe and a new job search activity of up to 8 weeks. If SESA is aware that a registrant has been entered into ESARS more than once in a 12-month period, the SESA shall consider the registrant's previous job search activity during the 12-month period, and the anticipated impact of additional job search, in determining the registrant's new job search requirements. Registrants subject to the job search requirements must take the following actions:

(A) Contact, as required by SESA, up to twenty-four prospective employers during the eight-week period. If the job search period is shortened, the number of required job contacts shall be reduced on a pro-rata basis, to the maximum extent practicable. A referral by SESA to an employer shall be considered a job contact for Food Stamp Program purposes, provided the registrant presents himself/herself to the employer as described in paragraph (f)(4) of this section.

(B) Twice during the eight-week job search period, report at a prescheduled time to the SESA on the result of all job contacts. If the eight-week job search activity is divided into two separate periods, SESA may require the registrant to report once during each period of job search activity. Job contacts shall be reported in written form as discussed in paragraph (f)(5) of this section. At the time of each subsequent interview, as discussed in paragraph (f)(5), the SESA will be responsible for reviewing its files to determine if current referral possibilities exist.

(ii) Work registrants classified as Category II will not be assigned any specific job search activity. Job attached persons who have not returned to their jobs or otherwise become exempt from the work registration requirement may be called in for reassessment at the end of sixty days. Other persons may be called in by the SESA during the six-month registration period. During subsequent interviews, job files will be reviewed for potential referrals, and the job search categorization of such individuals will be reassessed.

(iii) Work registrants classified as Category III will not be required to fulfill job search requirements until such time as that classification as Category III is no longer applicable and the work registrant is reclassified into an active job search category.

(3) *Follow-up activities.* (i) At the time of the initial assessment interview with the work registrant, the SESA will establish a schedule for two follow-up interviews over the job search period for Category I registrants. SESA may reduce the number of follow-up interviews to one for Category I registrants when the job search period and number of job contacts are reduced. Such schedules shall be documented and provided in written form to the work registrant. Category II registrants will be informed that they may be contacted either within the six-month registration period or in 60 days if they are job attached. If the work registrant fails to report for the follow-up interview for any reason, and has not contacted SESA in advance to reschedule the interview, the SESA shall contact the work registrant by letter to schedule another interview within the next two weeks. The letter shall inform the registrant of the date of the rescheduled interview, explain to the registrant the consequences of failing to appear for the rescheduled interview without good cause, and provide procedures for contacting the SESA if the rescheduled interview cannot be attended by the work registrant for good cause. If the work registrant fails to report to the rescheduled intervjew, without good cause, the State agency shall be notified of the failure within five working days of the date of the failure. Follow-up interviews will normally consist of in-person interviews at the SESA office, but SESA may make alternate arrangements where necessary

(for example, SESA could conduct a follow-up interview by telephone and direct the registrant to mail its report on job contacts to SESA if roads are impassable due to snow).

(ii) At the time of each follow-up interview, the SESA shall review the job contacts made by the work registrant, review job listings for potential referrals, and assist the work registrant in establishing his or her future plans for seeking employment.

(4) *Job contact.* To qualify as a job contact, two conditions must be met. First, the work registrant must present himself or herself to a prospective employer as available for work. Second, the prospective employer must ordinarily employ persons in areas of work that meet the suitability requirements discussed in paragraph (i) of this section and for which the work registrant is reasonably qualified by means of experience, training or ability. Depending upon the position being sought, the job contact requirement may be fulfilled by either a personal visit to the prospective employer or another method of application which is considered by the SESA to be generally accepted practice. The work registrant cannot contact the same employer in subsequent weeks unless the initial contact indicated that vacancies in suitable job positions may soon exist.

(5) *Reporting Job Contacts.* (i) Job contacts shall be reported in writing in a manner prescribed by the SESA. At the time of the initial interview with the SESA, the work registrant shall be told about the manner of reporting. While such reporting will not require the employer's written confirmation of the job contact, the work registrant shall be required to sign the written documentation to attest to its validity. The written report shall be submitted to the SESA at the time of the work registrant's follow-up interviews.

(ii) The work registrant shall be responsible for providing the SESA, upon reasonable request, any additional information regarding job contacts.

(iii) At the end of the job search period, the SESA shall determine if the work registrant has completed the assigned number of job contacts. If the work registrant was assigned a continuous job search period of less than 8 weeks, the registrant shall have two additional weeks to complete any missed contacts. If the work registrant was assigned a single continuous 8-week job search period, no additional time shall be allowed unless the SESA fails to accept, for reasons such as suitability or manner of contact, a job contact(s) reported by the registrant. In such instances, the work registrant shall be allowed an additional two weeks to make-up the disallowed contact(s). Persons failing to complete the required number of job contacts with good cause shall be excused from completion of the job search requirements.

(6) *SESA review.* If a work registrant believes that a SESA determination is improper, review of the determination may be obtained from a designated SESA official not involved in the original determination. For example, if the work registrant believes he or she has been improperly assigned to a job search category or assigned an improper number of job search contacts, or that an action which should have been counted as a contact was not, a review may be obtained. This would also apply to a SESA determination that noncompliance was not for good cause.

(g) *Failure to comply.* If the State agency is informed by the SESA that a household member has refused or failed without good cause to comply with the requirements of this section, the entire household shall be ineligible to participate as provided in this paragraph. Such ineligibility shall continue until either the member complies with the requirement in paragraph (h) of this section, or the member becomes exempt, or for 2 months, whichever occurs earlier. Prior to informing the State agency of the registrant's noncompliance, the SESA shall be responsible for contacting the work registrant to determine if good cause existed, as discussed in paragraph (h) of this section. Within 10 days after the SESA provides notification of the work registrant's failure to comply with the requirements of this section, the State agency shall provide the household with a notice of adverse action, as specified in § 273.13. Such notification shall contain the proposed period of disqualification and shall specify that the household may reapply at the end of the disqualification period. Information shall also be included with the notification on the procedures and requirements contained in paragraph (h) of this section. The disqualification period shall begin with the first month following the expiration of the adverse notice period, unless a fair hearing is requested. Each household has a right to a fair hearing to appeal a denial, reduction, or termination of benefits due to a determination of nonexempt status, or a SESA determination of failure to comply with the work registration and job search requirements of this section. The household can appeal SESA actions such as the job search category assigned, the number of job search contacts required, SESA refusal to accept an action as a job search contact, or SESA refusal to make a finding of good cause, if the household believes that a finding that the household has failed to comply has resulted from improper decisions on these matters. If a fair hearing is scheduled, the State agency shall provide the SESA sufficient advance notice to either permit the attendance of a SESA representative or ensure that a SESA representative will be available for questioning over the phone during the hearing. SESA shall be available to participate in the hearing through one of these means. The availability of a SESA representative for questioning over the phone shall be sufficient, unless the hearing official determines at the hearing (after examining the facts of the case and pursuant to a request for such a ruling by the household) that, taking into account the nature of the issues in dispute and the nature and importance of the evidence to be given by the SESA representative, fairness requires that the household be given an opportunity to confront the SESA representative in person. Such a determination should be necessary in only a very small number of cases. If such a determination is made, the hearing shall be adjourned, and rescheduled for a time at which the SESA representative is able to attend. In such an event, the timeframes prescribed by § 273.15(c) for State agencies to render fair hearing decisions shall be extended for as many days as elapse between the original fair hearing and the rescheduled fair hearing. A household shall be allowed to examine its SESA casefile at a reasonable time before the date of the fair hearing, except for confidential information (which may include test results) that SESA determines should be protected from release. Information not released to a household may not be used by the State agency or SESA at the fair hearing. The results of the State agency fair hearing shall be binding on both the State and SESA.

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8. In § 273.7, paragraph (h) is amended by numbering the introductory paragraph as (h)(1), deleting existing paragraph (h)(2), redesignating existing paragraphs (h)(1), (h)(3), (h)(4), (h)(5), and (h)(6) as (h)(1)(i), (h)(1)(ii), (h)(1)(iii), (h)(1)(iv), and (h)(1)(v), respectively. Newly designated paragraphs (h)(1), (h)(1)(iv), and (h)(1)(v) are revised, and new paragraph (h)(2) is added. The revisions and additions read as follows:

* * * * *

(h) *Ending disqualification.* (1) Following the end of the 2-mounth disqualification period for

noncompliance with the work registration and/or job search provisions prescribed under paragraphs (a), (e), or (f) of this section, a household may resume participation in the program if it applies again and is determined eligible. Eligibility may be reestablished during a disqualification period and the household shall (if otherwise eligible) be permitted to resume participation if the member who caused the disqualification becomes exempt from the work requirement, is no longer a member of the household (although any new household containing this member shall be subject to disqualification for the remainder of the disqualification period), or the member complies as follows: * * *

(iv) Refusal to accept a bona fide offer of suitable employment to which referred by the SESA—acceptance of the employment if still available to the participant, or securing other employment which yields earnings per week equivalent to the refused job, or securing employment of at least 30 hours per week with weekly earnings equal to the Federal minimum wage multiplied by 30 hours.

(v) Refusal to continue suitable employment to which referred by the SESA—returning to this employment, if still available to the participant, or securing any other employment which yields earnings per week equivalent to the refused job, or securing any other employment of at least 30 hours per week or securing employment of less than 30 hours per week but with weekly earnings equal to the Federal minimum wage multiplied by 30 hours.

(2) Persons failing to comply initially with the job search requirements, i.e., the assessment interview, follow-up interviews, and job contacts, are provided with a second opportunity to comply by the procedures established in paragraph (f) of this section. If the work registrant fails to comply on the second opportunity, without good cause, and such failure results in disqualification, the disqualification of the household containing the work registrant may be ended only if the person who caused the disqualification becomes exempt from the work registration requirements or is no longer a member of the household (although any new household containing this person shall be subject to disqualification for the remainder of the disqualification period), or at the end of two months, whichever occurs earlier. This means, for example, that if the noncomplaint household member secures full-time employment and thereby becomes exempt from the work registration requirement before the two month disqualification period is over, the disqualification would end at that point.

* * * * *

9. In § 273.7, the heading of paragraph (k) and paragraph (k)(1) are revised to read as follows:

* * * * *

(k) *Registration of certain PA, GA, and refugee households.* (1) State agencies may request approval from FNS to substitute State or local procedures for work registration for PA households not subject to the WIN registration requirements or for GA households. Work requirements imposed on refugees participating in refugee resettlement programs including but not limited to the Indochinese Refugee Assistance Program may also be substituted, with FNS approval. To receive approval, it must be demonstrated that:

(i) The work registration procedures are at least equivalent to food stamp work registration requirements;

(ii) Registrants' activities are monitored so that appropriate sanctions as required by these regulations will be applied. However, if additional work requirements (beyond those required under this section) are placed on household members, a household's food stamp benefits shall not be denied for the failure of a household member to comply with a requirement that exceeds the requirements of this section. For example, if a State rule requires individuals to register for work through age 65, any individual 60 years of age or older who fails to comply shall not be denied food stamp benefits as a result of that failure;

(iii) All household members which are not exempt under paragraph (b)(1) are either registered for work under such Federal, State or local programs as described in this paragraph, or are registered for work as provided in paragraph (a) of this section.

* * * * *

10. In § 273.7, the newly redesignated paragraph (m), *Determining Good Cause*, (formerly paragraph (g)) is revised to read as follows:

* * * * *

(m) *Determining good cause.* The SESA shall be responsible for determining good cause in those instances where the work registrant has failed to comply with the additional work registration and job search requirements of this section. The State agency shall determine good cause in these cases where an applicant has voluntarily quit a job. The SESA and the State agency shall consider the facts and circumstances, including information submitted by the household member involved and the employer. Good cause shall include circumstances beyond the member's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, or the unavailability of transportation. Problems caused by inability of the work registrant to speak or write English could constitute good cause (for example, a registrant who could not read English would have good cause for not appearing for a SESA interview if the appointment notice was written only in English).

Note.—The reporting and recordkeeping requirements contained in this rule are being submitted for approval by the Office of Management and Budget (OMB) in accordance with the Federal Reports Act of 1942. The reporting and recordkeeping requirements may be subject to revision prior to implementation if the requirements as presently formulated are not approved without change by OMB.

(91 Stat. 958, as amended (7 U.S.C. 2011–2027)).

(Catalog of Federal Domestic Assistance Programs, No. 10.551, Food Stamp).

Dated: December 31, 1980.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services, U.S. Department of Agriculture.

Dated: January 12, 1981.

Ernest Green,

Assistant Secretary, U.S. Department of Labor.

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Part XXI

Department of Health and Human Services

Food and Drug Administration

Proposed Revision of Reclassification Procedures To Determine That Licensed Biological Products Are Safe, Effective, and Not Misbranded Under Prescribed, Recommended, or Suggested Conditions of Use

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 601

[Docket No. 80N-0523]

Reclassification Procedures to Determine That Licensed Biological Products are Safe, Effective, and Not Misbranded Under Prescribed, Recommended, or Suggested Conditions of Use; Proposed Revision

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) proposes to revise the existing regulations governing the review and classification of biological products and issue new regulations to reclassify Category IIIA biological products as either safe, effective, and not misbranded (Category I), or unsafe, ineffective, or misbranded (Category II). The agency further proposes to permit interim marketing pending completion of clinical studies of any biological product reclassifed into Category II for which there is a compelling medical need and no suitable alternative therapeutic, prophylactic, or diagnostic agent.

DATES: Comments by March 17, 1981; if a final rule based on this proposal is issued, the agency proposes that it become effective on the date of publication.

ADDRESS: Written comments to the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Albert Rothschild, Bureau of Biologics (HFB-620), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1306.

SUPPLEMENTARY INFORMATION:

I. General Background

In the **Federal Register** of February 13, 1973 (38 FR 4319), the Commissioner of Food and Drugs promulgated § 601.25 (21 CFR 601.25) which established procedures for the review of all biological products license prior to July, 1972. The propose of the biologics review was to determine whether the licenses for the biological products reviewed met contemporary standards of safety, purity, and potency (the statutory standard for licensing biological products under section 351 of the Public Health Service Act (42 U.S.C. 262)). The biologics review was also intended to determine whether the biological products reviewed are effective for their labeled uses and therefore not misbranded within the meaning of section 502(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 352(a)).

Under § 601.25, the Commissioner assigned responsibility for the initial review of all biological products licensed prior to 1972 to six independent advisory review panels consisting of non-FDA qualified experts. Each of the advisory review panels was assigned to review a specific category of biological products. These panel assignments were published in the **Federal Register** of June 19, 1974 (39 FR 21176). The six categories of biological products to which the panels were assigned are: (1) Bacterial vaccines and bacterial antigens with "no U.S. standards of potency," (2) bacterial vaccines and toxoids with "U.S. standards of potency," (3) viral and rickettsial vaccines, (4) allergenic extracts, (5) skin test antigens, and (6) blood and blood derivatives.

Each panel was charged with preparing an advisory report to the commissioner which was to: (1) Evaluate the safety and effectiveness of the biological product; (2) review the labeling of the biological product; and (3) advise the Commissioner on which biological products under review are safe, effective, and not misbranded. See § 601.25(e).

Each advisory review panel report is to include a statement classifying products into one of the three following categories:

1. Category I: Biological products determined by the panel to be safe, effective, and not misbranded. The panel's statement may include any condition relating to active components, labeling, tests required prior to release of batches, product standards, or other conditions necessary or appropriate for their safety and effectiveness. See § 601.25(e)(1).

2. Category II: Biological products determined by the panel to be unsafe, ineffective, or misbranded. See § 601.25(e)(2).

3. Category III: Biological products determined by the panel not to fall within either Category I or II because the available data are insufficient for classification and further testing is therefore required. See § 601.25(e)(3). These products fall into two subcategories:

a. Category IIIA: Biological products recommended for continued licensing, manufacturing, and marketing while questions raised concerning the products are being resolved by further study. This recommendation is based on an assessment of the present evidence of safety and effectiveness of the product and the potential benefits and risks likely to result from the continued use of the product for a limited period of time.

b. Category IIIB: Biological products that a panel recommends should not be marketed and should not be licensed for general use while further studies are undertaken.

After reviewing the conclusions and recommendations of an advisory review panel, FDA publishes a proposed order in the **Federal Register** containing: (1) A statement designating the biological products reviewed into Category I, II, IIIA or IIIB; (2) a statement of the conditions under which Category IIIA biological products can continue to be marketed; and (3) the complete panel report to FDA. See § 601.25(f). After reviewing comments addressed to the proposed order, the agency publishes a final order. See § 601.25(g).

The current status of the biologics review is as follows:

1. The Commissioner's final order on the report of the Panel on Review of Bacterial Vaccines and Bacterial Antigens with "no U.S. Standards of Potency" was published in the Federal **Register** of January 5, 1979 (44 FR 1544) and placed eight products in Category IIIA because of questions about their effectiveness (not safety). Of those eight Category IIIA products, only two are being marketed. The licenses for other products classified in Category IIIA by this panel have been revoked at the manufacturer's request. The testing recommended by the panel is under way for those Category IIIA products being marketed.

2. The Commissioner's final order on the report of the Skin Test Antigens Panel was published in the Federal **Register** of July 10, 1979 (44 FR 40284) and placed five biological products in Category IIIA because of questions about their effectiveness (not safety). Of those five Category IIIA products, only three are being marketed. The licenses for those other products classified in Category IIIA have been revoked at the manufacturers' request. The testing recommended by the panel is under way for those Category IIIA products being marketed.

3. FDA's proposed order on the report of the Panel on Review of Viral and Rickettsial Vaccines was published in the **Federal Register** of April 15, 1980 (45 FR 25652). In that proposal, five products were classified in Category IIIA. Only one of those five products was being marketed when the panel submitted its report and, in any event, all five product

licenses are now revoked at the manufacturers' request. See 21 CFR 601.5(b)(2).

4. The agency has yet to issue proposed orders for the reports of the Panels on Review of Bacterial Vaccines and Toxoids with "U.S. Standards of Potency" and the Review of Blood and Blood Derivatives. These Panels have submitted their final reports to FDA and these reports recommended that a small number of products reviewed by these Panels be placed in Category IIIA. (Copies of these reports have been placed on file with FDA's Dockets Management Branch.) FDA plans to issue proposed orders based on these panel reports prior to issuance of any final rule for reclassification of Category IIIA products.

5. The agency expects that the report of the Panel on Review of Allergenic Extracts will be completed in the near future. Discussions of the Panel at both open and closed sessions, and the Panel minutes indicate that the vast majority of allergenic products—more than 6,000 specific company products (about 1,800 generic products) were reviewed—will be placed in what is now designated as Category IIIA.

II. Health Research Group Petition to Eliminate Category IIIA

On February 19, 1980, Sidney Wolfe, M.D., Director of the Public Citizen Health Research Group (HRG), a consumer research and advocacy organization concerned with the safety and efficacy of drugs, filed a petition under 21 CFR 10.30 requesting that FDA begin procedures to remove from the market all biological products which have not been shown to be effective. (A copy of the HRG petition has been placed on file with FDA's Dockets Management Branch.) The petitioner expressed the opinion that the marketing of such products is inconsistent with two decisions of the United States District Court for the District of Columbia, *American Public Health Association* v. *Veneman*, 349 F. Supp. 1311 (D.D.C. 1972) and *Cutler* v. *Kennedy*, 475 F. Supp. 838 (D.D.C. 1979). Specifically, HRG requested that the Category IIIA designation of the biologics review be eliminated. In addition, HRG contended that biological products are subject to the new drug provisions of the act and that the standard for determining their effectiveness was that prescribed for new drugs, namely, "substantial evidence" consisting of "adequate and well-controlled clinical investigations * * *." 21 U.S.C. 355(e).

The Commissioner responded to the HRG petition on August 19, 1980. (A copy of the Commissioner's response has been placed on file with FDA's Dockets Management Branch.) In his response, the Commissioner stated that "While I do not agree with the petitioner's arguments as to the applicable law, I have nevertheless tentatively decided to amend the regulations governing the biologics review (21 CFR 601.25) and, as appropriate, establish new procedural regulations, in order to eliminate the Category IIIA designation and to proceed to either reaffirm or initiate proceedings to revoke affected licenses."

By letter dated August 26, 1980, HRG contended that the Commissioner's August 19, 1980 response was incomplete because it did not contain an explanation of why the agency had been unable to reach a final decision on the petition. The HRG letter further asserted that biological products are subject to the new drug provisions of the act, 21 U.S.C. 355.

In a response dated September 18, 1980, the Commissioner explained that the agency's August 19, 1980 response was appropriately denominated "tentative" because FDA had not made a final decision as to which procedures would be used to eliminate Category IIIA. (A copy of the Commissioner's September 18, 1980 response has been placed on file with FDA's Dockets Management Branch.)

The Commissioner's response also rejected HRG's legal argument that the new drug provisions of the act apply to biological products. The Commissioner explained that FDA regulations make clear that biological products have never been subject to the new drug provisions of the act. See 21 CFR 310.4 (1980). The Commissioner's response further stated that:

> While the agency has affirmed many times that biological products are drugs within the meaning of the act, they are not subject to the new drug provisions. Rather, biological products have been regulated for nearly 80 years under the Biologics Control Act of 1902, recodified in 1944 as § 351 of the Public Health Service Act, 42 U.S.C. 262. Like new drugs, biological products must be licensed before they can be marketed. However, the critiera for marketing biological products under § 351 of the Public Health Service Act are that they have been shown to be safe, pure, and potent. These differ from the statutory criteria for new drugs under the Federal Food, Drug, and Cosmetic Act. While it is clear that as drugs biological products are misbranded if they are not effective for their labeled uses, and that the applicable statutory requirement for potency in the Public Health Service Act has been interpreted as requiring that a product be effective, the specific statutory criteria governing new drugs, "adequate and well-controlled clinical studies," have not been applied to biological drugs. Compare 21 CFR 600.3(s) with 21 CFR Part 314.

Finally, the response stated that FDA would propose amendments to the biologics review regulations and/or new procedural regulations, as necessary, to eliminate the Category IIIA designation by or before December 31, 1980.

III. The Procedures For Reclassification of Category IIIA Biological Products into Category I or II

The Category IIIA designation reflects a determination that there are doubts about whether the data are sufficient to support an action by the agency to revoke a license and that, based on an assessment of the present evidence of safety and effectiveness of a product, the potential benefits outweigh the potential risks likely to result from continued use of a product for a limited period of time. See § 601.25(f)(3). The Category IIIA designation does not, however, reflect a finding that the biologics license for a product should be withdrawn because it does not meet the statutory standard for approval of a biologics license. To eliminate Category IIIA, the data for each Category IIIA biological product will therefore need to be reviewed again to determine whether the product should be classified in Category I or II. FDA believes that there may be products now classified in Category IIIA that can and should be reclassified into Category II and removed from the marketplace. FDA is therefore proposing to eliminate the Category IIIA designation from § 601.25 (by deleting § 601.25(e)(3), (f)(3) and (h)), and to establish procedures for the review and reclassification of all Category IIIA products. These procedures are analogous to the procedures established in § 601.25 for the 1972 biologics review (described above).

Under the proposed procedures, panels of non-FDA qualified experts would submit to the Commissioner a report containing the panel's conclusions and recommendations as to whether the Category IIIA products reviewed should be placed in Category I or II. The deliberations of the panels would be governed by § 601.25(c) and their final reports by § 601.25(e). (Sections 601.25 (c) and (d) govern the deliberations of the existing panels involved in the 1972 biologics review.)

The procedure for the Commissioner's consideration of panel recommendations and the issuance of proposed and final orders would be the same as the procedures currently followed as part of the biologics review. See § 601.25 (f) and (g).

As part of the reclassification process, the advisory review panels could recommend that a biological product reclassified into Category II should remain on the market pending the completion of further clinical studies, if the panel finds that there is a compelling medical need and no suitable alternative therapeutic, prophylactic, or diagnostic agent for the product. This determination would involve consideration of the seriousness of the condition the product is intended to treat, prevent, or diagnose and the likelihood that, based on existing data, the effectiveness of the product can eventually be established by further testing and new test development. After consideration of the recommendations, FDA would include in the proposed order designating all reclassified Category I or II products, a proposal agreeing or disagreeing with the panel's recommendations. After consideration of comments on the proposal, FDA would publish a final order. Following issuance of a final order, FDA would issue notices of opportunity for hearing proposing to revoke the licenses of those Category II products for which interim marketing is not permitted.

The agency strongly emphasizes that the proposed provision for interim marketing of certain medically necessary Category II biological products is quite different from Category IIIA. Category IIIA is a broad classification that permits the continued marketing of products even though those products might not be a medical necessity or might be intended to treat a condition for which there is suitable alternative therapy. Thus, many, if not all, of the products which have been classified in Category IIIA may well fail to meet the strict criteria the agency is establishing for the continued marketing of a product under Category II pending further testing. Indeed, the agency is hopeful that it will not need to invoke this provision. However, the agency also believes that it is in the best interests of the public to allow interim marketing of biological products that are medically necessary and for which there is no suitable alternative therapy pending the completion of clinical studies.

FDA believes that it has legal authority to permit the continued marketing pending testing of Category II products that meet these criteria. FDA is eliminating Category IIIA for policy reasons and not because of any lack of legal authority. FDA does not believe that the cases relied on by HRG preclude the continued marketing of medically necessary biological products even though those products have been found not to meet the statutory standard for approval of a biologics license.

The first case, *American Public Health Association* v. *Veneman*, 349 F. Supp. 311 (D.D.C. 1972), involved a challenge to FDA's administration of section 505 of the act. The Court held that once FDA concluded that a drug did not meet the threshold statutory standard for approval of a new drug application, FDA was required to begin procedures to remove the product from the market. *Id.* at 1315. The Court based its holding on the following:

> [T]he statute states unequivocably that the Secretary shall * * * withdraw approval of an application with respect to any drug under this section if the Secretary finds * * * that there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed * * * 21 U.S.C. 355 * * *.
>
> * * * * *
>
> Thus, it could not be clearer that the Secretary *must* begin the procedures to withdraw a drug when he concludes that there is no substantial evidence of effectiveness.
>
> *Id.* at 1315. (Emphasis in original.)

The action FDA proposes to take in this document is distinguishable from *Veneman* because there is no statutory provision similar to section 505 of the act that applies to biological products. The Public Health Service Act does not mandate the revocation of licenses upon specific conditions, but rather provides that biologics licenses "shall be issued, suspended, and revoked as prescribed by regulations * * *." 42 U.S.C. 262(d). Thus, Congress gave FDA discretion to determine when and in what manner licenses should be revoked.

The regulations governing the revocation of a license provide that the Commissioner shall notify a licensee of its intention to revoke a license if the Commissioner concludes that the licensed product is not safe and effective for all of its intended uses or it is misbranded with respect to any such use. See 21 CFR 601.5(b)(6). The regulations further provide that:

> * * * the notification required in this paragraph shall provide a reasonable period for the licensee to demonstrate or achieve compliance with requirements of this chapter, before proceedings will be instituted for the revocation of a license. * * *
>
> 21 CFR 601.5(b)(6).

Thus, the statutory and regulatory scheme for revocation of biologics licenses is quite different from the statutory scheme for withdrawal of new drug applications and the former scheme authorizes the interim marketing of a biological product pending the completion of testing designed to demonstrate that the product meets statutory standards for licensing.

The *Veneman* case is also distinguishable because it involved drugs marketed under new drug applications approved prior to 1962 when the effectiveness requirement was added to section 505. Those drugs, therefore, had never been administratively determined to meet the "substantial evidence" standard of effectiveness. In marked contrast, all of the biological products subject to the biologics review have been found by FDA to be safe, pure, and potent, the standard set by the Public Health Service Act.

Even if the holding in *Veneman* did apply to the biologics review, it does not prohibit FDA from permitting the continued marketing of a limited category of medically necessary durgs pending the completion of clinical studies. The Court in *Veneman* did not declare the review scheme illegal, but rather prepared a timetable for compliance. The Court's order included the provision that "[a] limited number of drugs may remain on the market pending completion of scientific studies to determine effectiveness where there is a compelling justification of the medical need for the drug." Reported in Kleinfeld, Kaplan, and Weitzman, "Federal Food, Drug, and Cosmetic Act 1969–1974" at 549. Thus, the *Veneman* case fully supports the action FDA proposes to take with respect to biological products for which there is a medical need and no suitable alternative therapy.

In a subsequent judicial decision, *Hoffman-La Roche, Inc.* v. *Weinberger*, 425 F. Supp. 890 (D.D.C. 1975), Judge June Green followed the precedent set in the *Veneman* decision. In *Hoffman-La Roche*, Judge Green invalidated an FDA policy that allowed manufacturers of certain new drugs that had been found to be effective by the National Academy of Sciences/National Research Council to be marketed upon submission, but before approval of a new drug application. Following issuance of this decision, FDA argued that the language of the Court's decision could be construed to prohibit FDA's established use of the new drug procedures to require a holder of a new drug application (NDA) to perform further testing on a drug by initiating proceedings to withdraw approval of the NDA under section 505(e) of the act. FDA contended that the Court's decision might require FDA to effectuate removal from the marketplace of such drugs—even though medically necessary—in advance of completion of studies. In

response to this argument, Judge Green issued a supplementary order (No. 75–0270, filed Nov. 7, 1975) providing that:

> * * * nothing * * * shall prevent defendants, upon making * * * a determination that prescription new drugs in the following categories are medically necessary, from allowing such drugs to continue to be marketed pending completion of scientific studies required for an evaluation of their safety and effectiveness: (a) Drugs covered by approved new drug applications with respect to which new information causes defendants to initiate proceedings to withdraw approvals of applications pursuant to provisions of 21 U.S.C. 355(e) * * *.

(A copy of Judge Green's order has been placed on file with FDA's Dockets Management Branch.)

Judge Green thus allowed FDA to permit continued marketing of medically necessary drugs pending the completion of clinical studies, even though proceedings had been initiated to withdraw approval of the drug's new drug application under section 505(e) of the act.

The second case relied on by HRG, *Cutler* v. *Kennedy*, 475 F. Supp. 838 (D.D.C. 1979), is also inapposite. The *Cutler* case involved FDA's OTC drug review. The Court declared unlawful a procedure by which FDA permitted the continued marketing of drugs requiring further testing (OTC Category III). However, most of the OTC drugs marketed after 1962 had been marketed without a license or an approved NDA. Judge Sirica placed great reliance on the fact that there was no previous administrative determination that the Category III OTC drugs met the applicable statutory standard:

> The Commissioner's OTC regulations formally authorize the continued marketing of Category III drug products in the absence of an administrative determination that those products are today generally recognized by experts as safe and effective. This flies in the face of the statutory scheme.
>
> 475 F. Supp. at 854.

Biological products, on the other hand, have already been administratively determined to have met the statutory criteria of the Public Health Service Act.

Moreover, the Category III OTC drug designation does not involve a finding that those drugs were medically necessary. Category III for OTC drugs is therefore distinguishable from the interim marketing provisions proposed here as well as the provisions involved in the *Veneman* and *Hoffman-La Roche* cases.

FDA believes that it has authority to permit the interim marketing pending the completion of clinical studies of biological products reclassified from Category IIIA to Category II if those products are medically necessary and meet the other proposed criteria.

IV. Proposed Revision of the Regulatory Standard for Reclassification of Category IIIA Products

The regulations governing the 1972 biologics review contained a standard for determining the effectiveness of the products reviewed. See § 601.25(d)(2). FDA proposes to use the same regulatory standard for reclassification of Category IIIA biologics. FDA has, however, in preparing the proposal, reexamined this standard to determine if it can be better defined to facilitate the reclassification process. FDA believes that while the standard is adequate, some explanation of the special problems that must be dealth with in establishing the effectiveness of certain biological products would be helpful. These problems are particularly acute with allergenic extracts and these products will be used in providing examples.

The Public Health Service act requires that to be licensed a biological product must be shown to be safe, pure, and potent (42 U.S.C. 262). Although there is no specific requirement that biological products be shown to be effective, the requirement that biological products be shown to be potent has been interpreted to include the concept of effectiveness. The term "potency" is defined in 21 CFR 600.3(s) to mean the specific ability or capacity of a product, as indicated by appropriate laboratory tests or by adequately controlled clinical data obtained through the administration of the product in the manner intended, to obtain a given result. This definition of potency is reflected in the effectiveness standard for the 1972 biologics review. See 21 CFR 601.25(d)(2). Section 601.25(d)(2) provides that "adequate and well-controlled studies" need not exist where such studies are "not reasonably applicable to the biological product or essential to the validity of the investigation, and that an alternative method of investigation is adequate to substantiate effectiveness."

The agency believes that the evaluation of allergenics presents scientific problems that may often require the acceptance of alternative methods of testing to substantiate effectiveness. The first problem in the testing of allergenics is that in many instances it is difficult to determine the cause of causes of alleregic symptoms (e.g., sneezing or other respiratiory symptoms, blistering or rashes, or indigestion). The substances that can cause allergies are almost without number. Inhaled substances include tree, weed, and grass pollens, house and factory dust, mold spores, and animal danders (skin or hair shed by domestic animals). Allergic symptoms can also be caused by drugs and foods. A person may be allergic to more than one allergen and it may be diffiicult to determine the identity of all the allergens causing that person's allergic symptoms. This can complicate the testing of an allergenic product because, if the persons being tested are allergic to allergens other than the allergen being tested, the allergic symptoms may continue even though the tested allergenic may be effective. These factors can make the classical assessment of effectiveness by an "adequate and well-controlled clinical trial" (as defined in 21 CFR 314.111(a)(5)) impractical or impossible for particular allergenics.

Other factors that can complicate the testing of allergenics are variables such as seasonality, geography, spontaneous remission and the variability of the disease itself. These problems are especially difficult in testing pollen allergies because pollen production is seasonal, and will vary depending on geographic location. The amount of pollen production can also be affected by the amount of sun, rain, and wind. These latter factors can not only affect the total pollen production for a given year, but also the amount of pollen in the air at any particular time. As a result, an allergenic being tested may appear to be effective when in fact the improvement is due to a reduction in the amount of pollen in the air.

Another problem relates to current limitations in the state of the art as applicable to allergenics. In the case of many, perhaps most, of the allergenic extracts it is not possible with existing technology to identify and quantitate all active ingredients.

FDA recognizes that as the state-of-the-art progresses, the licensing standard can become more exacting. However, given the current state-of-the-art of biologics testing, it may not be feasible or practical to require all allergenic products to meet the "adequate and well-controlled studies" standard. Of course, even if such studies are not feasible, allergenics must nevertheless be shown to be safe, pure, and potent by suitable alternative testing methods. The proposed effectiveness standard provides that, for such a method to be acceptable, there must be a previously accepted correlation between data generated by use of the alternative testing method and clinical effectiveness.

FDA believes that there may be suitable alternative testing methods to

establish that many allergencis meet the statutory requirements for continued licensing. The use of such alternative methods as skin reaction tests,[1] RAST (radioallergosorbent technique) tests [2] and other appropriate assays in vitro or in experimental animals may be adequate to substantiate effectiveness where such data can be correlated with clinical effectiveness. The assessment of short ragweed and insect venom allergens provide examples. Each of these allergenics has been proven effective by well-controlled clinical trials and, for each, effectiveness has been shown to correlate with skin reaction test response, RAST activity and potency as determined by various in vitro assays of product ingredients. The advisory review panels used in the reclassification process and FDA will make full use of appropriate data provided by alternative methods in making accurate determinations as to whether the product under review should be placed in Category I or II.

The agency is not now expressing any final conclusions as to which, if any, allergenics or other biological products cannot be feasibly tested in an adequate and well-controlled study and whether the correlation between data derived from alternative methods is sufficient to substantiate a conclusion that the license for any particular product cannot be revoked. These decisions will be made in the course of the reclassification process.

V. Implementation of Reclassification Procedures

If this reclassification proposal is issued in final form, the reclassification process would begin immediately upon issuance of a final rule. The agency recognizes that the 1972 biologics review process will probably not be completed when a final rule is issued. The agency nevertheless plans to reclassify all Category IIIA products upon issuance of a final rule, even if those products are not the subject of final orders. Thus, this proposal provides that products classified in Category IIIA by either advisory review panel reports, proposed orders, or final orders shall, at the time this proposal is final, be immediately submitted to the advisory review panels responsible for reclassification of Category IIIA biological products.

[1] A skin reaction test involves injecting a diluted amount of each individual allergenic under the skin on the patient's arm or back. A small raised red area will develop at the test site in an allergic person.

[2] The RAST test uses samples of a patient's blood to determine the extent of IGE (a class of blood proteins responsible for skin sensitizing anti-bodies) production in response to a particular allergen.

Specifically, the reclassification panels would receive for review all Category IIIA products identified in FDA's (1) final order on Skin Test Antigens and Bacterial Vaccines and Antigens with "no U.S. Standards of Potency"; (2) proposed orders on Blood and Blood Derivatives and bacterial Vaccines and antigens with "U.S. Standards of Potency"; and (3) the final report of the Allergenics Review Panel. (All products classified in Categories I, II, and IIIB in these documents would be reviewed by FDA in accordance with the existing biologics review regulations (§ 601.25).)

This procedure will expedite the reclassification process. Moreover, since the reclassification process will include notice and comment procedures the public will have an adequate opportunity to comment upon the reclassification of those biological products that have not been subject to notice and comment procedures under the existing biologics review procedures.

VI. Conclusion

After consideration of all comments received in response to this notice of proposed rulemaking, the agency will decide whether to publish a final regulation in the Federal Register establishing the reclassification procedures.

The agency has determined pursuant to 21 CFR 25.24(d)(10) (proposed December 11, 1979; 44 FR 71742) that this proposed action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 201, 502, 701, 52 Stat. 1040-1042 as amended, 1050-1051 as amended, 1055-1056 as amended by 70 Stat. 919 and 72 Stat 948 (21 U.S.C. 321, 352, 371)), the Public Health Service Act (sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262)), and the Administrative Procedure Act (secs. 4, 10, 60 Stat. 238 and 243 as amended; 5 U.S.C. 553, 702, 703, 704) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), it is proposed that Part 601 be amended as follows:

§ 601.25 [Amended]

1. In § 601.25 *Review procedures to determine that licensed biological products are safe, effective, and not misbranded under prescribed, recommended, or suggested conditions of use* by removing paragraphs (e)(3), (f)(3), and (h).

2. By adding a new § 601.26 to read as follows:

§ 601.26 Reclassification procedures to determine that licensed biological products are safe, effective, and not misbranded under prescribed, recommended, or suggested conditions of use.

This regulation establishes procedures for the reclassification of all biological products that have been classified into category IIIA. A Category IIIA biological product is one for which an advisory review panel has recommended under § 601.25(e)(3):[1] the Commissioner has proposed under § 601.25(f)(3):[1] or the Commissioner has finally decided under § 601.25(g) that available data are insufficient to determine whether the product license should be revoked or affirmed and which may be marketed pending the completion of further testing. All of these Category IIIA products will either be reclassified into Category I (safe, effective, and not misbranded) or Category II (unsafe, ineffective, or misbranded) in accordance with the procedures set forth below.

(a) *Advisory review panels.* The Commissioner of Food and Drugs shall appoint advisory review panels and use existing advisory review panels to (1) evaluate the safety and effectiveness of all Category IIIA biological products; (2) to review the labeling of such products; and (3) to advise the Commissioner on which Category IIIA biological products are safe, effective, and not misbranded. These advisory review panels will be established in accordance with procedures set forth in § 601.25(a).

(b) *Deliberations of advisory review panels.* The deliberations of advisory review panels will be conducted in accordance with § 601.25(d).

(c) *Advisory review panel report to the Commissioner.* An advisory review panel shall submit to the Commissioner of Food and Drugs a report containing the panel's conclusions and recommendations with respect to the biological products falling within the category of products reviewed by the panel. The panel report shall include:

(1) A statement designating the biological products in the category under review in accordance with either § 601.25(e)(1) or § 601.25(e)(2).

(2) A statement identifying those biological products designated under § 601.25(e)(2) that the panel recommends should remain on the market pending completion of further testing because there is a compelling medical need and no suitable alternative therapeutic.

[1] Although § 601.25(e)(3) and (f)(3) is proposed for deletion, it is referenced here and will be the text of a footnote to the final regulation.

prophylactic, or diagnostic agent for the product. In making this recommendation, the panel shall take into account the seriousness of the condition intended to be treated, prevented, or diagnosed by the product and the likelihood that, based upon existing data, the effectiveness of the product can eventually be established by further testing and new test development. The report shall also recommend with as much specificity as possible the type of further testing and new test development required and the time period within which it might reasonably be concluded.

(d) *Proposed order.* After reviewing the conclusions and recommendations of the advisory review panels, the Commissioner of Food and Drugs shall publish in the **Federal Register** a proposed order containing statements designating each biological product reviewed in accordance with § 601.25(e)(1) and (2) and the full panel report or reports in accordance with § 601.25(f)(2). The proposed order shall further identify those biological products designated under § 601.26(c)(2) that the Commissioner proposes should be permitted to remain on the market pending completion of further testing because there is a compelling medical need and no suitable alternative therapeutic, prophylactic, or diagnostic agent for the product. In making this proposal, the Commissioner shall take into account the seriousness of the condition to be treated, prevented, or diagnosed by the product and the likelihood that, based upon existing data, the effectiveness of the product can eventually be established by further testing and new test development.

(e) *Final order.* After reviewing the comments on the proposed order, the Commissioner of Food and Drugs shall publish in the **Federal Register** a final order on the matters covered in the proposed order. Where the Commissioner determines that there is a compelling medical need and no suitable alternative therapeutic, prophylactic, or diagnostic agent for any biological product, the final order shall provide that the product license for that biological product will not be revoked, but will remain in effect on an interim basis while the data necessary to support its continued marketing are being obtained for evaluation by the Food and Drug Administration. The tests necessary to resolve whatever effectiveness questions exist shall be described.

(f) *Additional studies and labeling.* (1) Within 30 days following publication of the final order, each licensee for a biological product designated as requiring further study to justify continued marketing on an interim basis, pursuant to paragraph (e) of this section, shall satisfy the Commissioner of Food and Drugs in writing that studies adequate and appropriate to resolve the questions raised about the product have been undertaken, or the Federal Government may undertake the studies. The Commissioner may extend this 30-day period if necessary, either to review and act on proposed protocols or upon indication from the licensee that the studies will commence at a specified reasonable time. If no such commitment is made, or adequate and appropriate studies are not undertaken, the product license or licenses shall be revoked.

(2) A progress report shall be filed on the studies every January 1 and July 1 until completion. If the progress report is inadequate or if the Commissioner of Food and Drugs concludes that the studies are not being pursued promptly and diligently, or if interim results indicate the product is not a medical necessity, the product license or licenses shall be revoked.

(3) Promptly upon completion of the studies undertaken on the product, the Commissioner of Food and Drugs will review all available data and will either retain or revoke the product license or licenses involved. In making this review the Commissioner may again consult the advisory review panel which prepared the report on the product, or other advisory committees, professional organizations, or experts. The Commissioner shall take such action by notice published in the **Federal Register.**

(4) Labeling and promotional material for those biological products requiring additional studies shall bear a box statement in the following format:

> Based on a review by the Panel on Review of (*insert name of appropriate panel*) and other information, the Food and Drug Administration has directed that further investigation be conducted before this product is determined to be fully effective for labeled indication(s).

(5) A written informed consent shall be obtained from participants in any additional studies required under paragraph (f)(1) of this section, explaining the nature of the product and the investigation. The explanation shall consist of such disclosure and be made so that intelligent and informed consent be given and that a clear opportunity to refuse is presented.

(g) *Court appeal.* The final order(s) published pursuant to paragraph (e) of this section, constitute final agency action from which appeal lies to the courts. The Food and Drug Administration will request consolidation of all appeals in a single court. Upon court appeal, the Commissioner of Food and Drugs may, at the Commissioner's discretion, stay the effective date for part or all of the final order or notice, pending appeal and final court adjudication.

Interested persons may, on or before March 17, 1981, submit to the Dockets Management Branch (formerly the Hearing Clerk's office) (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857, written comments regarding this proposal. Four copies of any comments shall be submitted, except that individual may submit single copies of comments. The comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

In accordance with Executive Order 12044, as amended by Executive Order 12221, the economic effects of this proposal have been carefully analyzed, and it has been determined that the proposed rulemaking does not involve major economic consequences as defined by that order.

In addition, the agency has determined that the proposed rule should only affect a small number of small entities as defined by the Regulatory Flexibility Act (Pub. L. 96–354). FDA therefore certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Dated: January 13, 1981.

Jere E. Goyan,

Commissioner of Food and Drugs.

[FR Doc. 81-1744 Filed 1-15-81; 8:45 am]

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federal register

Friday
January 16, 1981

Part XXII

Department of Agriculture

Food and Nutrition Service

Food Stamp Program, 1980 Amendments to the Food Stamp Act of 1977; Policy Interpretations, Miscellaneous Technical Amendments

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 273, 274, 278

[Amdt. No. 189]

Food Stamp Program; 1980 Amendments to the Food Stamp Act of 1977; Policy Interpretations, Miscellaneous Technical Amendments

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rulemaking.

SUMMARY: This rulemaking contains proposed regulations for the Food Stamp Program to implement certain segments of the 1980 amendments to the Food Stamp Act of 1977. Included in this rulemaking are provisions of the Act on: certifying residents of Shelters for battered women and children; referring illegal aliens to the Immigration and Naturalization Service (INS); prorating income and counting resources of ineligible aliens; making fraud determination hearings optional; and eliminating depreciation as a cost of doing business for self-employed households.

In addition to these newly enacted provisions, a series of policy interpretations and technical amendments are incorporated in this rulemaking to clarify provisions published on October 17, 1978 and also to certain provisions of the 1977 Act. A number of the policy interpretations were included in a proposed rulemaking published on December 26, 1979. These interpretations and technical amendments cover numerous aspects of program operations, including bilingual services, certification processing standards, treatment of income, and claims processing requirements.

DATES: Comments must be received by March 17, 1981 to be assured of consideration.

ADDRESS: Comments should be submitted to Alberta C. Frost, Deputy Administrator for Family Nutrition Programs, Food and Nutrition Service, USDA, Washington, D.C. 20250. All written comments will be available for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5:00 p.m. Monday through Friday) at Room 678, 500 12th Street, SW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Larry R. Carnes, Chief, Policy and Regulations Section, Program Standards Branch, Program Development Division, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, Washington, D.C. 20250; 202-447-9075. A draft Impact Analysis describing the options considered in developing this proposed rule is available from the above address.

SUPPLEMENTARY INFORMATION: This proposed action has been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified "not significant."

The proposal has been reviewed with regard to the requirements of Pub. L. 96-354, 94 Stat. 1164, Sept. 19, 1980. Robert Greenstein, Administrator of the Food and Nutrition Service, has certified that the proposal does not have a significant economic impact on a substantial number of small entities. The proposal would implement several provisions of Pub. L. 96-249 which affect food stamp certification issues. Examples are requirements to count the income and resources of ineligible aliens, to report persons determined to be illegal aliens to the Immigration and Naturalization Service, and to allow persons residing in battered women's shelters to receive food stamps. These provisions do not represent major changes in certification policy and should have no significant impact on State or county agency workload, staffing needs, or paperwork. The provisions allowing persons residing in battered women's shelters to receive food stamps affects only persons in those shelters which provide meals to their residents. There are not a large number of such shelters, and a substantial number of small entities will not be affected by this provision. Where this is in effect, it will be to increase the shelter's resources. The proposed rule also contains provisions to clarify the application of a provision of the Food Stamp Act of 1977 that General Assistance payments may not be reduced because of food stamps. This will not have an impact on a substantial number of small governments as the Department is aware of few if any jurisdictions not already in compliance.

1980 AMENDMENTS TO THE FOOD STAMP ACT

Pub. L. 96-249, 958 Stat. 357, May 26, 1980, was enacted to amend the Food Stamp Act of 1977, Pub. L. 95-113, Stat. 958, Sept. 28, 1977, as previously amended. This rulemaking contains proposed regulations implementing the following statutory provisions. Section 101 of the new law exempts shelters or battered women and children from being considered institutions, and therefore permitting shelter residents who are otherwise eligible to receive food stamps. Section 118 of the 1980 amendments to the Food Stamp Act requires the reporting of illegal aliens to the Immigration and Naturalization Service (INS) as well as prorating the income and counting the resources of ineligible aliens who would otherwise be household members. This would eliminate windfall benefits to a household in which an ineligible alien was the major breadwinner. Section 109 makes the administrative fraud hearing system a State option in order to avoid duplicative systems if States have an effective fraud prosecution system. Additionally, the Conference Committee Report (H.R. Rep. No. 96-957, 96th Cong., 2nd Sess. (1980) p. 29) indicates that the Committee intended that the Secretary no longer permit depreciation as an allowable cost of doing business for self-employed households. This rulemaking proposes such a change in program policy.

Regulations implementing other provisions of the 1980 Amendments were published on July 8, 1980 (45 FR 46036). These included restrictions on participation of students, changes in the resources provisions and exclusion of certain energy assistance payments as income and resources. Regulations for certain remaining provisions including new requirements on the use of photo identification, 74% federal financial participation in the development and design of new computer systems, enhanced ability for State agencies and FNS to match wage and unemployment compensation data, and provisions for monthly reporting and retrospective accounting and enhanced funding are currently in preparation. Still other provisions of the law have an effective date of October 1, 1981 and will not be published until 1981. These concern changes in the current medical, shelter, and dependent care deductions.

Shelters for Battered Women and Children

Section 5(a) of the 1977 Food Stamp Act limits participation in the program to individuals and groups of individuals constituting households and section 3(i) of the Act excludes from the definition of household those people who reside in an institution. However, section 3(i) also exempts federally subsidized housing for the elderly and drug addict/alcoholic treatment centers from being considered as institutions. Certain group living arrangements certified under Section 1616(e) of the Social Security Act, as amended, were additionally exempted by the 1979 Amendments to the Food Stamp Act of 1977 (Pub. L. 96-58, 93 Stat. 389, August 14, 1979; 45 FR 23288, April 4, 1980.) The 1980 Amendments

expanded this exemption to include shelters for battered women and children which provide meals to their residents. Residents of such shelters that do not provide meals may already participate (if otherwise eligible) because under program regulations at 7 CFR 273.1(e) they are not considered as residing in institutions. This position was published in the Federal Register on December 26, 1979. (Policy Interpretation Response Number 80-5, 44 FR 76329.)

This proposed rulemaking incorporates the statutory change with regard to shelters for battered women and their children and introduces some special procedures for handling shelter residents. Those shelter residents who were previously eligible under existing regulations will continue to be eligible. However, in order for residents to be eligible for these special procedures the facility would need to meet the proposed definition of a shelter for battered women and children. This definition is discussed in detail below. Upon final publication of this rule, shelters with residents that are already permitted to participate should contact their local project area office to determine if they qualify under the new definition. This would ensure prompt certification of eligible residents under the proposed procedures.

Statutorily Required Changes

Shelters for battered women differ from other exempt institutions. Treatment centers and group living arrangements have authorizing agencies within the State, are limited to those facilities listed in certain statutes, and have residents that are incapacitated in some way. None of these characteristics necessarily apply to a shelter for battered women or its residents. Therefore, the Department believes that some criteria need to be proposed to identify such shelters.

The statute and the legislative history specify that a shelter must be public or private non-profit and exclusively serve battered women and their children Pub. L. 96-249, § 101; H.R. Rep. No. 96-788, 96th Cong., 2nd Sess. (1980), pp. 148-149. The Department proposes that if a facility, such as a YWCA, serves persons other than battered women and their children, it must have a wing or rooms set aside on a long-term basis to shelter such women. This definition would be added to § 271.2. The Department also proposes that the shelter must be a residence, not just a meeting place or meal provider in order to prevent participation by facilities that are not truly providing shelter; i.e., a temporary place to live, not just a place to eat (§ 271.2 and § 273.1). The Department proposes to allow shelters serving meals to accept coupons from its residents in payment, to set forth FNS' responsibility for authorizing shelters to redeem coupons through wholesalers and to prohibit shelters from redeeming coupons directly through banks (§ 274.10 and 278.2). This last prohibition is currently applicable to all such exempt institutions and is designed to prevent the potential abuse of redeeming coupons for cash and using the cash for purposes other than food purchases.

Before a shelter can be considered exempt under the proposed rule, the State agency or FNS must determine if it meets the regulatory definition. As mentioned earlier, shelters with residents already participating in the Food Stamp Program would contact the State agency for such a determination so that their residents are certified without delay under the special procedures. In addition, shelters that are not currently participating, either because they are classified as institutions or for any other reason, should contact their local project area offices for a determination. Shelters wishing to redeem coupons through wholesalers may contact FNS for authorization; this authorization will substitute for a State agency determination. Local project areas would maintain a list of shelters meeting the definition. This will expedite certification of eligible residents. FNS will provide the names of any shelters it authorizes to redeem coupons through wholesalers to the State agency for dissemination to the local project areas.

Special Procedures Regarding Household Concept and Application Processing

The Conference Report on the 1980 Amendments states that residents of shelters for battered women and children shall "* * * be considered for eligibility as individual (parent/child) units, rather than considered as part of a single household consisting of all shelter residents." See H.R. Rep. No. 96-957, 96th Cong., 2nd Sess., p. 11. The Department is proposing that residents of shelters be certified as individual units only (§ 273.1). A single woman or a woman with her children would be considered an individual household rather than part of a group of shelter residents. This limitation is made both in response to the legislative history and to ease the transition of residents from the shelter and is similar to the requirement that residents of drug addict/alcoholic treatment centers always apply as one-person households. Because of the short stay of most residents, it would be advantageous to certify the women/children as a household to make on-going certification simpler. Upon leaving the shelter the women/children would have ready access to their coupon allotment rather than trying to divide the allotment between the household members remaining in the shelter and those leaving. Residents of those shelters not meeting the definition may continue to be certified based on their own household composition, like any other applicants.

Under these regulations, the shelter would *not* automatically act as the authorized representative, unlike the procedures regarding addict/alcoholic treatment centers and some group living arrangements. The woman would apply on behalf of herself and her children, although she may name an authorized representative. She may, of course, name a shelter staff member or volunteer. This procedure may be necessary in cases where a woman and her children would be endangered if they left the shelter. In such cases a woman may be unable to appoint an authorized representative of her choice. State agencies should provide such persons with a home visit or telephone interview. The availability of these alternatives should be explained to the shelter and to shelter residents who inquire about applying.

Resources

The Department proposes that any resources jointly held with the former houshold be considered inaccessible to the shelter residents in order to be responsive to the special needs of women who have been abused and to expedite handling of the cases (§ 273.8). Because a woman could be in danger if she tried to obtain her share, for example, of a bank account and because of the high probability of her resources being under the statutory maximum of $1,500, the Department believes this provision is both needed and not very costly. This proposal should also speed-up processing of the case as the inaccessibility of the resources would not have to be determined.

Expedited Service

The Department is proposing that the shorter 2 or 3 day standard for expedited service already provided for in the regulations apply to shelter residents eligible for expedited service (§ 273.2). This is in lieu of the 7 day service standard which is used for residents of treatment centers and group living arrangements. Relatively few shelters routinely provide meals as do treatment centers or group living arrangements. Shelter residents apply as

individuals. Therefore, the extended limit in effect for other facilities would not adequately meet the food needs of shelter residents.

Residents Who Have Left Households Already Participating in the Program

It is possible that some applicants from the battered women's shelters may come from an already participating food stamp household. Normal program rules would deny program benefits to these women until a notice of adverse action could be issued to their former household and its allotment reduced. However, such a procedure would work severe hardship on these women and children. Therefore, the Department is proposing that the State agency determine the eligibility of women and children in shelters based on their current circumstances as a separate household, regardless of their past participation (§ 273.11). Applicants from battered women's shelters would be allowed to participate as a separate household while the former household continues to participate under notice of adverse action or notice of expiration procedures. This approach cannot be used more than once a month. Under the proposed rules a battered woman leaves a participating houshold and enters a shelter, returns to the household, and then returns to a shelter for the second time in one month, she may receive food stamps for only one of the times she enters a shelter.

These special provisions would apply only to residents of battered women's shelters, and not to other persons who leave a participating household during a certification period. The Department believes the legislation contemplates special rules for only residents of these shelters.

Also, the provision would apply only to women leaving the household containing the person who had abused them (§ 273.13). This limits use of the provision to those shelter residents who were actually forced to leave their prior place of residence. The Department is interested in public comment on this provision and in any alternative methods of meeting the needs of battered women without imposing complex administrative rules on state agencies. The Department is also interested in how State agencies are currently handling separated households when the participating members apply on their own behalf.

Coupon Use and Redemption

Provisions on coupons use and redemption which are found in § 274.10(d), and § 278.1(g) would be revised and a new paragraph would be added to § 278.2(g) as conforming amendments. As mentioned earlier, residents of shelters would be permitted to use their coupons to purchase meals prepared for them at the shelter. In addition, a provision outlining FNS' responsibility for authorizing the shelters to redeem coupons through wholesalers would be added. This authorization would be based on the proposed definition of an exempt shelter and, where granted by FNS, would relieve the State from any responsibilities for determining if the shelter met the proposed definition. Shelters, like other exempt institutions, would be prohibited from redeeming coupons directly through banks.

A significant issue which may affect many residents of these shelters concerns the use of coupons. Residents often stay in a shelter for a short period of time. As a result, the shelter might provide them with only a few meals. Current regulations forbid retailers to accept loose $5 or $10 coupons without book covers (§ 278.2(c)). Without a special provision, shelters would be forced to accept loose $5 or $10 coupons which could not be redeemed at retailers, or to redeem them at wholesalers. Unlike other, larger facilities, shelters may be small operations for which volume purchases from wholesalers are impractical. One way to address this problem would be to issue a specialy annotated identification card to each shelter wishing to redeem loose $5 of $10 coupons, and to allow these shelters to redeem the loose coupons at retailers. However, authorizing only shelters for battered women and their children to redeem loose coupons could be seen as discriminating against group living arrangements and drug treatment centers. Most of the residents of these other facilities remain for longer periods of time, but some may be short-term residents. Short-term residents of any facility would benefit from the use of loose $5 and $10 coupons. Further, current FNS publications instruct retailers to refuse loose coupons, and there is a likelihood that retailers will become confused over who may and may not redeem loose coupons. This confusion could weaken the ban on redeeming loose coupons at retailers, a ban designed to discourage the use of illegally obtained coupons. In addition, a change in policy, even for a small group of participants, will require a costly change in FNS's publications and instructions. A final problem concerns the issuance of ID cards. Whether this special card would be an annotated State card or a specially issued FNS card, the card would be an additional complication.

A second option is not to prescribe any special procedures, and not to permit shelters to redeem loose coupons.

The Department recognizes the costs, benefits and problems associated with each of these two approaches and especially seeks comments on how to resolve this isssue.

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The Department recognizes the costs, benefits and problems associated with each of these two approaches and especially seeks comments on how to resolve this issue.

A few minor revisions are also proposed to the drug addict/alcoholic treatment center and group living arrangement provisions in § 273.11(e) and (f). The changes in the provisions on treatment centers and group living arrangements require the facility to return to the local food stamp office any unused coupons not provided to departing residents. This resolves the problem, discovered in audits, that some facilities retain coupons of departing residents. Additional clarifications are made in the area of handling allotments for departing residents.

Reporting Illegal Aliens

Section 118 of Pub. L. 96–249 requires that the State agency report to the Immigration and Naturalization Service (INS) when certification personnel determine that any household member is ineligible to receive food stamps because that member is present in the U.S. in violation of the Immigration and Nationality Act.

In the Food Stamp Certification Handbook that was in effect under the 1964 Food Stamp Act, FNS (FS). 732–1, certification workers were instructed in section 2208.9 that: "If in the application process, it becomes known to the State agency that an alien has entered or remained in the United States illegally and INS (Immigration and Naturalization Service) has not declined deportation action, such alien shall be promptly brought to the attention of the FNS district office for appropriate action." See H.R. Rep. No. 95–464, 95th Cong., 1st Sess., 1977, p. 586. This provision was incorporated into State handbooks and was administered nationwide.

This provision of the FNS Handbook was subsequently withdrawn as a result of a consent decree in *Rodriquez*

v.Texas Department of Public Welfare, Civ. Action No. A-76-CA-57 (W.D. Tex. Mar. 31, 1976), a legal challenge based on the privacy restrictions of section 10(e) of the 1964 Food Stamp Act, Pub. L. 88-525, 78 Stat. 706 (1964), as amended. Moreover, section 11(e)(8) of the Food Stamp Act of 1977 specifies that a State agency shall not use or disclose information obtained from applicant households to persons not directly connected with the administration or enforcement of the Food Stamp Act or its regulations. Current regulations prohibit contact with INS by certification personnel without written consent by the household (§ 273.2(f)(1)(ii)(d)).

Section 118 of the 1980 amendments amends Section 11(e) to require "* * * the immediate reporting to the Immigration and Naturalization Service by the State agency of a determination by personnel responsible for the certification or recertification of households that any member of a household is ineligible to receive food stamps because that member is present in the United States in violation of the Immigration and Nationality Act."

The House Committee report contains considerable discussion (H.R. Rep. No. 96-788, pp. 134-138) of how the Department should implement this provision. The Committee Report specifies that an alien should be reported to INS only when food stamp certification workers are able to make a determination that the alien is present in the United States in violation of immigration laws. The Committee Report states that "[b]ecause under the laws of this country, an illegal alien or person 'known to be an alien in the United States in violation of the Immigration and Nationality Act' * * * is only known to have such status when he or she is found in this country and is known to have a final order of deportation outstanding against him or her * * * the Department may wish to incorporate this restriction in its regulations governing the reporting requirement." H.R. Rep. No. 96-788, pp. 135-136. This approach is also suggested by the legislation history to Pub. L. 96-68, the Departments of State, Justice and related agencies Appropriations Act of 1980, which calls for defining persons known to be illegal aliens as persons concerning whom "a final judicial determination as to the client's residency status has been reached" 125 Cong. Rec. § 12.286 (1980).

The Department found the question of how to determine that an applicant or participant is an illegal alien a particularly difficult issue. These proposed regulations attempt to set forth clearly defined statements to govern reporting requirements to INS. The Department is very interested in comment on this issue.

Under these proposals, State agencies would report to INS when, (1) the applicant or the household's authorized representative admits that illegal aliens are present in the household; (2) forged INS documents are presented by the household during the application or recertification process; or (3) a formal order of deportation is presented by the household during the application or recertification process.

These standards do not permit reporting to INS based on mere suspicion or prejudice. Firm evidence that a household member is illegally in the U.S. would be required. This procedure should facilitate the work of INS by not subjecting it to large numbers of reports that are not substantiated by evidence.

While the House Committee report suggested, but did not require, limiting the definition of an illegal alien to a person with a formal order of deportation, the Report is unequivocal in its directive that food stamp offices must "rely solely upon facts appearing on the face of the household's application form or revealed by the household in the course of the requisite interview * * * directly demonstrating illegal status * * * The worker could not undertake to investigate the matter on his own or attempt to ferret out further facts by going beyond the ordinary verification process * * *", H.R. Rep. No. 96-788, p. 136.

The Committee Report further notes that in 1977 Congress eliminated food stamp eligibility for many legal aliens, and that a determination that an alien is ineligible for food stamps does not constitute a determination that the alien is here illegally. The Report directs that food stamp personnel not devote time (beyond what is necessary in the certification process to determine eligibility) to the work that properly falls within the sphere of INS, H.R. Rep. No. 96-788, pp. 135-136.

Only if, in the process of determining food stamp eligibility, it is determined that an alien applicant is here illegally, may a food stamp office report the alien to INS. The Committee Report makes clear that a person who declines to be evaluated for food stamp eligibility as an ineligible alien shall not be reported to INS, H.R. Rep. No. 96-788, p. 136. The caseworker would be under no obligation to require the alien to clarify his status (although inquiry might need to be made into the alien's income and resources if other household members remain eligible for food stamps). The proposed regulations reflect these directives.

The Department is also proposing a review beyond the caseworker level of the determination of illegal alien status prior to any referral to INS. Such a review would be aimed at ensuring uniformity of practice and at ensuring that sufficient evidence exists to warrant a determination that an alien's status is illegal. The review would be conducted by a State agency official not involved in the initial determination. The Department strongly encourages State agencies to designate particular persons to review referrals to INS, and to provide training to such persons in the applicable immigration laws.

In view of the complexity of the immigration laws, the House Committee Report directs the Department to exclude worker failure to report illegal aliens as an error from measurement by the quailty control system. This is reflected in these proposed regulations.

The Department would like to note that other than in those situations where a determination has been made that an applicant or participant is an illegal alien, current regulations prohibiting a State agency from contacting INS without the household's written consent would remain unchanged.

Income and Resources of Ineligible Aliens

Section 115 of Pub. L. 96-249 provides that the income (less a prorata share) and resources of an ineligible alien are to be attributed to the Food Stamp household of which such a person would otherwise be a member.

The Food Stamp Act of 1977 excluded the income and resources of ineligible aliens from consideration in determining the eligibility and allotment entitlement of a household. Under this provision it was possible for substantial amounts of actually available to a household income and resources to be disregarded in determining household eligibility.

In an effort to target benefits more narrowly, Section 115 of the 1980 Amendments mandate the Department to treat the income and resources of ineligible aliens in the same manner as that of disqualified individuals. Resources which would otherwise be considered household resources were they not owned by an ineligible alien shall continue to be counted as household resources in the same manner as if they were owned by a household member. For example, a vehicle used to produce earned income which is owned by an ineligible alien who would otherwise be a household member

would continue to be treated as an exempt vehicle.

Optional Fraud Hearings

Section 109 of Pub. L. 96–249 amends Section 6(b) of the 1977 Act to make an administrative fraud hearing system a State option. The State agency is, therefore, given the option of pursuing suspected fraud through an administrative fraud hearing and/or through prosecution. However, the legislative history states that the Secretary may require a State agency to establish a fraud hearing system if the State is not promptly, actively, and seriously handling civil or criminal fraud cases. (H.R. Rep. No. 96–788, 115).

The Department proposes that § 273.16(d) be revised to require that a State have an administrative fraud hearing system *unless* the State agency has an agreement with the State's Attorney and/or county prosecutors to ensure the prompt prosecution of appropriate cases. This agreement would list any criteria set by the prosecutor for accepting cases for prosecution at either level and delineate how and under what circumstances cases would be accepted and possibly prosecuted.

The State agency would demonstrate to FNS that such an agreement is in effect prior to deleting the administrative fraud hearing system. The agreement is in lieu of setting specific standards, such as a rate of successful prosecutions that must equal or exceed that of successful fraud hearings or some other quantifiable measure. The Department does not have sufficient data to establish such quantifiable measures and in many instances the success rate on prosecutions is out of the State agency's control. A strict tolerance level of this sort would also be too inflexible and would not allow States enough of an opportunity to attempt to use prosecutions rather than a fraud hearing system.

Self-Employment—Depreciation as a cost of doing business

The regulations implementing the 1977 Act included a provision allowing depreciation as a cost of doing business for self-employed households (§ 273.11(a)(4)(ii)). This was done in compliance with the legislative history, H.R. Rep. No. 95–464, p. 25. The Conference Report accompanying the 1980 Amendments suggests that the Secretary delete depreciation, H.R. Rep. No. 96–957, p. 29. Allowing such costs when determining net self-employment income results in an exemption of mounts not constituting "actual costs" to the household; households are, in a sense, given a deduction in advance for the cost of capital goods which is otherwise not allowed. Appropriate changes are being proposed to § 273.11(a) to correspond to the Conference Report's suggestion.

Policy Interpretations

Introduction

Since the publication on October 17, 1978 of final rules implementing the Food Stamp Act of 1977, the Food and Nutrition Service has responded to over 600 policy inquiries with the intention of interpreting, clarifying and correcting the regulations for the benefit of food stamp clients and their representatives, State agencies and FNS regional offices.

On December 28, 1979, FNS published a notice in the **Federal Register** (44 FR 76329) proposing a system for informing State agencies and the interested public of changes and clarifications in the Food Stamp Program policy. This Policy Interpretation Response System (PIRS) describes four categories into which policy inquiries will be placed: inquiries requiring rulemaking, inquiries requiring interpretation of the Food Stamp Act or regulations of major importance and general applicability, inquiries requiring interpretations or clarification of the Act or regulations of a limited nature or applying to a particular group of households, and inquiries which can be answered by direct reference to the Act or regulations which apply to one household. Previously, inquiries in all four categories were answered by policy memoranda. Under PIRS, the first type of inquiry will be answered by rulemaking, the second type by notice in the **Federal Register**, the third type by policy memoranda indexed in the *FNS Index of Records* and the fourth type by FNS regional offices' responses. This proposed rulemaking responds to inquiries in the first category, those which require changes in the food stamp regulations. The rules discussed in this section have come about as a result of implementing the PIRS.

Earned Income Received by Non-Household Members

Section 273.11(d) of the current regulations discusses how State agencies should handle deductible expenses incurred jointly by household members and non-members. The regulations instruct State agencies to prorate such expenses as rent billed to a non-member but paid partly by the household, if the State agency cannot otherwise assign a portion of the expense to the household. The regulations do not currently discuss how to handle earned income which is received in the same way.

As an example, a household of six members may have four who work with an ineligibile alien, but the ineligible alien receives the wages of all five workers. The Department proposes that the State agency attempt to determine the amount earned by each household member and non-member and count the household's portion as earned income (§ 273.11(d)). The employer might be able to verify the amount earned by each person, even though for everyone's convenience, only one paycheck was issued. If the State agency could not assign the earned income in this way, the agency would prorate the income to all of those intended to receive it, to the five workers in the example, and count the wages of the household members. In this case, that State agency would count four-fifths of the wages as earned income to the household.

The Department proposes to prorate only earned income under this provision. Unearned income received in this way, such as an assistance grant received by a household for the benefit of a third party, is already covered by the regulations (§ 273.9). Therefore, it is anticipated this provision will affect only a few households. Mainly, these will be households working in agriculture, such as migrants who are frequently paid as groups rather than as individuals. This proposed procedure of prorating earned income is similar to the procedure used in determining the income of a household with a disqualified member, as required by § 273.11(c). The Department believes that this already existing procedure is the fairest way to determine household income under these questionable circumstances.

Verification of Citizenship

The regulations which detail the Program's verificafion requirements currently allow participation for two months by household members with questionable but unverified citizenship (§ 273.2(p)(2)(ii)(B)). Elsewhere the regulations allow some households to move from one project area to another and have their certification continued (§ 273.19(a)). Currently the regulations do not provide a mechanism for the two project areas to keep tract of the two-month period of conditional participation so as to terminate the certification of such persons after the second month. The Department proposes to require the old project area to enter information about this aspect of a case on form FNS–286, Certification of Transfer of Household Benefits. The Department further proposes that the

new project area terminate the certification of such individuals if verification has not been provided to either project area by the end of the second month (§ 273.19(b) and (c)). Prior to issuing a notice of adverse action or terminating the certification of such persons, the new project area shall attempt to contact the old project area to confirm that verification had not been provided in the intervening time. These proposals do not impose any additional burden on participants and simply shift the burden of adjusting the certification from the old project area to the new one.

Technical Amendments

Introduction

On October 17, 1978 (43 FR 47846), the Department published final rules that implemented major portions of the Food Stamp Act of 1977. Based on an ongoing analysis of program operations and rules, several sections of these regulations were identified as needing modifications to correct oversights or to clarify the October 17 rulemaking. Therefore, on June 8, 1979, the Department published Miscellaneous and Technical Amendments to address these problems. The State agencies have now worked with this new program for approximately two years and other items have been identified as requiring clarification. This segment of the rulemaking addresses these items.

Drug and Alcoholic Treatment Centers on Reservations

Section 3(i) of the 1977 Food Stamp Act, as amended, and its implementing regulations (7 CFR 273.1), prohibit anyone residing in an institution from constituting a household for Program purposes. However, residents of drug or alcoholic treatment programs as defined by section 3(f) of the Act and § 271.2 of the regulations are not to be considered residents of institutions.

The current statutory and regulatory definitions of such treatment programs require them to be certified by the State agency responsible for their administration. This certification is performed pursuant to Pub. L. 91–616, "Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970" and Pub. L. 92–255, "Drug Abuse Office and Treatment of 1972." FNS has learned that many Indian reservation based alcoholism programs are not State certified due to various agreements between the States and the reservations within their jurisdictions. However, the Indian alcoholism programs were originally Pub. L. 91–616 programs, funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA). Pursuant to a Memorandum of Agreement Between NIAAA and the Indian Health Service (IHS), dated May 5, 1978 and Modified October 29, 1980, these programs are being transferred from NIAAA to IHS as they meet specified transfer criteria. Many Indian alcoholism programs cannot seek State certification, yet there appears to be no reason why these programs should be denied the participation granted to non-reservation based programs. Therefore, the Department is proposing amendments to § 271.2, *Definitions* and paragraphs § 278.1(e), *Approval of Retail Stores and Wholesale Food Concerns*. These amendments would permit the Program participation of sponsored NIAAA or IHS sponsored reservation based treatment center residents.

Availability of Program Regulations, State Plans and Procedures

Current regulations mandate that all State agencies and local project areas maintain Federal regulations and procedures, State plans and the State handbook (manual) for public inspection (§ 272.1(d)). The Department is proposing that the regulations be altered: (1) To delete the requirement that State plans and Federal procedures be maintained in each project area, and (2) to delete the requirement that Federal regulations be maintained in project areas other than large project areas as defined under the Performance Reporting System regulations (project areas with caseloads of more than 7,000). State handbooks would still be required to be available in all local offices. Federal regulations and procedures and State plans would be available at State agency headquarters.

The Department is proposing this change for several reasons. Many local project area offices fail to receive on a timely basis copies of State plan amendments and Federal regulations and procedures, and may have incomplete records of these materials. Secondly, even if a food stamp office has copies of all the Federal regulations and procedures, it is often difficult, because of heavy workloads, for a staff person to find the time to update this material continually. Due to the large number of changes in Federal regulations, a significant amount of work is involved in ensuring that a complete compilation of current regulations, with all the latest changes inserted in the proper places, exists at all points in time. As a result, many project areas are not maintaining current regulations, and regulations that are not current are of limited use. Moreover, local offices generally do not use Federal regulations in making eligibility determinations. They use the state handbook.

State handbooks are generally the policy vehicle for the administration of the Program at the local level. Each is approved, then periodically reviewed by FNS. The Department is committed to having current and accurate State handbooks available in each certification office. If, through the Federal monitoring system handbooks are found to be misinterpreting or lacking regulations pertinents to a State, corrective action is required. State handbooks may also contain more precise information concerning application processing issues for specific locations than do the Federal regulations. The Federal regulations may contain options not relevant to a particular State.

If a client or member of the public requests access to Federal guidelines at a local office, the handbook should contain the informaiton desired if it is accurate and up-to-date. Generally, the Federal regulations and procedures are used less to resolve such questions at the local level than are State handbooks. Nevertheless, the Department recognizes that Federal regulations can serve some important functions at the local level. They may be of use in preparing for fair hearings or implementing fair hearing decisions. In addition, it is possible for a State handbook to be out of date or imprecise in an area that may be illuminated by examining the Federal regulations.

The Department has sought to balance these concerns by requiring that the regulations be available at a minimum of one location in large project areas, but not in other project areas. Large project areas have far more clients and hence more use of the regulations is likely. They also have more staff. In all cases, the regulations would be available at the State level, and the State handbook would be available in all local offices.

The Department is especially interested in comment on this matter.

Bilingual Services

The bilingual services standards set forth in § 272.4(c), require that the initial determination of bilingual needs be accomplished within specified time frames so that the bilingual provisions would be implemented uniformly and concurrently nationwide.

The Department is aware tha the need for bilingual services may change over time. The Department proposes to amend § 272.4(c)(6) to make clear that the need to meet the bilingual services

standards in an ongoing obligation. The Department proposes to require a redetermination of bilingual needs at least once every ten years, or more frequently if either the State agency or FNS determine that such a redetermination is needed in a particular area due to significant demographic changes.

Processing Requirements

It has been suggested that since the Food Distribution Program's regulations state "the household, if it wishes, may be accompanied to the interview by anyone of its choice" (§ 283.7(a) (50, 44 FR 35936, June 19, 1979)), a sentence should be added to the food stamp regulations stating the same. The proposed rule would adopt this suggested by amending § 273.2(e)(i).

30 Day Standard Processing

Section 11(e)(3) of the Food Stamp Act of 1977 mandates that State agencies provide eligible households an opportunity to participate as soon as possible but no later than 30 days after an application is filed. There were several inquiries about whether the day of application was included in the 30-day standard. The Department's intent was not to include the day of application in the standard. In other words, the first day of the 30-day standard for counting purposes is the day after the day of application. The Department is proposing language to emphasize this point.

Alien Status

The Department is proposing a technical amendment to the provisions setting forth requirements for alien eligibility for the Program (§ 273.2(f)(i)(ii) and 273.4(a)). This revision is required to conform with recent changes in the Immigration and Nationality Act (INA) required by the passage of the Refugee Act of 1980 (Pub. L. 96–212, 94 Stat. 108, 3/17/80). This revision to the INA provides permanent provisions in the law for the admission of aliens, defines refugee and formalizes the practice of admitting refugees under the asylum provisions.

Treatment of Payments to Yakima and Mescalero Apache Tribes

Pub. L. 95–433, 92 Stat. 1047, Oct. 10, 1978, provides for payments to members of the Yakima and Mescalero Apache Indians by the Indian Claims Commission. Under the language of the law both Federal and federally-assisted programs are prohibited from considering the judgment funds as income or resources when determining eligibility for assistance. These funds include those paid on a per capita basis and those held in trust for the benefit of tribal members. The Department proposes to revise § 273.8(e) "Exclusion from resources" and § 273.9(e) "Income exclusions" to reflect this provision.

Treatment of Social Security Payments to Eligible Students

Section 5(d) of the Food Stamp Act provides that scholarships, grants, veterans' educational benefits and similar educational benefit payments shall be excluded from income to the extent the payment is used for tuition and mandatory fees at institutions of higher education. The Department proposes to amend the regulations to clarify that the portion of social security educational benefits used for tutition and mandatory fees is excluded under this provision (§ 273.9(c)). These benefits are provided under certain conditions to students between 18 and 22 years old whose parents are deceased, or are disabled or retired and receiving Social Security benefits. There is no solid basis for distinguishing Social Security educational benefits from other sorts of student support payments (such as veterans educational benefits). The portion of these benefits going for tuition and fees should be excluded.

Since recently published food stamp regulations (45 FR 46040, July 8, 1980) eliminated many students from the Program, the number of eligible students affected by this clarification concerning Social Security benefits is expected to be small.

Treatment of VISTA Payments

Since the publication of the October 17, 1978 regulations several changes have taken place in Title I, II and III of the Volunteer Service Act of 1973, as amended. The Department proposes to update the references made to these programs in 7 CFR 273.9. Title II programs ACE and SCORE are being deleted since they are no longer being administered by ACTION, but instead were transferred to the Small Business Administration. Title II now includes RSVP, Foster Grandparents, Older American Community Service Program and Senior Companion Program. Currently Title I programs include VISTA, University Year for Action, National Student Volunteer Programs and a new program added in 1980, Urban Crime Prevention Program. Specifying the programs in question will benefit eligibility staff and facilitate accurate eligibility decisions.

In addition, a clarification is being added concerning the treatment of the subsistence allowance received from Title I programs (VISTA) as earned income. Regulations now state that persons who were not receiving public assistance or food stamps at the time they joined VISTA or other Title I programs will have these volunteer payments included as earned income. Wording is being added clarifying that since these payments are treated as earned income, they are subject to the 20% earned income deduction. This represents no change from current policy. These payments are provided in return for work performed in the VISTA or other Title I programs, and persons receiving these payments may incur work related expenses in performing this work.

Change Reporting Requirements for Applicants and Households with Fluctuating Income

The Department proposes to amend § 273.2 which requires households to report certain changes in income. Currently, households are required to report changes in the source of income, and gross monthly income changes exceeding $25, with some exceptions. While this requirement causes no confusion in those instances when income either does not change or changes in a way which can be anticipated, the requirement is not clear with regard to fluctuating income. This lack of clarity has led to disputes over the utility of quality control reviews in measuring the accuracy of food stamp benefit level determinations. The confusion about what households have been required to report may best be explained by an example. If a household reported weekly earnings of $100, $150, $175 and $200 in a month, it might be certified as having $670 in total gross income (the four weekly amounts averaged to $156 and converted by 4.3 to $670 monthly gross income). What should such a household report? One interpretation is that the household must report changes of more than $25 in the gross income, any amount above $695 or below $645. Another interpretation would have required reporting changes of more than $25 above the highest paycheck (more than $225) or below the lowest (under $75). A third interpretation would require the household to report any change of more than $25 measured from the average itself. In the example, that would mean reporting the receipt of only a paycheck greater than $181 or less than $131.

The above three interpretations were considered, along with three others: To give households with fluctuating income certification periods of no more than three months; to require State agencies to anticipate specific monthly income amounts; or to require households with

fluctuating incomes to report changes in the sources of income, the rate at which the income is received (the hourly or piece-work rates, for example), and changes between part-time and full-time employment status—instead of reporting changes in monthly income exceeding $25 a month.

The Department proposes to require households with fluctuating income to report changes in the source of income, in the wage rate of fluctuating income, and changes between full-time and part-time employment—rather than changes of more than $25 a month. (There would be no change in the reporting requirements for households who do not have fluctuating incomes). By requiring clients to report these changes, the Department and State agencies would be as responsive to changes as they would be under the first option. Error in household income is more frequently attributable to changes in basic employment status, such as converting from unemployed to employed or part-time to full-time employment, than fluctuations in the hours worked. The reporting of permanent changes in wage rates would allow State agencies to more exactly match benefits to household's long term circumstances.

Under this option, households would report permanent changes in their circumstances. These would be changes that would affect future month's income and not sporadic changes, which are of little value in an anticipatory system. Because only permanent changes would be reported and, the handling of changes by clients and caseworkers would be less susceptible to error. A client would have a better understanding of what would have to be reported; a caseworker would know the exact effect of the change on future income. To simplify reporting, over-time work, if done frequently, would already have been projected in the average. Finally, this option would allow clients to comply without keeping track of a particular income figure (figures) and would be the easiest option for State agencies to monitor.

The Department recognizes that this proposal poses some issues of its own, such as the need to have a different set of income reporting requirements for households with fluctuating income than for other households. Determining the reporting requirements for households with fluctuating income is a difficult task, and no entirely satisfactory solution exists. The Department is especially anxious to receive comments on this proposal.

Current regulations do not provide for the reporting of changes by households which have filed food stamp applications but have not yet been certified. Both section 6(c) of the Food Stamp Act of 1977 and § 273.12(a)(1) of the current regulations require only participating or certified households to report. The Department proposes to correct this omission by requiring applying households to report changes which have occurred since the filing of the application at the food stamp interview. Applicants and eligibility workers would discuss such changes when attempting to anticipate future circumstances. The Department further proposes that households report changes that occur between a food stamp interview and actual eligibility determination within ten days after being certified. This procedure will avoid imposing an unnecessary burden on households not yet participating in the program, yet will not allow important changes to go unreported. Allowing such households ten days after being certified the report is consistent with current reporting requirements.

Disqualification of Authorized Representatives

Current regulations permit a responsible household member to designate an authorized representative to act on the household's behalf when no responsible household member is able to do so (§ 273.1(f)). Authorized representatives may make application for the program, obtain the coupons and use the coupons to purchase food for the household's consumption. The household is held liable for any overissuance which results from erroneous information given by the authorized representative.

In a few cases, however, it has been determined that an authorized representative has knowingly given false information to the State agency without the household's knowledge. The Department proposes that in cases where the State agency can substantiate that such misrepresentation has occurred the State agency has the power to disqualify the authorized representative for up to one year from acting for the certified household in question and for all other households that he/she might be authorized to represent (§ 273.1(f)(4)(iii)). The households and the authorized representative will be notified of this determination in writing thirty days prior to the date of disqualification. The thirty days option was chosen over ten days to give the affected households more time to select another authorized representative. The notification would include the proposed action, the reason for the action, the right of the household and authorized representative to request a fair hearing, the telephone number and if possible, the name of the person to contact for additional information.

Claims Processing

The Department proposes to alter some of the claims provisions in § 273.18. These proposed changes may enable State agencies to recover a larger portion of non-fraud overissuance and enable States to more efficiently conduct fraud hearings. One of the amendments would permit households which have received an overissuance of coupons to repay those claims with coupons in lieu of cash.

Under the 1964 Food Stamp Act, households in certain situations could repay overissuances with coupons. There were problems encountered, however, with some caseworkers coercing clients into using a portion of their needed food stamp allotment to pay back claims. In some cases this action was deemed detrimental to household members since they were then unable to obtain enough food for the entire issuance period. For the protection of households, the option of accepting coupons in lieu of cash was omitted from the October 17, 1978 regulations.

However, prohibiting the use of coupons for repayment turns out to produce problems of its own. This prohibition can cause hardships on families that prefer that method of repayment. For example, a household certified to receive $50 worth of coupons monthly, but which receives $500 instead because of a keypunch error must, according to current regulations, repay the overissuance in cash. This repayment requirement would cause a hardship on the household.

In addition, some State agencies believe that non-fraud claims collection will increase if clients are allowed to repay with food stamp coupons. The Department is therefore proposing to allow repayment of non-fraud claims with coupons (§ 273.18(e)(1)(iii)). However, the Department emphasizes that repayment with coupons is to be strictly a household option, and that no coercion may be used by the State agency in recovery efforts.

The second aspect of change in the regulations regarding claim processing would increase the $35 initial limit for processing fraud and non-fraud claims. This limit also applies to the amount involved in initiating fraud hearings which lead to fraud overissuance recovery. It has been determined that in nearly all instances the costs associated with overissuance recovery significantly exceed the $35 limit and the consequent amount recovered. It is presently

estimated that an administrative fraud hearing costs between $200 and $400. Nonetheless, a State agency is required to initiate fraud hearing procedures if a client is alleged to have committed food stamp fraud resulting in at least a $35 overissuance. A recent survey indicated that the same situation is true with costs associated with non-fraud collection activities. Most State agencies spend much more money in administrative costs and staff time pursuing a non-fraud claim of $35 than will be collected. Based on these cost factors, the Department proposes to raise the limit to $100 or whatever lesser amount is determined cost effective by the State agency (§ 273.18(d) and § 273.18(6)(3)(i)(A)). The Department realizes that the sole criterion is not cost effectiveness when handling fraud claims collection; also considered is the deterrent effect collection activities have on reducing program fraud and abuse. This issue was taken into consideration when arriving at the $100 limit by giving State agencies the option of decreasing this figure if a lower amount is deemed appropriate.

Also proposed is a requirement that multiple overissuances having a combined total exceeding $100, or the minimum limit set by the State agency (within a twelve-month period) be processed in the same manner as a single overissuance of an equal amount. In the event that a State agency does not initiate collection on a claim below the initial limit, the agency may later offset the claim against a future restoration of lost benefits. However, the Department is retaining the current time limit of one year for establishing non-fraud claims.

Nonfraud Claims Demand Letter

The proposed regulation would also delete from § 273.18(b)(3)(ii) the requirement that a non-fraud demand letter contain the statement that household eligibility or benefits will not be affected if a household falls behind in making payments or is unable to pay the claim. This change is proposed in response to views expressed by some State agencies and officials of the Office of Inspector General that removal of the statement from the demand letter may increase claims collections. It should be noted that this proposal does not permit benefits actually to be terminated or reduced if a household is unable to pay a non-fraud claim.

Section 273.18(e)(2)(iv) which allows for termination or reduction of benefits with regard to nonpayment of a fraud claim, but does not permit such an action in the case of nonpayment of a non-fraud claim, would remain intact.

These claim processing changes are intended to make recovery efforts more efficient in application.

Destruction of Coupons

Current regulations require that prior to any destruction of improperly manufactured or mutilated coupons valued at more than $200 per coupon issuer or bulk storage point per month, the State agency must request permission from FNS (§ 274.8(b)(3)). It has been noted that the current practice is an excessive economic burden due to traveling costs and need for FNS staff to be present at the destruction site. The Department requested comments from Regional offices concerning the $200 limitation. All offices that responded supported raising the $200 ceiling because it is not cost effective and because most States have mutilated coupons in excess of the $200. The Department, therefore, proposes that the limit be raised to $500 per coupon issuer or bulk storage point per month, since according to the survey, most State agency coupon destruction rates fall below this figure.

Implementation

The Department proposes that State agencies implement these regulations on the first day of the month 120 days after it publishes them in a final rulemaking. These 120 days should provide sufficient time to amend State food stamp handbooks and forms, make any necessary changes in data processing systems and administrative procedures, train eligibility workers and inform food stamp recipients and the general public.

Accordingly, the Department proposes to amend Parts 271, 272, 273, 274, and 278 as follows:

PART 271—GENERAL INFORMATION AND DEFINITIONS

1. In § 271.2, the definitions of "drug addiction or alcoholic treatment and rehabilitation program," "eligible foods," "retail food store", and "Shelters for Battered Women and Children" are added in alphabetical order. The additions read as follows:

§ 271.2 Definitions.

* * * * *

"Drug addiction or alcoholic treatment and rehabilitation program" means any drug addiction or alcoholic treatment and rehabilitation program conducted by a private nonprofit organization or institution which is certified by the State agency or agencies designated by the Governor as responsible for the administration of the State's programs for alcoholics and drug addicts pursuant to Pub. L. 91-616, "Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970" and Pub. L. 92-255, "Drug Abuse Office and Treatment Act of 1972" as providing treatment that can lead to the rehabilitation of drug addicts or alcoholics. If an alcoholic treatment and rehabilitation program is located on an Indian reservation and the State does not certify or license reservation-based centers, approval to participate may be granted if the requirements of paragraphs (a), (b), and (d)(1) of § 278.1 are met and the program either is funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) pursuant to Pub. L. 91-616 or was so funded and has subsequently been transferred to Indian Health Service (IHS) funding.

* * * * *

"Elgible foods" means (1) any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot-food products prepared for immediate consumption; (2) seeds and plants to grow foods for the personal consumption of eligible households; (3) meals prepared and delivered by an authorized meal delivery service to households eligible to use coupons to purchase delivered meals or meals served by a communal dining facility for the elderly, for SSI households or both, to households eligible to use coupons for communal dining; (4) meals prepared and served by an authorized drug addict or alcoholic treatment and rehabilitation center to households eligible to use coupons to purchase those meals; (5) meals prepared and served by an authorized group living arrangement facility to residents who are blind or disabled recipients of benefits under title II or title XVI of the Social Security Act; (6) meals prepared by and served by an authorized shelter for battered women and children to its residents; and (7) in the case of certain areas of Alaska where access to food stores is extremely difficult and the households rely on hunting and fishing for subsistence, equipment for the purpose of procuring food for eligible households, including nets, lines, hooks, fishing rods, harpoons, knives, and other equipment necessary for subsistence hunting and fishing, but not equipment for the purpose of transportation, clothing or shelter, nor firearms, ammunition or other explosives.

* * * * *

"Retail food store" means (1) an establishment or recognized department of an establishment, or a house-to-house trade, route, whose eligible food sales

volume is more than 50 percent staple food items for home preparation and consumption; (2) public or private communal dining facilities and meal delivery services; drug addict or alcoholic treatment and rehabilitation programs; public or private nonprofit group living arrangements; or shelters for battered women and children; (3) any store selling equipment for procuring food by hunting and fishing to eligible households in Alaska, as specified in the definition of eligible food; (4) any private nonprofit cooperative food purchasing venture, including those whose members pay for food prior to receipt of the food; and (5) a farmers' market.

* * * * *

"Shelter for Battered Women and Children" means a public or private nonprofit residential facility that serves battered women and their children. If such a facility serves other individuals, a portion of the facility must be set aside on a long-term basis to serve only battered women and children.

* * * * *

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, paragraphs (a) and (b) are revised; paragraphs (c) through (g) are redesignated as (d) through (h) and a new paragraph (c) is added; newly redesignated paragraph (e)(2) is revised; and a new subparagraph (27) is added to the newly redesignated paragraph (h). The changes are as follows:

§ 272.1 General terms and conditions.

(a) *Coupons as income.* The value of the food stamp allotment provided any eligible household shall not be considered income or resources for any purpose under any Federal, State, or local laws including, but not limited to, laws on taxation, welfare, and public assistance programs.

(b) *No aid reduction.* No participating State or political subdivision shall decrease the assistance paid directly to an individual or individuals because of receipt of a coupon allotment. Per diem payments to an exempt institution made expressly for a particular individual or individuals shall also be considered direct payments. Block grants or other types of funding provided to a drug or alcoholic treatment center, a shelter for battered women and children or group home for the disabled are not considered direct assistance and, therefore, are not subject to this reduction prohibition. A decrease in benefits for the purpose of the food stamp program shall be any actual reduction in an established benefit level because of the receipt of food stamp benefits.

(1) An established benefit level is one that has been established by a specific legislative mandate prescribing either a specific benefit level or a formula resulting in a specific level, a judicial determination as to the appropriate benefit level, or simple use of a given benefit level in the absence of a legislative or judicial prescription. Illegal reductions include but are not limited to the following situations:

(i) State or local assistance benefits are reduced because food stamp benefits are counted as income or resources in determining GA eligibility or benefits levels.

(ii) Persons who are members of households eligible for or participating in the food stamp program are, as a class, given lower benefits than other recipients. Violations in this category could occur in any of a number of ways. Counties which provide a single total GA grant with no specific amount allocated for food, rent, etc. could reduce the overall GA payment, or counties which calculate the total GA grant by adding separate components for food, rent, etc. could reduce the amount of the food component for a GA participant who is eligible for or receives food stamps. A violation could also occur if the county gives participants who do not receive or are not eligible for food stamps greater GA benefits than are given to food stamp participants or eligibles.

(iii) The jurisdiction operating the State or local program specifically includes food stamp benefits as part of its benefit standard. In such circumstances, the payment is less than the benefit standard because food stamp benefits are being used to make up part of the standard.

(iv) The overall State or local benefit standard has been reduced, or the food component of the standard has been reduced, since inception of the food stamp program in the jurisdiction because of the availability of food stamps. For example, if the food stamp program were instituted in a jurisdiction and the jurisdiction subsequently reduced its GA grant, or the food component of grant, because of the availability of food stamp benefits, such action would, in the view of FNS, constitute an illegal reduction.

(v) A jurisdiction has reduced its benefits standard or the food component of the grant due to the elimination of the food stamp purchase requirement. If the jurisdiction previously included the cost of the food stamp purchase requirement (or the cost of a voucher in this amount) in its overall benefit standard, or in the food component of the benefit standard, and has reduced the benefit standard or the food component of the standard by this amount since the elimination of the purchase requirement, such action would, in the view of FNS, constitute an illegal reduction.

(2) The institution of a reduction in grant levels or in the food component of the grant does not automatically mean the reduction is illegal. For example, if budget reductions resulted in a reduction of the overall GA allowance, no violation would occur: *Provided,* That the food allowance is not reduced disproportionately, and provided that no part of the reduction is due to the availability of food stamps.

(3) The following situations do not constitute illegal reductions in State or local benefits in the view of FNS.

(i) Grants or food allowances are low but have not been reduced since inception of the food stamp program. Mere failure to increase benefits to allow for inflation would not, of itself, constitute a violation.

(ii) The food component of the State or local grant is less than the Thrifty Food Plan, unless the benefit program has a food standard that is equal to or greater than the Thrifty Food Plan.

(iii) Despite the availability of studies showing that food needs are higher than the food allowance, the jurisdiction has not adopted a recommended increase for reasons other than the availability of food stamps (e.g., lack of funds).

(c) *State Agency Liability.* The State agency shall be liable for any overissuances resulting from violations as outlined in paragraphs (a) and (b) of this section.

* * * * *

(e) *Information available to the public.* * * *

(2) Federal regulations, Federal procedures embodied in FNS Notices and policy memos, and State Plans of Operation (including specific planning documents such as Outreach and Corrective Action Plans) shall be available upon request for examination by members of the public during office hours at the State agency headquarters as well as at FNS Regional and National offices. The State agency handbook will be available for examination upon request at each local certification office within each project area as well as at the State agency headquarters and FNS Regional and National offices. Federal regulations shall also be available for examination upon request in at least one office in each large project area as defined in § 275.5 (project areas with a monthly caseload of more than 7,000).

(h) *Implementation.* * * *

(27) *Amendment 189.* State agencies shall implement these regulations on the first day of the month 120 days after publication.

3. In § 272.4, a sentence is added to the end of paragraph (c)(6).

§ 272.4 Program administration and personnel requirements.

* * * * *

(c) *Bilingual requirements.* * * *

(6) * * * The State Agency shall re-evaluate the need for bilingual services at least once every ten years, or more frequently if the State agency or FNS determines that a more frequent re-evaluation is necessary due to significant demographic changes in an area. The methodology for such a re-evaluation and subsequent State agency action on the results of the re-evaluation may be subject to approval by FNS.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.1:

(1) Paragraph (7) of paragraph (b) is revised;

(2) The introductory paragraph (e) is revised and a new subparagraph (4) is added to subparagraph (e);

(3) The 3rd sentence of paragraph (f)(1)(i) and the last sentence of paragraph (f)(4)(iii) are revised.

The revisions and additions read:

§ 273.1 Household concept.

* * * * *

(b) *Nonhousehold members.* * * *

(7) *Disqualified individuals.* Individuals disqualified for fraud, as set forth in § 273.16, or persons disqualified for failure to obtain a social security number, as set forth in § 273.6, or ineligible aliens as set forth in § 273.4.

* * * * *

(e) *Residents of institutions.* Individuals shall be considered residents of an institution when the institution provides them with the majority (at least 50% of three meals daily) of their meals as part of the institution's normal services. Residents of institutions are not eligible for participation in the program, with the following exceptions:

* * * * *

(4) Women or women with their children temporarily residing in a shelter for battered women and children as defined in § 271.2. Such persons temporarily residing in shelters for battered women and children shall be considered individual household units for the purposes of applying for and participating in the Program.

* * * * *

(f) *Authorized representatives* * * *

(1) * * *

(i) *Making application for the program.*

* * * The State agency shall inform the household that the household will be held liable for any overissuance which results from erroneous information given by the authorized representative, except as provided in § 273.11(e)(6) and § 273.16(a). * * *

* * * * *

(4) * * *

(iii) * * * State agencies which have substantiated that an authorized representative has misrepresented a household's circumstances and has knowingly provided false information pertaining to the household, or has made improper use of coupons, may disqualify that authorized representative from participating as an authorized representative in the Food Stamp Program for up to one year. The State agency shall send written notification to the affected households and the authorized representative thirty days prior to the date of disqualification. The notification shall include: The proposed action; the reason for the proposed action; the household and authorized representative's right to request a fair hearing; the telephone number of the office and if possible, the name of the person to contact for additional information.

* * * * *

5. In § 273.2:

(1) A new sentence is added after the second sentence in paragraph (e)(1);

(2) A new sentence is added to the end of paragraph (f)(1)(ii)(B); and paragraphs (f)(1)(ii)(C), (f)(1)(ii)(E), (f)(1)(ii)(F), and (f)(2)(ii)(B) are revised;

(3) The first sentence of paragraph (g)(1) is revised;

(4) The introductory text of paragraph (h) is revised; the first sentence of paragraph (h)(1)(i)(D) is revised; the third and fourth sentences of paragraph (h)(2)(i)(A) are revised; the second sentence of paragraph (h)(3)(i) is revised, and the third sentence of paragraph (h)(4)(iii) is revised; and

(5) A new subdivision (v) is added to paragraph (i)(3).

The revisions and additions read:

§ 273.2 Application processing.

* * * * *

(e) *Interviews.*

(1) * * * The applicant may bring any person he or she chooses to the interview. * * *

* * * * *

(f) *Verification.* * * *

(1) *Mandatory verification.* * * *

(ii) *Alien status.*

* * * * *

(B) * * * However, delays for delivering these cards are lengthy so an interim document is provided to new immigrants, Form I–181–B. This form is given at the time of adjustment of status to lawful permanent residence. It is imprinted with the stamped annotation, "Processed for I–551, Temporary Evidence of Lawful Admission for Permanent Residence."

(C) Aliens in the categories specified in § 273.4(a)(4) through (a)(6) shall present an INS form I–94—"Arrival—Departure Record". The State agency shall accept the INS form I–94 as verification of eligible alien status only if the form is annotated with section 203(a)(7), 207, 208, 212(d)(5) or 243(h) of the Immigration and Nationality Act. The form may also be annotated with one of the following terms: Refugee, parolee, paroled, conditional entry or entrant, or asylum. An INS form I–94 annotated with the letters (A) through (L) shall be considered verification of ineligible alien status unless the alien can provide other documentation from INS which indicates that the alien is eligible. If the INS form I–94 does not bear any of the above annotations and the alien has no other verification of alien classification in his or her possession, the State agency shall advise the alien to submit Form G–641, Application for Verification of Information from Immigration and Naturalization Service Records. This form when properly annotated at the bottom by an INS representative and delivered directly to a State agency office, may be accepted as evidence of lawful admission for permanent residence or parole for humanitarian reasons. The alien shall also be advised that classification under section 203(a)(7), 207, 208, 212(d)(5), or 243(h) of the Immigration and Nationality Act shall result in eligible status; that the alien may be eligible if acceptable verification is obtained; and that the alien may contact INS as stated previously, or otherwise obtain the necessary verification or, if the alien wishes and signs a written consent, that the State agency will contact INS to obtain clarification of the alien's status.

* * * * *

(E) If the proper INS documentation is not available, the alien may state the reason and submit other conclusive verification. The State agency shall accept other forms of documentation or corroboration from INS that the alien is classified pursuant to section 101(a)(15), 101(a)(20), 203(a)(7), 207, 208, 212(d)(5), 243, or 249 of the Immigration and

Nationality Act, or other conclusive evidence such as a court order stating that deportation has been withheld pursuant to section 243(h) of the Immigration and Nationality Act.

(F) While awaiting acceptable verification, the alien whose status is questionable shall be ineligible, but the eligibility of the remaining members (if any) of the household shall be determined in accordance with the procedures in § 273.11(c). If the alien does not wish to contact INS, the household shall be given the option of withdrawing its application or participating without that member.

* * * * *

(2) *Verification of questionable information.** * *

(ii) *Citizenship.** * *

(B) The member whose citizenship is in question shall be allowed to participate for 2 months pending verification of citizenship, if the household is otherwise eligible and efforts are being made to obtain the necessary verification. If verification has not been obtained within 2 months, the member whose citizenship is in question shall be ineligible and that member's income and resources shall be considered available to any remaining household members as set forth in § 273.11(c).

* * * * *

(g) *Normal processing standard*—(1) *Thirty-day processing.* The State agency shall provide eligible households that complete the initial application process an opportunity to participate as soon as possible, but not later than 30 calendar days following the date the application was filed.* * *

* * * * *

(h) *Delays in processing.* If that State agency does not determine a household's eligibility and provide an opportunity to participate within 30 days following the date the application was filed, the State agency shall take the following action:

(1) *Determining cause.** * *

(i)* * *

(D) For households that have failed to appear for an interview, the State agency must have attempted to reschedule the initial interview within 30 days following the date the application was filed. * * *

* * * * *

(2) *Delays caused by the household.*

(i) * * *

(A) * * * However, if a notice of denial is sent and the household takes the required action within 60 days following the date the application was filed, the State agency shall reopen the case without requiring a new application. No further action by the State agency is required after the notice of denial or pending status is sent if the household failed to take the required action within 60 days following the date the application was filed, or the State agency chooses the option of holding the application pending for only 30 days following the date of the initial request for the particular verification that was missing, and the household fails to provide the necessary verification by this 30th day.

* * * * *

(3) *Delays caused by the State agency.*

(i) * * * The State agency shall not deny the application if it caused the delay, but shall instead notify the household by the 30th day following the date the application was filed that its application is being held pending. * * *

* * * * *

(4) *Delays beyond 60 days.* * * *

(iii) * * * A notice of denial need not be sent if the notice of pending status informed the household that it would have to file a new application if verification was not received within 30 days following the date of the initial request. * * *

* * * * *

(i) *Expedited service.* * * *

(3) *Processing standards.* * * *

(v) *Residents of Shelters for Battered Women and Children.* Residents of shelters for battered women and children who are otherwise entitled to expedited service shall be handled in accordance with the time limits in subparagraph (3)(i) of this action.

* * * * *

6. Section 273.3 is revised to read as follows:

§ 273.3 Residency.

Households must be living in the project areas in which they file applications for participation unless the State agency has made arrangements, in accordance with the provisions of § 272.5, to allow particular households to file applications for participation in nearby specified project areas. Unless an individual is a resident of a shelter for battered women and children as defined in § 271.2 and was a member of a household containing the person who had abused him or her, he or she shall not participate as a member of more than one household or in more than one project area, in any month. Residents of shelters for battered women and children shall be handled in accordance with § 273.11(g). The State agency shall not impose any durational residency requirements. A fixed residence is not required; for example, migrant campsites satisfy the residency requirement. Nor shall residency require an intent to reside permanently in the State or project area. Persons in a project area solely for vacation purposes shall not be considered residents.

7. Section 273.4 is revised as follows:

§ 273.4 Citizenship and alien status.

(a) *Citizens and eligible aliens.* State agencies shall prohibit participation in the program by any person who is not a resident of the United States and one of the following:

(1) A United States citizen.

(2) An alien lawfully admitted for permanent residence as an immigrant as defined in sections 101(a)(15) and 101(a)(20) of the Immigration and Nationality Act.

(3) An alien who entered the United States prior to June 30, 1948, or some later date as required by law, and has continuously maintained residency in the United States since then, and is not ineligible for citizenship, but is considered to be lawfully admitted for permanent residence as a result of an exercise of discretion by the Attorney General pursuant to section 249 of the Immigration and Nationality Act.

(4) An alien who qualified for conditional entry because of persecution on account of race, religion, or political opinion or because of being uprooted by a catastrophic natural calamity pursuant to section 203(a)(7), 207, or 208 of the Immigration and Nationality Act.

(5) An alien lawfully present in the United States as a result of an exercise of discretion by the Attorney General for emergent reasons or reasons deemed strictly in the public interest pursuant to section 212(d)(5) of the Immigration and Nationality Act, or as a result of a grant of parole by the Attorney General.

(6) An alien living within the United States for whom the Attorney General has withheld deportation pursuant to section 243 of the Immigration and Nationality Act because of the judgement of the Attorney General that the alien would otherwise be subject to persecution on account of race, religion, or political opinion.

(b) *Ineligible aliens.* Aliens other than those described above shall not be eligible to participate in the program as a member of any household. Among those excluded are alien visitors, tourists, diplomats and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country.

(c) *Income and resources.* The income and resources of an ineligible alien who would be considered a member of a household if he or she did not have ineligible alien status shall be

considered in determining eligibility or level of benefits of the household, as specified in § 273.11(c).

(d) *Awaiting verification.* If verification of eligible alien status as required by § 273.2(f) is not provided on a timely basis, the eligibility of the remaining household members shall be determined. The alien whose status is unverified shall be treated as a disqualified member, and the eligibility of the remaining household members determined in accordance with § 273.11(c). If verification of eligible alien status is subsequently received, the State agency shall act on the information as a reported change in household membership in accordance with timeliness standards in § 273.12.

(e) *Reporting illegal aliens.* The State agency shall immediately inform the local INS office whenever personnel responsible for the certification or recertification of households determine that any member of a household is ineligible to receive food stamps because the member is present in the United States in violation of the Immigration and Nationality Act. Because many aliens who are legally present in the U.S. are not eligible for food stamps, State Agencies are cautioned that a determination that a person is an ineligible alien is not equivalent to a determination that a person is an illegal alien. Any decision to report a household member to INS shall be reviewed by State Agency personnel unconnected with the initial determination. State Agencies are encouraged to designate a particular individual to conduct such a review and to provide training in the appropriate laws to reduce the possibility of an erroneous reporting decision.

(1) A determination that a person is an illegal alien shall be based solely upon information obtained from the household (and not from a third party source) during the course of the application or interview. The State agency shall focus solely on information necessary to the certification process. A report to INS shall be based on solid evidence. The State agency shall document in the household casefile the basis for any report to INS.

(2) A determination that a person is an illegal alien shall be based only on:

(i) Admissions by the applicant or another household member (or the household's authorized representative) that illegal aliens are present in the Household;

(ii) INS documents presented by the household during the application or recertification process that are determined to be forged; or

(iii) A formal order of deportation presented by the household during the application or recertification process.

(3) Absence of documentation, or inability or refusal to provide documentation of alien status shall not be grounds for reporting to INS. When a household indicates inability or unwillingness to provide documentation of alien status for any household member, that member shall be classified as an ineligible alien. When a person indicates inability or unwillingness to provide documentation of alien status, the State agency shall not continue efforts to obtain that documentation. In such cases, if the State agency does not already have sufficient documentation to require a report to INS, the state agency shall not contact INS.

(4) Failure to report an illegal alien to INS shall not be considered a QC error or assessed as an administrative deficiency.

8. In § 273.8, paragraph (d) is amended by removing the third sentence and substituting two new sentences in its place; new paragraphs (e)(11)(x) and (e)(12) are added; paragraphs (h)(1)(iii), (h)(1)(vi), (h)(3)(iii) are revised, paragraphs (i)(1) and (i)(2)(iii) are revised; and paragraph (j) is revised; as follows:

§ 273.8 Resource eligibility standards.

* * * * *

(d) * * * The resource shall be considered totally inaccessible to the household (or to the ineligible alien or disqualified person whose resources are being considered available to the household) if the resource cannot practically be subdivided and the household's access to the value of the resource is dependent on the agreement of a joint owner who refuses to comply. Resources shall be considered inaccessible to persons residing in shelters for battered women and children, as defined in § 271.1, if the resources are jointly owned by such persons and by members of their former household.

* * * * *

(e) * * *

(11) * * *

(x) Payments received by the Confederated Tribes and bands of the Yakima Indian Nation and the Apache Tribe of the Mescalero Reservation from the Indian Claims Commission as designated under Pub. L. 94–433, Section 2.

(12) Where an exclusion applies because of use of a resource by or for a household member, the exclusion shall also apply when the resource is being used by or for an ineligible alien or disqualified person whose resources are being counted as part of the household's resources. For example, work related equipment essential to the employment of an ineligible alien or disqualified person shall be excluded (in accordance with paragraph (e)(5) of this section), as shall one burial plot per ineligible alien or disqualified household member (in accordance with paragraph (e)(2) of this section).

* * * * *

(h) *Handling of licensed vehicles.*

* * *

(1) * * *

(iii) Necessary for long distance travel, other than daily commuting, that is essential to the employment of a household member (or ineligible alien or disqualified person whose resources are being considered available to the household), for example, the vehicle of a traveling sales person or a migrant farmworker following the work stream.

* * * * *

(vi) Necessary to transport a physically disabled household member (or ineligible alien or disqualified person whose resources are being considered available to the household) regardless of the purpose of such transportation (limited to one vehicle per physically disabled person). A vehicle necessary to transport a physically disabled person need not have special equipment or be used primarily by the physically disabled person. The exclusion in paragraph (h)(1) (i) through (v) of this section will apply when the vehicle is not in use because of temporary unemployment, such as when a taxi driver is ill and cannot work, or when a fishing boat is frozen in and cannot be used.

* * * * *

(3) * * *

(iii) Any other vehicle used to transport household members (or an ineligible alien or disqualified household member whose resources are being considered available to the household) to and from employment or to and from training or education which is preparatory to employment, or to seek employment in compliance with the job search criteria. A vehicle customarily used to commute to and from employment shall be covered by this equity exclusion during temporary periods of unemployment. The equity value of licensed vehicles not covered by this exclusion, and of unlicensed vehicles not excluded by paragraphs (e)(3), (4), and (5) of this section, shall be attributed toward the household's resource level.

* * * * *

(i) *Transfer of resources.* (1) At the time of application, households shall be

asked to provide information regarding any resources which any household member (or ineligible alien or disqualified person whose resources are being considered available to the household) has transferred within the 3-month period immediately preceding the date of application. * * *

(2) * * *

(iii) Resources which are transferred between members of the same household (including ineligible aliens or disqualified persons whose resources are being considered available to the household); and (iv) resources which are transferred for reasons other than qualifying or attempting to qualify for food stamp benefits, for example, a parent placing funds into a educational trust fund described in paragraph (e) (8) of this section.

* * * * *

(j) *Resources of nonhousehold members.* The resources of nonhousehold members, defined in § 273.1(b), shall not be counted as available to the household unless the member is disqualifed from the program for fraud in accordance with § 273.16 or for failing to comply with the requirement to provide an SSN in accordance with § 273.6, or is an ineligible alien who would be considered a household member if not for his or her ineligible alien status.

* * * * *

9. In § 273.9, paragraph (iv) is added to paragraph (b)(1); the first sentence of paragraph (b)(3) is revised; the first sentence of (c)(3) is revised, paragraph (c)(10)(iii) is revised, and a new subdivision (ix) is added to (c)(10).

The addition and revisions read as follows:

§ 273.9 Income and deductions.

* * * * *

(b) *Definition of income.* * * *

(1) * * *

(iv) Payments under Title I (VISTA, University Year for Action, etc.) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113) as amended, shall be considered earned income and subject to the 20 percent earned income deduction, excluding payments made to those households specified in paragraph (c)(1)(iii) of this section.

* * * * *

(3) The earned or unearned income of an individual disqualified from the household for fraud in accordance with § 273.16, for failing to comply with the requirement to provide an SSN in accordance with § 273.6, or for being an ineligible alien in accordance with § 273.4, shall continue to be counted as income, less a prorata share for the individual. Procedures for calculating this prorata share are described in § 273.11(c). * * *

(c) *Income exclusions.* * * *

(3) Education loans on which payment is deferred, grants, scholarships, fellowships, veterans' education benefits, Social Security student benefits, and the like to the extent that they are used for tuition and mandatory school fees at an institution of higher education, including correspondence schools at that level, or a school at any level for the physically or mentally handicapped. * * *

* * * * *

(10) * * *

(iii) Any payment to volunteers under Title II (RSVP, Foster Grandparents and others) of the Domestic Volunteer Services Act of 1973 (Pub. L. 93–113) as amended. Payments under Title I (VISTA, University Year for Action, Urban Crime Prevention Program and others) to volunteers shall be excluded for those individuals receiving food stamps or public assistance at the time they joined the Title I program, except that households which were receiving an income exclusion for a VISTA or other Title I subsistence allowance at the time of conversion to the Food Stamp Act of 1977 shall continue to receive an income exclusion for VISTA for the length of their volunteer contract in effect at the time of conversion. Temporary interruptions in food stamp participation shall not alter the exclusion once an initial determination has been made. New applicants who are not receiving public assistance or food stamps at the time they joined VISTA shall have these volunteer payments included as earned income.

* * * * *

(ix) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation (Pub. L. 95–443).

* * * * *

10. In § 273.11;

(1) The last sentence of paragraph (a)(2)(ii) is revised; paragraph (a)(4)(ii) is removed; (a)(4)(iii) is redesignated as (a)(4)(ii); and a new paragraph (D) is added to the newly redesignated (a)(4)(ii);

(2) The introductory text of paragraph (c), and paragraphs (c)(5)(i), and (c)(5)(ii) are revised and a new paragraph (iii) is added to (c)(5);

(3) The first sentence of the introductory language for paragraph (d) is revised and a new sentence is added at the end of the introductory language of paragraph (d); and new paragraphs (d)(1) and (d)(2) are added.

(4) Paragraph (e)(5) is revised;

(5) Paragraphs (f)(5)(i) and (ii) are revised and a new paragraph (iii) is added to paragraph (f)(5);

(6) Paragraphs (g)(1) and (g)(2) are redesignated as (h)(1) and (h)(2) respectively and a new paragraph (g) is added.

The changes read as follows:

§ 273.11 Action on households with special circumstances.

* * * * *

(a) *Self-employment income.* * * *

(2) *Determining monthly income from self-employment.* * * *

(ii) * * * The cost of producing the self-employment income shall be calculated by anticipating the monthly allowable costs of producing the self-employment income.

* * * * *

(4) *Allowable costs of producing self-employment income:* * * *

(ii) * * *

(D) Depreciation.

* * * * *

(c) *Treatment of income and resources of disqualified members.* Individual household members may be disqualified for fraud, or for failure to obtain, or refusal to provide, an SSN, or for being an ineligible alien. During the period of time a household member is disqualified, the eligibility and benefit level of any remaining household members shall be determined as follows:

* * * * *

(5) *Reduction or termination of benefits within the certification period.* When an individual is disqualified within the household's certification period, the State agency shall determine the eligibility or ineligibility of the remaining household members based, as much as possible, on information in the case file.

(i) *Fraud disqualification.* If a household's benefits are reduced or terminated within the certification period because one of its members has been disqualified for fraud, the State agency shall notify the remaining members of their eligibility and benefit level at the same time the disqualified member is notified of his or her disqualification. The household is not entitled to a notice of adverse action but may request a fair hearing to contest the reduction or termination of benefits.

(ii) *SSN disqualification.* If a household's benefits are reduced or terminated within the certification period because one or more of its members required to provide an SSN is being disqualified for failure to meet the SSN requirement the State agency shall

issue a notice of adverse action in accordance with § 273.13(a)(2), which informs the household that the individual without an SSN is being disqualified, the reason for the disqualification, the eligibility and benefit level of the remaining members, and the actions the household must take to end the disqualification.

(iii) *Ineligible alien disqualification.* If a household's benefits are reduced or terminated within the certification period because one or more of its members is being disqualified as an ineligible alien, the State agency shall issue a notice of adverse action, in accordance with § 273.13(a)(2), which informs the household that the alien is being disqualified, the reason for the disqualification, the eligibility and benefit level of the remaining members, and the actions the household must take to end the disqualification.

(d) *Treatment of income and resources of other nonhousehold members.* For those nonhousehold members that have not been disqualified such as ineligible students or SSI recipients in cash-out States, the income and resources of the nonhousehold member shall not be considered available to the household. * * * When the earned income of one or more household members and the earned income of a non-household member are combined into one wage, the income of the household members shall be determined as follows:

(1) If the household's share can be identified, the State agency shall count that portion due to the household as earned income.

(2) If the household's share cannot be identified the State agency shall prorate the earned income among all those whom it was intended to cover and count that portion prorated to the household.

* * * * *

(e) *Residents of drug/alcoholic treatment and rehabilitation* * * *

(5)(i) When the household leaves the center, the center shall provide the resident household with its ID card and any untransacted ATP cards. The household, not the center, shall be allowed to negotiate any untransacted HIR cards. The departing household shall also receive its full allotment if already issued and if no coupons have been spent on behalf of that individual household. These procedures are applicable at any time during the month. However, if the coupons have already been issued and any portion spent on behalf of the individual, and the household leaves the treatment and rehabilitation program prior to the 16th day of the month, the treatment center shall provide the household with one half of its monthly coupon allotment. If the household leaves after the 16th day of the month and the coupons have already been issued and used, the household does not receive any coupons.

(ii) Once the household leaves the treatment center, the center is no longer allowed to act as that household's authorized representative. The center, if possible, shall provide the household with a change report form to report to the State agency the individual's new address and other circumstances after leaving the center and shall advise the household to return the form to the appropriate office of the State agency within 10 days.

(iii) The treatment center shall return to the State agency any coupons not provided to departing residents at the end of each month. These returned coupons shall include those not provided to departing residents because they left after the 16th of the month or they left prior to the 16th and the center was unable to provide the individual with the coupons.

* * * * *

(f) *Residents of group living arrangements who receive benefits under title II or title XVI of the Social Security Act.* * * *

(5)(i) When the household leaves the facility, the group living arrangement, either acting as an authorized representative or retaining use of the coupons on behalf of the residents (regardless of the method of application), shall provide residents with their ID cards (if applicable) and any untransacted ATP cards. The household, not the group living arrangement, shall be allowed to negotiate any untransacted HIR cards. Also, the departing household shall receive its full allotment if issued and if no coupons have been spent on behalf of that individual household. These procedures are applicable at any time during the month. However, if the coupons have already been issued and any portion spent on behalf of the individual, and the household leaves the group living arrangement prior to the 16th day of the month, the facility shall provide the household with its ID card (if applicable) and one-half of its monthly coupon allotment. If the household leaves after the 16th day of the month and the coupons have already been issued and used, the household does not receive any coupons. If a group of residents have been certified as one household and have returned the coupons to the facility to use, the departing residents shall be given a prorata share of one half of the coupon allotment if leaving prior to the 16th day of the month, and shall be instructed to obtain ID cards or written authorizations to use the coupons from the local office.

(ii) Once the resident leaves, the group living arrangement no longer acts as his/her authorized representative. The group living arrangement, if possible, shall provide the household with a change report form to report to the State agency the individual's new address and other circumstances after leaving the group living arrangement and shall advise the household to return the form to the appropriate office of the State agency within 10 days.

(iii) The group living arrangement shall return to the State agency any coupons not provided to departing residents at the end of each month. These returned coupons shall include those not provided to departing residents because they left after the 16th or before the 16th and the facility was unable to provide them with the coupons.

* * * * *

(g) *Shelters for Battered Women and Children.* (1) Prior to certifying its residents under this paragraph, the State agency shall verify that the shelter for battered women and children meets the definition in § 271.2. Shelters having FNS authorization to redeem at wholesalers shall be considered as meeting the definition and the State agency is not required to do further verification. Shelters should contact their local project area office to determine if they meet the definition in § 271.2. The local project area shall maintain a list of shelters meeting the definition to insure prompt certification of eligible residents following the special procedures outlined below.

(2) Many shelter residents have recently left a household containing the person who has abused them. Their former household may be certified for participation in the Program, and its certification may be based on a household size that includes the women and children who have just left. Shelter residents who are included in other certified households may nevertheless apply for and (if otherwise eligible) participate in the Program as separate households if the other certified household which includes them is the household containing the person who subjected them to abuse. Shelter residents who are included in other certified households may receive an additional allotment as a separate household only once a month.

(3) Shelter residents who apply as separate households shall be certified solely on the basis of the income and resources currently available to them and the expenses for which they are currently responsible. They shall be certified without regard to the income, resources, and expenses of their former household. Jointy held resources are considered inaccessible in accordance with § 273.8. Room payments to the shelter shall be considered as shelter expenses.

(4) Any shelter residents eligible for expedited service shall be handled in accordance with § 273.2(i).

(5) The former household of shelter residents shall be provided a notice of expiration in accordance with § 273.14(b) and Policy Interpretation 79–108.

* * * * *

11. In § 273.12, paragraphs (a)(1)(i) and (a)(2) are revised as follows:

§ 273.12 Reporting changes.

(a) *Household responsibility to report.*

(1) Certified and applicant households are required to report the following changes in circumstances:

(i) Changes in income:

(A) Households with fluctuating income shall report changes in the source or in the wage rate of fluctuating income and changes in the full or part-time employment status of household members with fluctuating income;

(B) Households without fluctuating income shall report changes in the sources of income or in the amount of gross, monthly, non-fluctuating income of more than $25;

(C) Households shall not be required to report changes in the public assistance grant, or in the general assistance grant in project areas where GA and food stamp cases are jointly processed in accord with § 273.2(j)(2). Since the State agency has prior knowledge of all changes in the public assistance grant and these general assistance grants, action shall be taken on the State agency information;

* * * * *

(2) Certified households shall report changes within 10 days of the date the change becomes known to the household. Applicant households that have not yet been certified when the change occurs shall report changes at the certification interview or, for changes occurring after the interview but before the eligibility determination, within 10 days after the date of the determination. Optional procedures for reporting changes are contained in § 273.12(f) for households in States with FNS-approved forms for jointly reporting food stamp and public assistance changes and food stamp and general assistance changes.

* * * * *

§ 273.16 [Amended]

12. In § 273.16, paragraph (d) is revised to read as follows:

* * * * *

(d) *Administrative disqualification.* State agencies shall establish procedures for conducting fraud hearings which must conform with the procedures outlined in this section. In addition States may also pursue alleged fraud cases through prosecution. FNS shall permit a State to delete its administrative fraud hearing system if the State agency has entered into an agreement with the State's attorney general's office or where necessary, county prosecutors. The agreement shall provide that prosecution will be pursued in cases where appropriate. This agreement shall inlude information on how, and under what circumstances, cases will be accepted for possible prosecution and any other criteria set by the prosecutor for accepting cases for prosecution, such as a minimum amount of fraudulent overissuance. An administrative fraud hearing or referral for prosecution action shall be initiated by the State agency whenever the State agency has documented evidence substantiating that a currently certified household member has committed one or more acts of fraud as defined in paragraph (b) of this section and the State agency believes the household member should be disqualified. Such cases may include those in which the State agency believed the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system. Other cases may be those previously referred for prosecution but for which prosecution was declined by the appropriate legal authority. The State agency may initiate an administrative fraud hearing regardless of the current eligibility of the individual. The disqualification period for nonparticipants at the time of the fair hearing decision shall be deferred until the individual applies for and is determined eligible for program benefits. Fraud hearings need not be conducted if the amount the State agency contends has been fraudulently obtained is less than $100 or if the value of the coupons used to obtain ineligible items is under $100, or a less amount of suspected fraud can be pursued if it is cost effective to the State agency. The administrative fraud hearing may be conducted regardless of whether other legal action is planned against the household member. FNS may require a State agency to establish an administrative fraud hearing system if it determines that the State agency is not promptly or actively pursuing suspected fraud claims through the courts.

* * * * *

13. In § 273.18, paragraph (b)(3)(i)(A) is revised; paragraph (b)(3)(ii) is revised; and new subdivision (iii) is added to paragraph (e)(1).

The revision and addition read as follows:

§ 273.18 Claims against households.

(b) *Nonfraud Claims.* * * *

(3) *Collecting nonfraud claims.*

(i) * * *

(A) The total amount of the nonfraud claim is less than $100 or whatever lesser amount is deemed cost effective by the State agency. State agencies shall accept voluntary payments by households for overissuances of less than the established amount set by the State agency, although these losses need not be pursued through demand letters. State agencies are encouraged, however, to advise households orally or in writing of claims in amounts under the designate sum and advise the household that the State agency may offset the amount of the claim against any future restoration of lost benefits accrued by them. The household shall also be informed that if it disagrees with the State agency over the claim or its amount, the household has the right to a fair hearing. State agencies shall keep records of all overissuances even if collection procedures are not initiated. At such time that multiple overissuances for a household total $100 or more within a 12-month period, then State agencies shall proceed with collection activities as described in subparagraph (3)(ii) of this paragraph. Households shall be informed of this policy.

* * * * *

(ii) State agencies shall initiate collection action by sending the household a written demand letter, designed by FNS, which informs the household of the amount owed, the reason for the claim, the period of time the claim covers, any offsetting that was done to reduce claims, how the household may pay the claim, and the household's right to a fair hearing if the household disagrees with the State agency's determination. FNS may grant deviations from the designed letter under conditions specified in § 273.2(b). If the household pays the claim, payments shall be accepted and submitted to FNS in accordance with the procedures outlined in paragraphs (e) and (f) of this section. If the household

does not respond to the first demand letter, additional demand letters shall be sent at reasonable intervals such as 30 days, until the household has responded by paying or agreeing to pay the claim, or until the criteria for suspending collection action, as specified in paragraph (b)(4) of this section, have been met. The State agency may postpone collection action on nonfraud claims in cases where an overissuance is being referred for possible prosecution or for a fraud hearing and the State agency is advised in writing that collection action will prejudice the case.

* * * * *

(e) *Methods of collecting payments.*

(1) * * *

(iii) *Coupons for repayment.* The State agency shall accept food stamp coupons as partial or full payment of a nonfraud claim if the household prefers to use this method of repayment. Choice of this option is entirely up to the household and no household shall be required or pressured to pay a nonfraud claim with coupons.

* * * * *

14. In § 273.19, two new sentences are added to the end of paragraph (b) and a new subparagraph (5) is added to (c). The additions read as follows:

§ 273.19 Sixty day continuation of certification.

* * * * *

(b) *Former project area.* * * * Using form FNS-286, Item 15, the former project area shall inform the new project area of any member whose citizenship is questionable but who is participating in accordance with § 273.2(f)(2)(ii)(B). The form shall also show the last month that a member may participate without vertification of citizenship.

(c) *New project area.* * * *

(5) If the household was certified in accordance with § 273.2(f)(2)(ii)(B), and the member whose citizenship is in question has not verified that citizenship, the State agency shall act in accordance with that § 273.2(f)(2)(ii)(B).

* * * * *

PART 274—ISSUANCE AND USE OF FOOD COUPONS

15. In § 274.8, paragraphs (b)(1)(i) and (b)(3) are revised and read as follows:

§ 274.8 State agency reporting and destruction of unusable coupons.

* * * * *

(b) *Destruction of unusable coupons.* * * *

(1) * * *

(i) It has been determined that the value of coupons does not exceed $500.00 per coupon issuer or bulk storage point for any month; and

* * * * *

(3) If the value of the coupons to be destroyed exceeds $500.00 per coupon issuer or bulk storage point per month, the State agency shall request FNS approval prior to any destruction of the coupons.

* * * * *

16. In § 274.10, a new sentence is added to the end of paragraph (d) to read as follows:

§ 274.10 Use or redemption of coupons by eligible households.

* * * * *

(d) *Residents of certain institution.* * * * Eligible residents of a group living arrangement, acting on their own behalf, may use coupons issued to them to purchase meals prepared especially for them at a group living arrangement. Residents of shelters for battered women and children may also use their coupons to purchase meals prepared especially for them at such shelters.

* * * * *

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND BANKS

17. In § 278.1, a new sentence is added after the first sentence in paragraph (e); paragraphs (g) through (m) are redesignated as (h) through (n) and a new paragraph (g) is added. The revisions and additions read as follows:

§ 278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(e) *Treatment programs.* * * * If an alcoholic treatment and rehabilitation program is located on an Indian reservation and the State does not certify or license reservation-based centers, approval to participate may be granted if the requirements of paragraphs (a), (b), and (d)(1) of this section are met and the program either is funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) pursuant to Pub. L. 91-616 or was so funded and has subsequently been transferred to Indian Health Service (IHS) funding. * * *

* * * * *

(g) *Shelters for battered women and children.* FNS shall authorize shelters for battered women and children at retail food stores to redeem coupons directly through wholesalers. The shelter must be public or private nonprofit, as defined in paragraph (d)(1) of this section, and meet the requirements of paragraphs (a) and (b) of this section. Shelters which also serve other groups of individuals must have a portion of the facility set aside on a long-term basis to shelter battered women and their children. Also required is that the shelter be a residence which serves meals or provides food to its residents.

* * * * *

18. In § 278.2, paragraph (g) is revised as follows:

§ 278.2 Participation of retail food stores.

* * * * *

(g) *Redeeming coupons.* Authorized retail food stores may exchange coupons in accordance with this part for face value upon presentation through the banking system or through a wholesale food concern to accept coupons from that retailer. Authorized drug addict or alcoholic treatment and rehabilitation programs, group living arrangements, and shelters for battered women and children may present coupons for redemption through authorized wholesale food concerns. A drug addict or alcoholic treatment center, group living arrangement, or shelter for battered women and children may purchase food in authorized retail food stores as the authorized representative of its participating households. Authorized drug addict and alcoholic treatment and rehabilitation programs, group living arrangements, and shelters for battered women and children shall not present coupons directly to a bank for redemption.

* * * * *

Note.—Food Stamp forms are being revised in accordance with the requirements of this amendment. The reporting and/or record keeping requirements anticipated in this amendment resulting from the forms will be forwarded to the Office of Management and Budget for approval in accordance with the Federal Reports Act of 1942.

(91 Stat. 958 (7 U.S.C. 2011-2027))

(Catalog of Federal Domestic Assistance Program N. 10551, Food Stamps)

Dated: January 13, 1981.

Carol Tucker Foreman,

Assistant Secretary.

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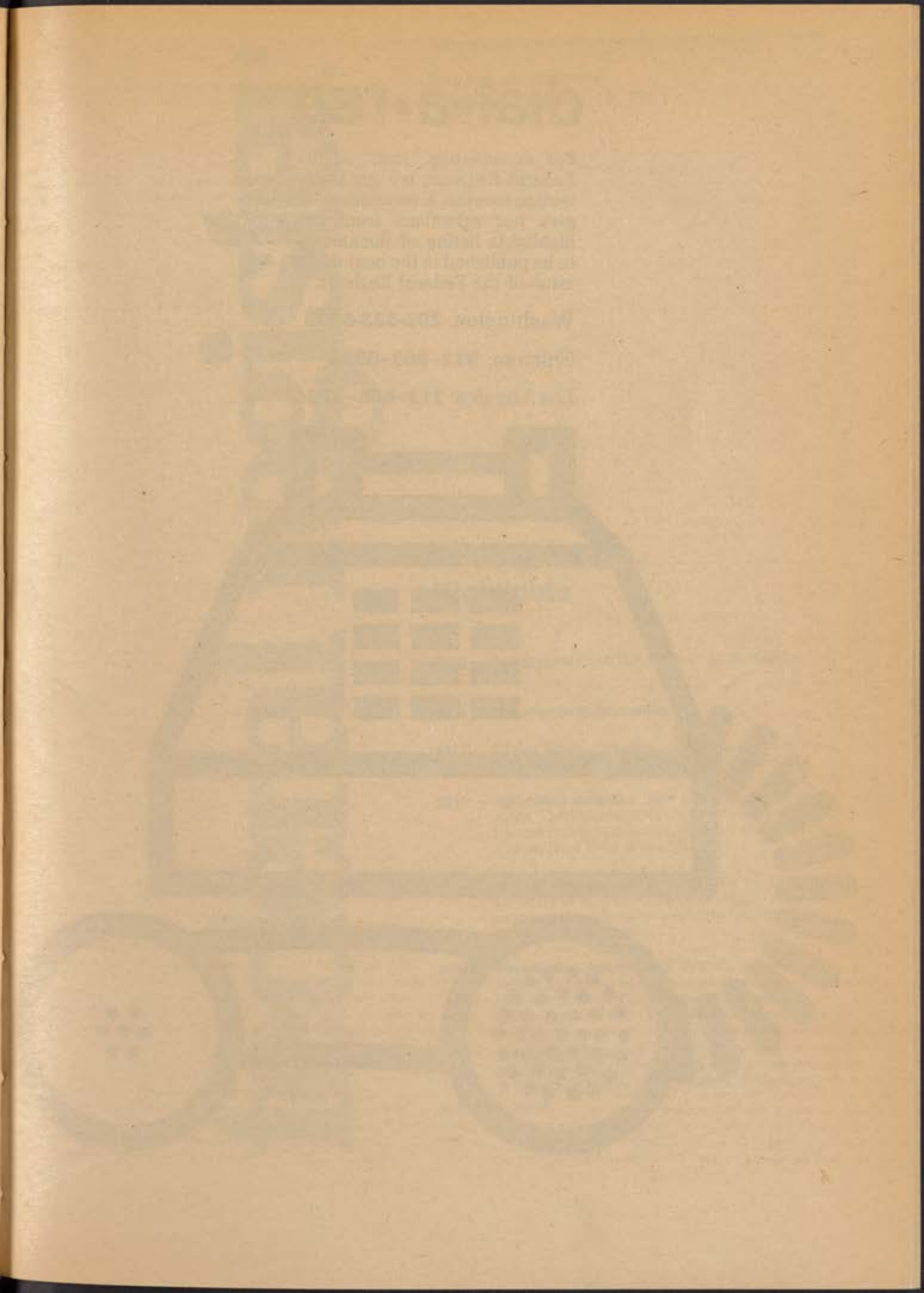

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